Lewis v. Clarke: The Road Away from Sovereign Immunity?

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Summary of the Holding

- In a suit brought against a tribal employee in his individual capacity for a tort committed in the scope of employment, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated.
- An indemnification provision codified under tribal law cannot, as a matter of law, extend the tribe's sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

Facts of the Case

- Brian and Michelle Lewis were driving on a Connecticut interstate when they were struck from behind by a vehicle driven by William Clarke.
- William Clarke was an employee of the Mohegan Sun Tribal Gaming Authority who was transporting Mohegan Sun Casino patrons in a limousine owned and insured by the Gaming Authority.
- Mr. Lewis' injuries were moderate, mild TBI and $75,000 in medical bills. Mrs. Lewis' damages were negligible.

What the Majority Said

- Clarke was sued in his personal or individual capacity, as opposed to official, capacity.
- Suits against government officers for actions taken under the color of state law are not barred by the state's sovereign immunity. (*citing Hafer* and *Bivens)*
- "There is no reason to depart from these general principles in the context of tribal sovereign immunity. It is apparent that these general principles foreclose Clarke's sovereign immunity defense in this case."

What the Majority Said

- The "tribal employee was operating the vehicle within the scope of his employment, but on state lands, and the judgment will not operate against the tribe" (because the State courts have no jurisdiction over the Tribe per *Kiowa* and *Bay Mills*).
- "This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which will not *require* action by the sovereign or disturb the sovereign's property."
- "The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity."

What the Majority Said

- "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab."
- "[I]ndemnification is not a certainty here, Clarke will not be indemnified by the Gaming Authority should it determined that he engaged in 'wanton, reckless, or malicious' activity." Indemnification provisions are a voluntary choice on the part of the state.
- The court then reviews decisions that hold civil rights claims against state employees in their individual capacity do not implicate or alter a state's immunity under the Eleventh Amendment.

What the Concurrences Said

- Thomas and Ginsberg both file separate concurrences both based on logic of dissenting opinions in *Bay Mills* and *Kiowa* decisions.
- Ginsburg: "These dissenting opinions explain why tribes, interacting with nontribal members outside reservation boundaries, should be subject to non-discriminatory state laws of general application."
- *Kiowa* holding (1999): Tribes have immunity even when a suit arises from off-reservation commercial activity.
- *Bay Mills* holding (2014): Same, subject to *Ex Parte Young* exception for claims seeking declaratory and injunctive relief.

What the Opinion Did Not Do

- Despite the arguments in the concurrences, the Court did not revisit the question of Tribal sovereign immunity off-reservation
- Thus both the *Kiowa* and *Bay Mills* holdings are left intact.
- The Court also did not address the question of "qualified" or "official immunity."
- As we will discuss later, these immunity doctrines will provide some protection against these type of tort actions against Tribal/TDHE employees.

What the Scholars Said

- **Matthew Fletcher (Professor, Michigan State Univ. College of Law)**: "As most Indian tribes have already acquired general liability insurance to cover the tortious actions of their employees, the ruling might have little impact. But the breadth of the court's opinion should give tribal interests pause to reflect on just how far this decision reaches."

- "The breadth of the court's opinion surely will encourage plaintiffs' attorneys to test or even stretch the holding. Indian tribes can expect a bunch of new kinds of suits. General liability premiums for Indian tribes might be in flux for a time, but over time the new liability landscape will settle down. In the end, the impact likely will be minimal, but for a time, expect a significant uptick in litigation."

What the Scholars Said

- **Todd Henderson (Professor, University of Chicago Law School)**: "…the court reasoned that a relatively bright line can be drawn between suits against officials acting in their official capacities and officials acting as individuals. For instance, the court noted that in the former case, if the official being sued were replaced, perhaps because of a change in administration, the suit would proceed against the new office-holder, while in the latter case, the defendant would remain the same."

- "In reaching this straightforward but somewhat arbitrary conclusion, the Court was essentially leveling the playing field between states and tribes. All agree that if Clarke were an employee of Connecticut instead of the Mohegan tribe, the case would be an individual one, and there would be no sovereign immunity. *The decision in this case stands for the proposition that tribal immunity is no greater than state immunity. That seems right, both as a matter of history and logic.*"

What the Scholars Said

- **Ezra Rosser (Professor, American University Washington College of Law)**: "That the Court held that a state tort claim against the driver of a tribal vehicle in his individual capacity, arising far removed from a reservation on a major interstate should not be barred by sovereign immunity might be yet another mark in the Indian law loss column, but it is not a particularly troubling loss."

- "The holding in *Lewis* makes sense if reservation boundaries and the possibility of individual capacity claims are taken seriously. What makes the decision hard to swallow is that *Strate* and *Hicks* did not take the reservation boundary (or individual capacity claims) seriously. *Strate* invented the fiction that state roads through a reservation should be treated like state land, and *Hicks* prohibited tribal courts from resolving claims of harm to tribal members in their homes within the reservation. In both cases, the Supreme Court found theories upon which to treat reservations and Indian nations as secondary to the power of states to adjudicate disputes."

Does *Lewis* Change the Law of Tribal Sovereign Immunity?

- Kelly's view: Plaintiffs can be expected to frame lawsuits against Tribes and TDHE's as claims against employees in their individual capacity to avoid sovereign immunity in tribal, state and federal courts.
- While this case law (*Lewis*, *Bay Mills*, *Kiowa*) arose in the context of off-reservation activity, the holding in *Lewis* doesn't articulate that distinction.
- Expect more instability in this area of the law, especially where challenges are brought to a Tribe's assertion of sovereign immunity in the course of off-reservation commercial activity.

Does *Lewis* Change the Law of Tribal Sovereign Immunity?

- Dave's view: In many ways, the U.S. Supreme Court and Appeals Courts have held the same position for decades.

- (1977) *Puyallup Tribe v. Dept. of Game Washington* – interpreting treaty rights -- "regardless of tribal sovereign immunity, individual defendant members [including council members] of the Puyallup Tribe remain amenable to the process of Washington Courts in connection with fishing activities occurring off their reservation."

- (1978) *Santa Clara Pueblo v. Martinez* – interpreting ICRA -- officers of the Tribe are not protected by the Tribe's SI from suit – Tribal forums are available to vindicate rights created by ICRA – "Nonjudicial tribal institutions have also been recognized as competent law-applying bodies"

Does *Lewis* Change the Law of Tribal Sovereign Immunity?

- (2008) *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.* (10th Cir.) "The general bar against official-capacity claims…does not mean that tribal officials are immunized from individual-capacity suits *arising out of actions* they took in their official capacities…Rather, it means that tribal officials are immunized from suits brought against them *because of* their official capacities – that is because the powers they possess in those [official] capacities enable them to grant the plaintiffs relief on behalf of the tribe." (emphasis in original)

- (2013) *Maxwell v. San Diego* (9th Cir.) – "Our tribal SI cases do not question the general rule that individual officers are liable in their individual capacities. We see no reason to give tribal officers broader SI protections than state and federal officers given that tribal SI is coextensive with other common law immunity principals."

Does *Lewis* Change the Law of Tribal Sovereign Immunity?

- Ed's view: It did to the extent that tribes had previously operated under the assumption – based on case law – that such suits would be barred if they impacted the tribal treasury.
- It was that assumption that lead the Tribe and Clarke to argue that the Tribe's indemnification provision extended the cloak of immunity to Clarke.
- There are numerous cases that have held that Tribal immunity is "co-extensive" with that of the **U.S.**, but not of the States – but this decision appears to suggest that tribal immunity should mirror state immunity.

Does *Lewis* Change the Law of Tribal Sovereign Immunity?

- Professor Henderson's statement that by equating tribal and state immunity the Court has merely "leveled the playing field" between states and tribes is based on a very ahistorical view of that playing field.
- That field has long been tilted in favor of the states, and this decision only tilts it further.
- It creates more inroads for state courts into the tribal realm. It will encourage numerous plaintiffs' attorneys into state courts.

What Does this Mean for TDHEs?
Practical Considerations – New Risks and Claims

- If a plaintiff sues an employee of a TDHE in their "individual capacity" (instead of the TDHE directly), it is possible that sovereign immunity may not be relied upon to defeat the claim – depending on the tort involved.
- Where the tort is an automobile accident or other garden variety tort, it may not change the landscape much – since those are actions which might normally lie against the individual.

What Does this Mean for TDHEs?
Practical Considerations – New Risks and Claims

- But Lewis may give rise to more questionable attempts to avoid the bar of sovereign immunity by suing employees/officials.
  - What about allegations of defective work done by THDE force account crew when carrying out rehab or maintenance?
  - Decisions by staff or board to terminate programs that lead to allegations of harm or damage?
  - Tortious interference with construction and other contracts?
  - Parallel claims challenging evictions in state court as involving some kind of tortious interference with peaceful enjoyment?

What Does this Mean for TDHEs?
Practical Considerations – New Risks and Claims

- Example from Prof. Fletcher:
- Imagine a heated tribal council meeting where one elected official makes a statement that potentially defames another elected official.
- Before Lewis, the tribal elected official who made the statement could assert the general federal Indian law principle that state and federal courts have no jurisdiction over the internal affairs of the tribal government.
- A federal or state official making the same statement likely would be governed by official immunity. But, potentially, the federal Indian law bar might dissipate in an individual capacity suit because the tribe's interests are not the same as an individual's interest.

What Does this Mean for TDHEs?
Practical Considerations – New Risks and Claims

- Similar issues could arise within TDHE Boards or staff meetings.
  - Defamatory statements.
  - Decisions on personnel matters.
  - Decisions on tenant grievances and appeals.

What Does this Mean for TDHEs?
Practical Considerations – New Risks and Claims

- Some steps to consider:
- Buy Insurance -- Understand the Scope of Coverage.
- Consider putting in place tribal laws that define and limit the scope of liability.
- Consider implementing laws and policies that clarify the scope of official and qualified official immunity.

Protections – Tribal Legislation on Immunity

- The Big Picture:
- In *Lewis*, the Supreme Court made lots of analogies to principles of law that create exceptions to the rule of sovereign immunity and allow for suits against states, the federal government, and their officials.
- Part of the Court's thought process seems to be: "If you can sue a state or the federal government official for it, you should be able to sue a tribal official for it."
- Whether you agree or not, look to legal protections that remain in place to bar suits against state and federal government officials for examples of how to proactively legislate the contours of immunity for Tribes and tribal officials.

Protections – Tribal Legislation – Claims Acts Indemnifying Tribal Employees

- Many states (and the federal government) have laws that indemnify their employees for liability that might arise in the course and scope of their job.
- The idea is to protect (or insure) the employee against liability.
- Peace of mind for employees.
- But, potentially expensive. Generally, State and Federal Governments have more money than tribal government.
- And, indemnity or insurance can incentivize lawsuits that might otherwise never be brought.

Protections – Tribal Legislation – Claims Acts Damage Caps

- Many states have limits or caps on money damages that can be sought against the state and/or state officials.
- In some cases, the damage cap may be automatically and periodically adjusted by an local inflation factor.
- In some cases, the state may allow local governments and government entities to raise the damage cap by resolution.
- Damage caps can help keep the cost of insurance down, and manage the balance of risk and reward for litigants.
- The Federal Tort Claims Act limits contingent fee agreements to 25%.

Protections – Tribal Legislation – Claims Acts Co-Employee Liability

- Most states have laws that abrogate common law negligence claims against co-employees. Instead, states provide the remedy of worker's comp.
- Many Tribes participate in worker's comp insurance programs, but have no law abrogating co-employee liability.
- Tribes should consider passing similar laws. The potential extent of the "comp bar" liability shield is significant.

Protections - Insurance

- How much to buy?
- Waivers up to available coverage
- Who decides when to assert sovereign immunity?
- Self-insuring or creating a reserve

Defenses – Qualified Immunity

- The doctrine of "qualified immunity" or "good faith immunity" is well-established in civil rights law. The doctrine bars claims where the government employee is acting in good faith. Very significant protection, which is normative in state and federal law.
- Absolute Immunity may be appropriate in some instances. What if disgruntled litigant sues a Judge? Absolute immunity would bar the claim in most state jurisdictions.

Defenses – Qualified Immunity

- Official immunity and qualified immunity are usually defined by the laws operating within that jurisdiction.
- But *Lewis* raises the question of whose jurisdiction?
  - Is it the jurisdiction of the tribe whose official is being sued?
  - Or is it the jurisdiction of the state whose court the action is being brought in?

Defenses – Discretionary Function

- Under the Federal Tort Claims Act (a law that defines when you can and cannot sue the federal government for tort liability), there is a "discretionary function" doctrine, which creates a defense to claims that might otherwise by viable at common-law.

- The discretionary function doctrine embodies the idea that the government doesn't have enough money to protect everyone from every risk. *See* e.g., 28 U.S.C. Sec 2680(a); see also *United States v. Gaubert*, 499 U.S. 315, 323(1991) (discretionary function exception prevents judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort).

Thank You

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