

Lewis v. Clarke

Justices question immunity of tribal employees

The US Supreme Court held oral argument on January 9, 2017, in *Lewis v. Clarke*, the only Indian law case on its docket this term. In the 2014 case of *Michigan v. Bay Mills Indian Community*, in a 5-4 decision the Supreme Court upheld the doctrine of tribal sovereign immunity in a case involving a tribe's off-reservation commercial conduct. With the *Lewis* case, the Court was faced with the more narrow question of whether a tribal employee, engaged in off-reservation conduct within the scope of his duty, is protected by the employer tribe's sovereign immunity from an individual-capacity tort suit.

Lewis involves William Clarke, an employee of the Mohegan Tribe who was involved in a limousine accident while transporting patrons outside the Tribe's reservation. The Connecticut Supreme Court sided with Mr. Clarke below, holding that since he was acting within the scope of his tribal employment, he was protected by the Mohegan Tribe's immunity from claims that he negligently caused the accident that injured Petitioners Brian and Michelle Lewis.

At oral argument, the Lewises argued that a suit seeking relief from just an employee (rather than from an Indian tribe) does not implicate the Indian tribe's immunity. The United States, which had filed an amicus curiae (or "friend of the court") brief and appeared at oral argument, largely agreed with the Petitioners, but contended that the Court should consider the separate doctrine of "official immunity," which forecloses certain suits against federal officials, including those based on discretionary acts. Several justices questioned whether the Court could reach the issue of official immunity at all, given that the question it had agreed to decide in the case was couched solely in terms of "sovereign immunity."

Mr. Clarke urged the Court to apply to tribal employees the same rules that apply to federal, state and foreign governments, granting immunity in cases where, as here, a tribe has agreed to indemnify the employee and to provide a tribal court forum to address the suit. Some of the members of the Court asked questions suggesting that the Mohegan Tribe's commitment to indemnify its employee supports extending immunity to Mr. Clarke. But several of the Justices questioned whether allowing employees like Mr. Clarke to benefit from the Tribe's immunity would leave the Lewises or other tort victims without any remedy for off-reservation injuries inflicted by tribal employees. For instance, Justice Stephen Breyer, who voted with the majority to uphold tribal immunity in *Bay Mills Indian Community*, expressed concern about the potential lack of a recourse for victims, noting that those injured by ordinary automobile accidents caused by tribal employees will have no remedy at all when injured by what he referred to as "missiles being sent out from the reservation."

Justice Samuel Alito asked whether the policies favoring immunity—to protect the "fearless, vigorous, and effective administration of policies of government"—apply at all to a tribal limousine driver, quipping, "[Y]ou want to encourage limo drivers on I-95 to be fearless in the way they drive?" Mr. Clarke's attorney responded that the Lewises' proposed rule would not only apply to Mr. Clarke, the limousine driver, but would potentially permit suit against a broad array of tribal government officials and employees, including tribal prosecutors, tribal judges and emergency services workers. Citing the amicus brief submitted by twenty-one tribes, Mr. Clarke pointed out that the Lewises' proposed rule would have a chilling effect on those who provide tribal police and fire services, who must indeed "be fearless in saving peoples' lives."

Dentons served as counsel of record on the amicus brief filed on behalf of the twenty-one tribes, which is available [here](#).

The Court is currently short one justice, as the US Senate has yet to confirm a replacement for Justice Antonin Scalia, who passed away last year. The Court's decision in *Lewis v. Clarke* is expected by this summer.

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