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Noah T. Allaire
University of New Mexico - School of Law

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Experiments in Legal Hybridity: From Indian Tort Law to Tribal Tort Law

NOAH T. ALLAIRE

ABSTRACT

Tort law is a broad set of rules designed to compensate people who have suffered injuries and harm by imposing penalties on those who caused the resulting injuries and harm. Indian tort law is the limited set of rules that the United States imposed upon tribal nations over a century ago. Today, tribal courts have the important opportunity and responsibility to articulate tribal tort law. Tribal legislatures, in turn, can codify tribal tort rules to guide future judicial decision-making. Through this process, tribal tort law will gradually supplant Indian tort law. Articulating tribal tort law necessarily involves conducting experiments in legal hybridity because tribal courts often interpret and apply tribal law, federal law, state law, and the common law to resolve tort cases. Legal hybridity represents a viable third space of sovereignty for tribes, beyond the false choice between completely adopting or completely rejecting American tort rules. This Article provides a roadmap for the journey from Indian tort law to tribal tort law.

First, I address tribal civil jurisdiction and its limits, arguing that tribal courts should exercise broad discretion in deciding tort cases. Next, I analyze Indian tort law, specifically the carelessness and accident standards for tort liability and the availability of additional penalties for deliberate torts. I use the Mescalero Apache Tribal Code as an example of enacted tribal law that both adopts and slightly modifies Indian tort law rules. Finally, I describe five tort decisions from the Navajo Nation, the Eastern Band of Cherokee Indians, the St. Regis Mohawk Tribe, the Mohegan Tribe, and the Mashantucket Pequot Tribal Nation to show how tribal tort law can supplant Indian tort law through experiments in legal hybridity. The selected decisions illustrate different tribal approaches to various tort concepts, including negligence, assault, wrongful death, qualified immunity, foreseeability, constructive notice, premises liability, and *res ipsa loquitor*. Conducting experiments in legal hybridity allows tribal nations to develop various bodies of tort law that serve tribes' individual and evolving needs while simultaneously asserting and defending tribal sovereignty and self-determination.

I. INTRODUCTION

Law should develop in response to the needs of the communities in which its rules are applied. Tribal nations in the United States are "not all alike."[1] In fact, tribal nations cannot be easily classified as either inside or outside the

[1] Max Minzer, *Treating Tribes Differently: Civil Jurisdiction Inside and Outside Indian Country*, 6 NEV. L.J. 89, 89 (2005) (discussing geographic, economic, and legal variation across Indian tribes in the United States).

United States.[2] In any case, there is great historical, geographic, cultural, linguistic, economic, and legal variation across tribes. As a result of this variation, different tribal communities have different legal needs. Therefore, different tribes should have different laws. Because tribal courts interpret and apply tribal law, federal law, state law, and the common law in resolving tort disputes, they are well positioned to experiment with legal hybridity, where hybridity is understood "as a process that creates a third space within the colonial dialectic."[3] Rather than simply adopting American legal doctrines or attempting to return to pre-colonial dispute resolution methods, modern tribal courts can and should blend different bodies of law in thoughtful ways that serve the needs of the tribe, tribal members, and non-member litigants.

This Article presents evidence of actual and potential experiments in legal hybridity through the interpretation and application of tribal law, federal law, state law, and the common law in tribal code provisions related to torts and tribal tort decisions. Focus is given to torts because "[t]ort law has been developed through social theory; the needs of society have affected the growth of specific rules."[4] More specifically, examining tort rules in tribal codes and case law demonstrates how tribal nations interpret and apply both tribal and Anglo-American values.[5] Section I addresses tribal civil jurisdiction and its limits, with particular attention given to the jurisdictional consequences of the United States Supreme Court's decision in *Montana v. United States* and two important assumptions underlying the Court's holdings on tribal civil jurisdiction.[6] Section II describes three provisions governing judgment in tort actions in Courts of Indian Offenses and uses the Mescalero Apache Tribal Code as an example of how these provisions have been incorporated into tribal codes. Section III presents and analyzes five tribal court tort decisions, showing how different tribal courts have experimented with legal hybridity.

II. TRIBAL CIVIL JURISDICTION AND ITS LIMITS

[2] KEVIN BRUYNEEL, THE THIRD SPACE OF SOVEREIGNTY: THE POSTCOLONIAL POLITICS OF U.S.-INDIGENOUS RELATIONS xv (arguing that because tribal governments existed before the establishment of the United States, tribal nations are neither "part of nor not part of the United States." Instead, they "straddle the temporal and spatial boundaries of American politics, exposing the incoherence of these boundaries as they seek to secure and expand their tribal sovereign expression.").

[3] JODI A. BYRD, THE TRANSIT OF EMPIRE: INDIGENOUS CRITIQUES OF COLONIALISM 188 (2011) (describing how the concept of hybridity in postcolonial theory is potentially useful for the development of indigenous critical theories within legal discourses of indigenous sovereignty).

[4] James W. Zion, *Harmony Among the People: Torts and Indian Courts*, 45 MONT. L. REV. 265, 266 (1984) (citing W. PROSSER, HANDBOOK OF THE LAW OF TORTS 1416 (4th ed. 1971)).

[5] *Id.* (arguing that tribal justice systems should reflect the social trends of their tribe while remaining sensitive to broader societal needs).

[6] Montana v. United States, 450 U.S. 544, 565 (1981).

The United States Supreme Court recognizes tribes as "domestic dependent nations" that retain the right to exercise inherent sovereignty over tribal members and tribal lands.[7] In *Montana v. United States*, the Supreme Court held that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[8] *Montana* also created two important exceptions to this general rule. The first *Montana* exception applies to "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[9] The second exception applies to "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[10]

Although the Supreme Court announced the *Montana* jurisdictional framework in the context of a dispute over a tribe's legislative jurisdiction, it has since been controversially applied in cases involving tribes' civil adjudicative jurisdiction.[11] As a result of *Montana*, tribal courts can decide civil cases arising from disputes between tribal members, matters taking place on tribal land, and cases brought against the tribal government or its agents.[12]

Two key assumptions motivate the Supreme Court's holdings with respect to tribal civil jurisdiction and its limits. First, the Court has assumed that tribes and states should not have concurrent jurisdiction over civil disputes because concurrent jurisdiction would threaten and possibly overwhelm tribes' "fragile" court systems.[13] Second, the Court has assumed tribes should not have jurisdiction

[7] Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); *see also* BYRD, *supra* note 3, at 171 (describing the recognition of tribes as domestic dependent nations as a "discursive juridical fiction.").

[8] *Montana*, 450 U.S. at 565 (1981) (explaining that the general principles of retained inherent sovereignty apply to tribal authority in civil matters).

[9] *Montana*, 450 U.S.at 565–566; *see also* Williams v. Lee, 358 U.S. 217, 223 (1959); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 152–154 (1980).

[10] *Montana*, 450 U.S. at 566; *also* Fisher v. District Court, 424 U.S. 382, 386 (1976); Williams v. Lee, 358 U.S. 217, 220 (1959); Mont. Cath. Missions v. Missoula Cnty., 200 U.S. 118, 128–129 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898).

[11] *See* Strate v. A-1 Contractors, 520 U.S. 438 (1997) (denying an Indian tribe's inherent power to adjudicate a civil lawsuit brought by a non-Indian plaintiff against a non-Indian defendant for personal injuries arising from an automobile accident on a state highway within the boundaries of an Indian reservation); Nevada v. Hicks, 533 U.S. 353 (2001) (denying a tribal court's authority to hear a federal civil rights claim absent federal authorization); Plains Com. Bank v. Long Fam. Land & Cattle Co., Inc., 554 U.S. 316 (2008) (denying a tribal court's authority to adjudicate a lawsuit brought by a company owned by tribal members against a bank owned by non-tribal members).

[12] This Article pays particular attention to the last category of cases because tribal courts may be more willing to experiment with legal hybridity in cases brought against the tribe or its agents. *See infra* section III.

[13] Minzer, *supra* note 1, at 90 (describing the Supreme Court's suggestions that tribal court jurisdiction would be undermined by state court concurrent jurisdiction because litigants in

over non-Indian litigants because tribal courts would be inherently unfair to them.[14] As a result of these assumptions and the holdings they motivate, tribal courts unfortunately retain minimal civil jurisdiction over non-Indian defendants.[15]

Turning to tribal tort law specifically, tribal courts face three distinct challenges in resolving tort disputes. These challenges might otherwise be described as opportunities for experimentation with legal hybridity. First, most tribal nations have not enacted comprehensive tort statutes.[16] Second, tribal courts typically do not have a large body of tribal or common law tort decisions to rely on when deciding tort cases.[17] Third, tribal discretion in resolving tort cases is often limited by choice-of-law provisions in tribal codes that require tribal courts to interpret and apply state or federal law in the absence of controlling tribal authority. Given these three challenges, the importance of articulating and codifying tribal tort law becomes clear. The next section describes and analyzes Indian tort law—the unique and sparse body of tort rules that many tribes have adopted from the Code of Federal Regulations.

III. INDIAN TORT LAW AND THE MESCALERO APACHE TRIBAL CODE

Many tribal nations, including the Mescalero Apache Tribe, have adopted provisions from the Code of Federal Regulations governing judgments in civil actions in Courts of Indian Offenses (CFR Courts) into their tribal codes.[18] These provisions form the core of Indian tort law,[19] which might be distinguishable from,

general, and in particular non-tribal litigants in particular, would prefer state courts to tribal courts if given the choice).

[14] *Id.* (describing the Supreme Court's assumption that "non-Indian litigants will generally be disadvantaged in tribal courts, and as such need protection from the exercise of tribal jurisdiction[,]" noting that this assumption is not limited to the judiciary, and describing efforts by Senator Slade Gorton in the 1990s to condition federal funding for tribes upon tribal waiver of sovereign immunity from suit in federal and state courts).

[15] *Id.* at 100–101 (noting that tribes may exercise jurisdiction over non-Indian defendants if there is a specific grant of jurisdiction by treaty or statute, describing the *Montana* exceptions, and identifying a shift from a test for tribal jurisdiction with a geographic focus to a test based on the identity of the parties, particularly defendants).

[16] MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW, 573 (1st ed. 2011) (noting that despite the lack of comprehensive tribal tort statutes, tribal legislatures are increasingly enacting statutes that govern the filing of tort claims against tribal enterprises and the tribal government, many of which provide for tribal sovereign immunity).

[17] *Id.* (explaining that tribal courts often apply the law of the state in which the tribe is located to resolve civil disputes).

[18] *Compare* MESCALERO APACHE TRIBAL CODE § 2-3-8 (2016), *with* 25 C.F.R. § 11.501 (1993)*; see also* Zion, *supra* note 4, at 277 ("The regulations of the Bureau of Indian Affairs concerning Courts of Indian Offenses are common to many American tribal courts, either directly through the regulations or indirectly through tribal code provisions copied from them, and there are only a few principles directly applicable to the area of tort law.").

[19] Zion, *supra* note 4, at 277 (explaining that it is important to understand the current rules governing judgment in tort actions in tribal courts to "see how they fit into the idea of an Indian common law.").

or the predecessor to, multiple emergent bodies of tribal tort law. This section describes the history of these provisions and analyzes them using the Mescalero Apache Tribal Code as a representative example of how Indian tort law can become tribal tort law through tribal legislative enactment.

In 1883, the Secretary of the Interior, acting without express statutory authorization,[20] established CFR Courts to enforce the newly enacted Code of Indian Offenses (CIO) on Indian reservations.[21] Congress enacted the CIO in response to the Supreme Court's decision in *Ex parte Crow Dog*.[22] In *Crow Dog*, the Court held that a lower federal court did not have the authority to try and sentence an Indian for the murder of another Indian on tribal land.[23] Congress took issue with this result and acted quickly to override it by passing the CIO.

The administrative regulations governing CFR Courts state that the courts were created "to provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of state jurisdiction but where tribal courts have not been established to exercise the jurisdiction."[24] A contemporary perspective recognizes that Congress enacted the CIO and the Secretary of the Interior created CFR Courts to impose federal law on tribal communities, to eliminate traditional tribal practices, and to undermine traditional sources of tribal legal authority.[25] Although tribal courts operated by tribal governments have replaced CFR Courts in many tribal communities following the enactment of the Indian Reorganization Act (IRA) in 1934,[26] five CFR Courts—serving multiple tribes and two Indian boarding school properties—continue to exist today.[27]

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[20] Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 235 (1994) (describing how the perceived need to regulate law and order on Indian reservations among members of the federal government allowed the Secretary of the Interior to rely on his general authority over Indian affairs to establish CFR courts).

[21] *See* 25 C.F.R. § 11.100 *et seq*. (2020); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[c][iv][B] (Nell Jessup Newton et al. eds., 2019).

[22] Valencia-Weber, *supra*, note 20, at 235 n.28 (citing ROBERT N. CLINTON ET. AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 36–37 (3d ed. 1991)).

[23] Ex parte Crow Dog, 109 U.S. 556, 567–568 (1883).

[24] 25 C.F.R. § 11.102 (2020).

[25] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.04[c][iv][B] (Nell Jessup Newton et al. eds., 2019) (describing CFR courts as "agents of assimilation" because they were created to enforce the Code of Indian Offenses, which "outlawed many traditional Indian practices and marginalized traditional sources of authority."); *see also* Zion, *supra* note 4, at 277 (describing CFR courts as "instruments of control").

[26] The IRA allowed tribes to adopt constitutions fixing government powers, thus providing for tribal courts established and operating under tribal law rather than federal law. *See* Zion, *supra* note 4, at 268. *See also* 25 U.S.C. §§ 461–479 (1983).

[27] The Albuquerque CFR Court serves the Albuquerque Indian School Property, the Santa Fe Indian School Property, and Kewa Pueblo for the limited purpose of criminal jurisdiction. The Southern Plains CFR Court serves the Apache Tribe of Oklahoma, Caddo Nation of Oklahoma,

The CFR Court regulations include only a few provisions directly related to tort law.[28] One commentator has explained the brief treatment of tort law in the CFR regulations by suggesting the federal government wrongly assumed CFR Courts would apply state law in tribal tort disputes.[29] Guided by choice-of-law provisions, tribal courts *do* often interpret and apply state law in resolving civil cases even if their predecessors—CFR Courts—did not.[30] The following subsection provides an overview and analysis of the CFR Court regulations governing judgments in tort cases.

A. The Core of Indian Tort Law – Civil Actions under 25 C.F.R. § 11.501

25 C.F.R. § 11.501 governs judgments in civil actions in CFR Courts.[31] Section 11.501 invokes, but does not directly refer to, the common law tort concepts of negligence, intent, and punitive damages and the modern tort concept of comparative fault. Anglo-American tort concepts go by different, more commonplace names in Section 11.501. Commentators have previously recognized the substantive differences between the tort rules in the CFR Court regulations and common law tort rules.[32] These differences alone may represent a form of nascent and perhaps unintentional legal hybridity because they leave space for CFR Courts and tribal courts to "develop and apply their own rules of common law instead of turning to state law."[33]

First, the CFR Court regulations establish a carelessness test rather than a negligence test for tort liability.[34] Second, the regulations require the judgment to impose an "additional penalty" in cases "[w]here the injury was deliberately inflicted[.]"[35] Further, the "additional penalty may run either in favor of the injured

Fort Sill Apache Tribe of Oklahoma, Kiowa Indian Tribe of Oklahoma, Otoe-Missouria Tribe of Indians, and Wichita and Affiliated Tribe of Indians. The Western Region CFR Court serves the Skull Valley Band of Goshutes Indians and the Te-Moak Bank of Western Shoshone Indians. The Eastern Oklahoma Region CFR Court serves the Eastern Shawnee Tribe of Oklahoma, Modoc Tribe of Oklahoma, Ottawa Tribe of Oklahoma, Peoria Tribe of Indians of Oklahoma, and Seneca-Cayuga Tribe of Oklahoma. Finally, the Southwest Region CFR Court serves the Ute Mountain Ute. *See Court of Indian Offenses*, U.S. DEPARTMENT OF THE INTERIOR INDIAN AFFAIRS, https://www.bia.gov/CFRCourts [https://perma.cc/NU8L-KSZE] (last visited Apr. 2, 2023).

[28] *See* 25 C.F.R. § 11.501 (1993).

[29] Zion, *supra* note 4, at 277.

[30] This practice may be required by choice-of-law provisions in tribal codes, which create a hierarchy of bodies of law that tribal courts must interpret and apply in the absence of tribal law. *See* FLETCHER, *supra* note 16, at 573.

[31] 25 C.F.R. § 11.501 (1993).

[32] *See* Zion, *supra* note 4, at 277–279; *see also* Valencia-Weber, *supra* note 20, at 255–256.

[33] Zion, *supra* note 4, at 278.

[34] 25 C.F.R. § 11.501(b) (1993) ("Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he or she has suffered.").

[35] 25 C.F.R. § 11.501(c) (1993).

party or in favor of the tribe."[36] Third, the regulations require that the judgment "compensate the injured party for a reasonable part of the loss he or she has suffered" in cases "[w]here the injury was inflicted as a result of accident, or where both the complainant and the defendant were at fault[.]"[37] An analysis of these three provisions and an illustration of how they have been incorporated into the Mescalero Apache Tribal Code is presented below.

1. Elaborating the Carelessness Test for Tort Liability Using Tribal Concepts

The first relevant provision of Section 11.501 establishes a carelessness test for tort liability.[38] The carelessness test for tort liability could be interpreted as eliminating the step-by-step, common law negligence analysis. More specifically, the carelessness test might bypass the need to determine whether the defendant failed to exercise ordinary care to avoid foreseeable harm to the plaintiff. Duty of care may not be a question of law and breach, causation, scope of liability and damages may not be questions of fact under the carelessness standard.[39] By Anglo-American legal standards, the carelessness test for tort liability may be closer to a subjective test than an objective test

With respect to the effect of the carelessness test on the rights of litigants, it is likely more stringent than the negligence standard, with fewer protections available to defendants. As alluded to above, it is unclear whether the common law tort concepts of foreseeability and standard of care—which often function to protect defendants—are implicated by the carelessness test. Indeed, one commentator has suggested that they are not.[40]

More abstractly, another commentator has said that the carelessness test conforms with an "expansive viewpoint" common among members of tribal communities.[41] Assuming this is true, the carelessness test may serve the needs of those communities better than the common law negligence analysis. On the other

[36] *Id.*
[37] 25 C.F.R. § 11.501(d) (1993).
[38] 25 C.F.R. § 11.501(b) (1993).
[39] This blending of the role of the judge and the factfinder is arguably present in federal and state court bench trials and may serve the needs of some tribal communities that face problems empaneling juries. *See* FLETCHER, *supra* note 16, at 580 (noting that special problems arise with empaneling a jury in Indian country due the limited territorial jurisdiction and population from which to draw a jury pool).
[40] Zion, *supra* note 4, at 277 (explaining that under the carelessness standard, "[t]he tribal judge need not be concerned with the fine definitions of the standard of care a defendant owes.").
[41] Valencia-Weber, *supra* note 20, at 255 ("The carelessness standard rule allows the judge and jury to use the expansive viewpoint that is common among American Indians.").

hand, careless is often used as a synonym of negligent, suggesting there may be little difference between the two liability standards after all.[42]

Tribal courts interpreting and applying the carelessness test for tort liability could experiment with legal hybridity by developing a step-by-step carelessness analysis based on tribal concepts analogous to the common law concepts of duty, breach, causation, scope of liability, and damages. Reincorporating such tribal concepts into tribal tort jurisprudence—and perhaps not attempting to translate the indigenous words designating these concepts into English—will undoubtedly serve the needs of tribal communities.[43] Indeed, indigenous languages, their speakers, and the entire legal community could benefit from the introduction of indigenous words and tribal concepts into the legal lexicon and imaginary.

In accordance with the CFR Court regulations, the Mescalero Apache Tribal Code (MATC) codifies a carelessness standard for tort liability.[44] The Mescalero Apache Tribal Government may have recognized little semantic difference between carelessness and negligence, or it may have thought that codifying the carelessness standard would allow Mescalero Apache courts the freedom to apply community outlooks in tort cases and elaborate the law using tribal concepts.[45]

2. Recognizing Causes of Action and Awarding Additional Penalties for Deliberate Torts

The second relevant provision of Section 11.501 requires CFR Courts to impose "an additional penalty" in cases where an injury was "deliberately" inflicted.[46] Further, the additional penalty "may run either in favor of the injured party or in favor of the tribe."[47] Significantly, this provision does not repeat the common law names or elements governing the adjudication of intentional torts, including, for example, assault, battery, defamation, and false imprisonment.[48] In the absence of tribal case law on point, disputes may arise about whether causes of

[42] Zion, *supra* note 4, at 277; *see also Negligent, Black's Law Dictionary* (rev. 4th ed. 1968).

[43] *See generally* Christine Zuni Cruz, *Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law*, 1 Tribal L.J. 2 (2000) (arguing that because tribal nations can adopt any law they choose, including Western law, they should adopt law that reinforces tribal values and norms).

[44] MESCALERO APACHE TRIBAL CODE § 2-3-8(B) (2016) ("Where the injury inflicted was the result of carelessness on the part of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.").

[45] Zion, *supra* note 4, at 278. Further research, which is beyond the scope of this Article, is necessary to determine how Mescalero Apache tribal courts interpret and apply the carelessness standard in practice.

[46] 25 C.F.R. § 11.501(c) (1993).

[47] *Id.*

[48] Zion, *supra* note 4, at 277–278.

action for common law intentional torts are recognized in tribal courts interpreting and applying this unelaborated deliberate tort provision of the CFR regulations.

In the process of determining liability, the deliberate tort standard probably functions much like the common law intentional tort standard because a defendant's intent usually cannot be measured objectively. Without an admission of intent, courts and juries often rely on circumstantial evidence to determine the defendant's state of mind at the time of the injury. Further, deliberate is often used as a synonym of intentional, suggesting little to no difference between the two liability standards.[49] Still, there are areas of ambiguity to be resolved by tribal courts here as well. It is unclear, for example, whether the deliberate tort standard incorporates the common law doctrine of transferred intent. The deliberate tort standard may leave open the question of whether a defendant could be held liable for invasions of interests beyond their express intent.

Tribal courts applying the deliberate standard could experiment with legal hybridity by recognizing or declining to recognize common law causes of action for intentional torts. If a tribal court chooses to recognize a common law intentional tort cause of action, the court might proceed to define its elements in a way that accords with tribal custom and law. If a tribal court declines to recognize a common law intentional tort cause of action, the court could explain why the cause of action is not recognized within the tribal jurisdiction. Further, tribes should consider whether additional penalties should be *required* in cases where the harm was deliberately inflicted by the defendant and whether such penalties should be available to the tribe itself in lieu of the plaintiff.

In accordance with the CFR regulations, the MATC provides for an additional penalty that may run in favor of the injured party or the Tribe in cases where the injury was deliberately inflicted.[50] The Mescalero Apache Tribal Government's decision to allow additional penalties in deliberate torts cases suggests that the Tribe reasonably seeks to deter tribal members and non-members within its jurisdiction from deliberately harming one another. Allowing additional penalties to run in favor of the Tribe likely accords with tribal customary law, whereby a deliberate injury suffered by a tribal member may be understood as an injury suffered by the Tribe itself.

Significantly, the MATC makes passing reference to assault, false imprisonment, and "other alleged torts" in a section providing civil immunity from liability to tribal law enforcement or public service officers who "make a protective search of an intoxicated person before transporting him to a residence, health care

[49] *Id.; see also Intention, Black's Law Dictionary* (rev. 4th ed. 1968).

[50] MESCALERO APACHE TRIBAL CODE § 2-3-8(C) (2016) ("Where the injury was deliberately inflicted, judgment may impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the Tribe.").

facility or jail."[51] To benefit from these protections, the measures taken by an officer must be "reasonable" and must not "involve the use of excessive or unnecessary force."[52] As a result, it is possible that a Mescalero Apache tribal court would recognize causes of action for assault, false imprisonment, and other common law intentional torts based on this passing reference to them in the Tribal Code. This Code section clearly lays the groundwork for Mescalero Apache jurisprudence on qualified immunity.

Next, the MATC provides that the "Tribal Court shall recognize the civil torts of slander, libel, and the intentional interference of a contract as those common law torts have been recognized in jurisdictions outside the Mescalero Apache Reservation."[53] Finally, the Code establishes what appears to be a strict damages standard for "a false and hurtful statement made against another individual."[54] These provisions function to deter unfair dealing and insulting verbal conduct, which may be understood as particularly harmful under traditional Mescalero Apache law.

3. Defining the Limits of Liability and Apportioning Fault Under the Accident Standard

The final relevant provision of Section 11.501 establishes both an accident standard for tort liability and what appears to be a comparative fault rule for damages.[55] The use of the word accident in this provision could be interpreted as extending tort liability well beyond the limits of a carelessness or negligence standard. Indeed, one commentator has interpreted this provision to mean the court may apportion fault between the parties and assess damages in any case where the injury was accidental but not the result of the defendant's carelessness *or* where both parties are at fault.[56] Following this interpretation, injuries inflicted as the result of an accident are mutually exclusive of injuries inflicted as the result of

[51] MESCALERO APACHE TRIBAL CODE § 14-4-3 (2016).
[52] *Id.*
[53] MESCALERO APACHE TRIBAL CODE § 35-1-1 (2016).
[54] MESCALERO APACHE TRIBAL CODE § 35-1-2 (2016) ("The Mescalero Apache Tribal Court shall recognize that a false and hurtful statement made against another individual is in fact damaging to the name and reputation of the
victim and, therefore, prima facie proof of damages to the victim that is sufficient to provide the victim a
reasonable monetary recovery in an amount sufficient to discourage such indecent and vile conduct in the
future.").
[55] 25 C.F.R. § 11.501(d) (1993) ("Where the injury was inflicted as the result of accident, or where both the complainant and the defendant were at fault, the judgment shall compensate the injured party for a reasonable part of the loss he has suffered.").
[56] Zion, *supra* note 4, at 278 ("The meaning of this regulation is that where the court finds there was no carelessness causing the injury or where both parties were at fault, the court may still order the payment of a "reasonable part" of the damages.").

carelessness and damages are available even in cases where the defendant's carelessness has not been established.

Unlike the common law doctrine of contributory negligence, damages are available to the injured party even if they were partially at fault for their injury. Thus, this provision announces a rule like the modern tort principle of comparative fault. Tribal courts applying this provision should review its logic and decide whether it conforms with tribal custom and law. Experimentation with legal hybridity is possible in determining whether percentages of fault should be assigned to the litigants, what factors might be used in apportioning fault, how fault should be apportioned to non-parties, whether the common law assumption of risk defense should be available to defendants, and whether a pure or modified comparative fault rule suits the needs of the tribal community.

In a slight departure from the CFR regulations, the MATC establishes an accident standard for tort liability while announcing what could reasonably be interpreted as a modified comparative fault rule with a 51% bar on recovery for plaintiffs.[57] No similar comparative fault rule appears in the MATC provision establishing the carelessness test discussed above. Thus, it would be reasonable to assume that comparative fault principles apply only to cases in which the injury was inflicted accidently, but not carelessly, under the MATC. This is an interesting and perhaps unintentional choice whereby a defendant gets the benefit of fault apportionment only at the lowest end of the culpability spectrum.

Overall, the provisions considered in this section leave CFR Courts and the tribal courts that have replaced them "free to develop and apply their own rules of common law instead of turning to state law."[58] This freedom may have been one of the reasons that many tribes, including the Mescalero Apache Tribe, adopted the CFR regulations governing judgment in civil actions into their tribal codes. On the other hand, there may be disadvantages to these provisions for tribal courts and communities alike. Tribal legislatures and courts should carefully review these Indian tort law provisions to determine whether they conform with tribal law, whether they reflect the social trends of the tribe, and whether they are sensitive to larger societal needs. The next section turns to tribal case law on torts to show how tribal courts take different approaches to resolving tort disputes in practice.

IV. TRIBAL TORT LAW IN FIVE CASES

This section describes and analyzes five tribal court decisions that demonstrate the variety of issues that may arise in tort cases and the variety of

[57] MESCALERO APACHE TRIBAL CODE § 2-3-8(D) (2016) ("Where the injury was inflicted as the result of an accident where both the complainant and the defendant were at fault, the Court shall determine the case on the basis of the evidence brought before it, assessing against the party found to be most at fault the total of damages minus an amount of damages found to have been caused by the party least at fault.").

[58] Zion, *supra* note 4, at 278.

approaches that different tribal courts may take in resolving those issues. These cases were selected based on their availability and the issues and approaches they demonstrate. Each decision shows a different way that tribal courts can navigate legal pluralism and experiment with legal hybridity.

A. Clarifying Carelessness: *Mann v. Navajo Tribe*

Mann v. Navajo Tribe reconciles Indian tort law with Anglo-American common law to achieve a result that accords with traditional tribal values and supports the police power of the tribal government.[59] The *Mann* court held that a tribal law enforcement officer was not liable for the death of an intoxicated tribal member at a traditional Navajo ceremony because the officer did not breach a legal duty that he owed to the decedent.[60] Although *Mann* is a tribal tort case, it's interesting to consider how the litigation and result would have been different if the suit was brought in federal court under the Indian Civil Rights Act.[61]

Mann is a wrongful death case decided by the Navajo Nation Court of Appeals in Window Rock, Arizona in 1983.[62] The case was brought as a result of Dan Mann's death during a traditional Navajo Enemyway Ceremony on tribal land after he was run over by a police vehicle.[63] On the night of the ceremony, Mr. Mann "did a great deal of drinking, and people noticed he was highly intoxicated."[64] A witness testified that they saw Mr. Mann stagger away from the ceremony into an area dense with sagebrush.[65] Shortly thereafter, a Navajo law enforcement officer drove his police van in a circular lap around the area where the ceremony was taking place.[66] Although there were other vehicles present, a witness testified that no other vehicle drove around the ceremony around the time of Mr. Mann's death.[67]

The court noted that Navajo common law had not been raised by the plaintiff and determined that under the Navajo Tribal Code, legal liability depended on whether there was carelessness in causing Mr. Mann's death.[68] Clarifying the carelessness standard for tort liability, *Mann* held that carelessness "is actually the same legal standard as 'negligence[.]'"[69] The court explained that the defendant

[59] Mann v. Navajo Tribe, 1983 Navajo App. LEXIS 7, 4 Nav. R. 83 (Nav. Ct. App. 1983).
[60] *Id.* at *5.
[61] *See* 25 U.S.C. §§ 1301–1304.
[62] *Mann*, 1983 Navajo App. LEXIS at *1.
[63] *Id.* at *1–2 ("This case is a very sad example of the result of breaches of Navajo law at Navajo traditional ceremonies. While liquor is illegal in the Navajo Nation, there are those who do not only choose to break the secular law, but to defile a sacared [sic] Navajo ceremony by becoming intoxicated. In this case a breach of Navajo statutory and sacred law resulted in a death.").
[64] *Id.* at *2.
[65] *Id.*
[66] *Id.* at *2–3.
[67] *Id.* at *3.
[68] *Id.* (citing 7 NAVAJO TRIBAL CODE Sec. 701(b)).
[69] *Id.* at *6.

officer would not be liable for carelessness unless he breached a legal duty he owed to Mr. Mann and his breach proximately caused Mr. Mann's death.[70]

First, the court considered what legal duty the defendant officer owed to Mr. Mann and held that the officer owed a duty of reasonable care in the performance of his job.[71] Proceeding to a breach analysis, the court found the defendant carried out his legal duty to conduct police patrol activities with reasonable care and did not breach his duty with respect to Mr. Mann.[72] Addressing the question of proximate cause, the court observed that the defendant's conduct may have been a proximate cause of Mr. Mann's death but "it was not a proximate cause in breach of any duty."[73] Thus, *Mann* establishes a foreseeable plaintiff rule à la *Palsgraff v. Long Island R. Co.*[74] in holding "there is certainly no policy requirement that this court tell an otherwise cautious driver that he must foresee the possibility of a drunk in the sagebrush at Enemyway Ceremonies."[75] Finally, the *Mann* court addressed the availability of reasonable damages under the Navajo Tribal Code's accident standard: "[A]lthough it may be said that the death was the result of an 'accident,' and the court could award a reasonable part of the loss suffered under 7 N.T.C. Sec. 701(d), there is no just or equitable consideration to cause it to do so."[76]

Mann relies on common law tort doctrines to resolve the ambiguities of Indian tort law in a way that strengthens and accords with tribal law. First, the *Mann* court walked through a step-by-step negligence analysis using the common law concepts of duty, breach, and proximate cause to relieve the defendant of liability for carelessness. Second, the court established a justice or equity test for applying the accident standard for liability. Although the result in *Mann* is harsh for the plaintiff, the court emphatically asserted that the result would motivate proper respect for traditional tribal practices and deter alcohol use and abuse.[77]

B. Importing Immunities: *Beillo v. E. Band of Cherokee Indians*

Beillo v. E. Band of Cherokee Indians blends tribal law, the common law, federal law, and state law to achieve a result that supports the police power of the

[70] *Id.* at *3 (finding that the defendant would not be liable unless "there was come legal duty which Officer McCabe owed to Mr. Mann, and which Officer McCabe breached, proximately causing the death.").
[71] *Id.* at *4 (holding that the duty owed was "[v]ery simply the duty of carrying out police patrol duties in a manner appropriate for the crowd conditions, the time of day, and the terrain.").
[72] *Id.*
[73] *Id.*
[74] *See Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 342 (1928) ("In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury" (internal citations omitted)).
[75] *Mann*, Navajo App. LEXIS 7 at *5 (1983).
[76] *Id.* at *6.
[77] *Id.*

tribal government.[78] *Beillo* is a wrongful death, excessive force, and immunities case decided on the defendants' motion for summary judgment by the Eastern Band of Cherokee Tribal Court in 2003.[79] The case arose out of the fatal shooting of seventeen-year-old Charles Don Beillo (Charlie) by an officer of the Cherokee Indian Police Department (CIPD) after four CIPD officers responded to a 911 emergency call from Brenda Bustos, Charlie's mother, requesting assistance at her residence.[80]

On the 911 call, Ms. Bustos told the operator that Charlie had cut himself on the neck with a knife.[81] When CIPD officers arrived at the Bustos residence, "a scuffle ensued" during which the officers struck Charlie with their police batons, and one officer "was cut superficially on the hand."[82] Ultimately, Charlie "moved either towards the door of the residence or lunged at Defendant Sneed and was fatally shot twice in the chest by Defendant Pheasant."[83]

The plaintiff, Charlie's father, brought a claim for negligence against the individual responding officers, the police chief, the police department, and the Eastern Band of Cherokee Indians (EBCI) itself.[84] The court determined that the plaintiff's complaint actually stated claims against the responding officers for "wrongful death by use of excessive force and/or assault and battery" and claims against the police chief, the police department, and the Band for both "wrongful death as derivative liability by way of respondeat superior" and "wrongful death because of failure to have adequate training and policies for dealing with emotionally disturbed subjects."[85]

The first issue was whether the Band recognized a cause of action for wrongful death.[86] The court held that the EBCI did recognize a cause of action for wrongful death because an ordinance of the Cherokee Code established comparative negligence as a defense to a wrongful death claim.[87] The second issue was whether the EBCI should also recognize civil immunities for law enforcement and public officers.[88] Turning to the Cherokee Code and the laws, customs, traditions, and precedents of the Band, the court found no tribal authority on immunities.[89] Turning next to federal law, the court adopted the Supreme Court's

[78] Beillo v. E. Band of Cherokee Indians, 3 Cher. Rep. 47, 2003 N.C. Cherokee Ct. LEXIS 992.
[79] *Id.*
[80] *Id.* at 48.
[81] *Id.*
[82] *Id.* at 48–49.
[83] *Id.* at 49.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 50.

articulation of the doctrine of qualified immunity for law enforcement officers in *Pierson v. Ray* and found qualified immunity to be the law of the EBCI.[90]

To determine whether the defendant officers were entitled to qualified immunity, the court adopted the *Saucier v. Katz* test for qualified immunity in cases alleging excessive force by law enforcement officers.[91] The two-part *Saucier* test requires a court to first consider whether the defendant officer's conduct violated a constitutional right.[92] If the officer's conduct violated a constitutional right, then the court must consider whether the violated right was "clearly established."[93] The *Beillo* court interpreted the second prong of the *Saucier* test as a reasonableness requirement.[94] In preparing to apply the *Saucier* qualified immunity test, the court rejected the plaintiff's argument that his claim was for negligence and therefore did not involve or invoke any constitutional rights.[95] The court explained that the *Saucier* test could be used to analyze the defendants' conduct because Charlie's rights guaranteed by the Indian Civil Rights Act may have been violated when he was killed by tribal police.[96]

First, the court held that the non-shooting officers were entitled to qualified immunity because their conduct did not violate any of Charlie's rights.[97] Second, the court held that the shooting officer was also entitled to qualified immunity because he did not act unreasonably under the circumstances.[98] Third, the court held that the plaintiff's *respondeat superior* claims against the police chief, the police department, and the EBCI failed because all the responding officers were entitled to qualified immunity.[99]

Addressing the plaintiff's remaining inadequate training and procedures claims, the court again applied the *Saucier* test and held that the police chief and police department were *not* entitled to qualified immunity because they failed to develop policy and training regarding encounters with emotionally disturbed people.[100] Finally, the court held that the police chief was entitled to public officer immunity and could not be held liable in his individual capacity.[101] Thus, the court granted the defendants' summary judgment motion on nearly all of the plaintiff's

[90] *Beillo*, 3 Cher. Rep. 47, 50; *see also* Pierson v. Ray, 386 U.S. 547, 555 (1967).
[91] *Id.*; *see also* Saucier v. Katz, 533 U.S. 194 (2001).
[92] *Saucier*, 533 U.S. 194, 201 (2001).
[93] *Id.*
[94] *Beillo*, 3 Cher. Rep. 47, 50 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[95] *Id.* at 50.
[96] *Id.* (citing 25 U.S.C. § 1302(a)(2) (1978)).
[97] *Id.* at 51.
[98] *Id.* at 51–52.
[99] *Id.* at 52.
[100] *Id.* at 52–53 (citing 42 U.S.C. § 1983; *Spell v. McDaniel*, 824 F.2d 1380, 1389 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988)).
[101] *Id.* at 53-54 (citing *Meyer v. Walls*, 347 N.C. 97, 112 (1997); *State v. Hord*, 264 N.C. 149, 155 (1965)).

claims. By importing immunities from federal law, the court allowed a trial only on the plaintiff's inadequate training and policy claim against the police chief and department.

Beillo highlights some of the opportunities for experimentation with legal hybridity that arise in the absence of tribal tort codes and case law. The court made at least six significant decisions for the tribe in *Beillo*. First, it read wrongful death claims into the plaintiff's complaint for negligence. Second, it interpreted enacted tribal law on contributory negligence to recognize a cause of action for wrongful death. Third, it adopted a federal interpretation of the common law origin of qualified immunity and public immunity. Fourth, it recognized those immunities. Fifth, it adopted a federal test for qualified immunity. And finally, it adopted a state test for public immunity. Like *Mann*, *Beillo* arrives at a harsh result for the plaintiff that supports the police power of the tribal government, but through much different means.

C. Relying on the Restatement: *Curotte v. Thompson*

In the absence of St. Regis Mohawk Tribal authority on the elements of assault, *Curotte v. Thompson*[102] interprets the Restatement (Second) of Torts and state law to reach a flexible result that privileges the economic needs of the plaintiff over a strict application of common law tort rules. *Curotte* arose from a disciplinary interaction on tribal land between the defendant and the plaintiff's minor child.[103] The defendant was the plaintiff's landlord at the time of the alleged assault.[104] All descriptions of the alleged assault are redacted in the court's opinion, so it is difficult to understand exactly what occurred. The plaintiff sought compensatory damages for emergency moving expenses incurred as a result of the alleged assault and court costs.[105]

First, the court held that it had jurisdiction over the matter based on a provision of the Saint Regis Mohawk Tribe Civil Code (SRMT Civil Code) granting the court jurisdiction over tort disputes involving injuries proximately caused, carried out, or suffered "in Mohawk Indian Country."[106] Second, the court considered what body of law was applicable to the plaintiff's claim. The court observed that although the Tribe had not enacted a written law addressing tort claims, the SRMT Civil Code allowed the court to apply "generally recognized principles of the law of torts, as reflected by the most recent Restatement of Torts[.]"[107] Then, the court explained that it would look to New York case law for

[102] Curotte v. Thompson, No. 18-CIV-00019, 2018 St. Regis Mohawk Trib. LEXIS 19 (October 5, 2018).
[103] *Id.* at *1.
[104] *Id.*
[105] *Id.* at *1, *8.
[106] *Id.* at *2 (quoting SAINT REGIS MOHAWK CIVIL CODE § II. C.).
[107] *Id.* at *3.

guidance in interpreting the Restatement because New York law was not inconsistent with principles of sovereignty, self-government, and self-determination, and was in the overall interest of justice and fairness to the parties.[108]

Addressing the defendant's liability, the court observed that imminent apprehension of offensive contact is an element of assault in the Restatement (Second) of Torts.[109] Finding no evidence demonstrating that the plaintiff's child was aware that offensive contact was imminent during his interaction with the defendant, the court found that the elements of assault were not strictly met.[110] However, the court relied on a catch-all section of the Restatement for intentional conduct that does not "come within one of the traditional categories of tort liabilities"[111] and a New York opinion interpreting it to find the defendant liable for the plaintiff's damages and costs.[112]

Curotte shows how tribal courts can use choice-of-law provisions in tribal codes to adopt progressive tort law principles from widely recognized treatises and use state law to interpret those principles. The *Curotte* court was able to achieve a result that compensated the plaintiff for the expenses she incurred as a result of the defendant's intentional conduct without requiring the plaintiff to prove that the defendant's conduct satisfied all the common law elements of assault.

D. Sticking with the State: *Gentile v. Mohegan Tribal Gaming Authority*

Gentile v. Mohegan Tribal Gaming Authority[113] relies on state law to achieve a result that fairly protects the Tribe's economic interest in operating its casino against opportunistic claims of injury from non-member litigants. *Gentile* is a slip-and-fall, premises liability, and constructive notice case decided by the Mohegan Gaming Disputes Trial Court in 2001.[114] The plaintiff alleged that she sustained injuries as a result of slipping and falling on grease present on the wooden floor of a walkway in the defendant's casino, which is located on tribal land.[115]

The plaintiff's theory of liability was that the defendant failed to exercise due care in the operation, maintenance, and control of the casino because the defendant had actual or constructive notice of the grease on the floor, which

[108] *Id.* at *4–5.
[109] *Id.* at *9.
[110] *Id.* at *9–10.
[111] *Id.* at *10 (citing Restatement (Second) of Torts § 870 (Am. L. Inst. (1979)).
[112] *Curotte*, 2018 St. Regis Mohawk Trib. LEXIS 19, 24; *see also* Curiano et. al. v. Suozzi, 63 N.Y.2d 113 (1984).
[113] Gentile v. Mohegan Tribal Gaming Auth., No. GDTC-T-99-103, 2001 Mohegan Gaming Trial LEXIS 3 (July 10, 2001).
[114] *Id.* at *1.
[115] *Id.* at *2, *6.

constituted a dangerous condition on the premises.[116] The evidence presented at trial showed that the grease was present on the floor for approximately five minutes before the plaintiff fell.[117] The defendant admitted that the plaintiff was its invitee––meaning that the defendant owed the plaintiff a duty of reasonable care to keep the premises in a reasonably safe condition and to warn of any non-obvious dangerous conditions—but raised the "special defense" of contributory negligence.[118]

The *Gentile* court considered whether five minutes was a sufficient length of time for the defendant to have had constructive notice of the grease on the floor.[119] The court noted that the Mohegan Torts Code choice-of-law provisions require the court to look to Mohegan Tribal Ordinances, the Connecticut General Statutes, and the common law of Connecticut, "except as such common law is in conflict with the Mohegan Tribal Law."[120] The court observed that the Mohegan Tribal Ordinances and the Connecticut General Statutes were silent as to constructive notice.[121] Thus, the court interpreted and applied Connecticut case law on constructive notice.

The court cited one case in which a Connecticut court found that two-and-a-half hours was long enough for constructive notice of a dangerous condition, and a second Connecticut case where ninety seconds was not long enough to provide constructive notice.[122] The court then concluded that "five minutes was not a sufficient length of time to constitute constructive notice" and entered judgment for the defendant.[123]

Gentile represents a tribal court's reliance on state court decisions interpreting the common law doctrine of constructive notice. The case shows how state law can serve as the conduit through which tribal nations adopt common law tort doctrines. It also demonstrates how statutory tribal law often requires tribal courts to apply state law in the absence of tribal authority on a particular issue. The next case involves a similar fact pattern and shows how a different tribal court achieved a similar result without having to turn to state law.

E. Tracing Tribal Law: *Lucier v. Mashantucket Pequot Gaming Enterprise*

[116] *Id.* at *2–3.
[117] *Id.* at *1.
[118] *Id.* at *3.
[119] *Id.* at *8.
[120] *Id.* at *7–8.
[121] *Id.* at *8.
[122] *Id.* at *9–11 (citing Ormsby v. Frankel, 255 Conn. 670, 768 A.3d 441 (2001); Prato v. City of New Haven, 246 Conn. 638, 717 A.2d 1216 (1998)).
[123] *Id.* at *12.

Lucier v. Mashantucket Pequot Gaming Enterprise[124] is an example of a tribal court decision that applies common law tort rules while relying exclusively upon enacted tribal law and tribal precedent. *Lucier* is a negligence, carelessness, and *res ipsa loquitur* case decided by the Mashantucket Pequot Tribal Court in 2008.[125] The plaintiff alleged that he was injured by an electrical shock after touching the screen of a slot machine at a casino operated by the defendant on tribal land.[126]

The plaintiff's complaint included two counts. The first count alleged a cause of action for negligence and carelessness, and the second count alleged a cause of action under the common law doctrine of *res ipsa loquitur*.[127] In the first count, the plaintiff advanced a theory that the slot machine was defective, that it constituted a dangerous condition on the premises, and that the defendant was liable for failing "to inspect, warn, and properly train and supervise its employees to provide a safe slot machine."[128]

The court found that the plaintiff did not prove that there was a defect or dangerous condition in the slot machine and held that the defendant was not liable on the theory of failure to warn, inspect, and train its employees.[129] Citing its own case law, the court summarized the common law doctrine of *res ipsa loquitur* and observed that the common law doctrine "allows the court to infer negligence based upon the circumstances of the incident even though no direct evidence of negligence has been shown."[130]

Applying *res ipsa loquitur* to the facts, the court found that the plaintiff still had to prove that the slot machine was defective or constituted a dangerous condition to prevail under the doctrine.[131] The court reviewed the definition of "dangerous condition" in the Mashantucket Tort Claims Law and found that under tribal law, "a dangerous condition does not exist solely by the 'mere existence of a natural physical condition.'"[132] The court observed that "static electricity is a natural phenomenon" before concluding again that the plaintiff had not proven that the phenomenon he experienced was caused by an electrical defect in the slot machine.[133]

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[124] Lucier v. Mashantucket Pequot Gaming Enter., No. CV-PI-2006-111, 2008 Mashantucket Trib. LEXIS 2 (Feb. 08, 2008).
[125] *Id.* at *1–3.
[126] *Id.* at *1.
[127] *Id.* at *3.
[128] *Id.*
[129] *Id.* at *5.
[130] *Id.* at *6 (citing McDonald v. Mashantucket Pequot Gaming Enter., 2 Mash.Rep. 157, 159, 2 Mash. 200, 201 (1997).
[131] *Id.* at *7.
[132] *Id.* at *7 (quoting IV M.P.T.L. ch. 1 §1(e)).
[133] *Id.* at *7.

By the time *Lucier* was decided, the Mashantucket tribal legislature and court had already adopted and articulated common law premises liability rules and doctrinal definitions to serve the needs of their community. Thus, *Lucier* is less of an experiment and more of an instantiation of legal hybridity. The case serves as an example for other tribal nations of the benefits that come with articulating and codifying tribal tort law.

V. CONCLUSION

Comprehensive tort statutes are rare in tribal codes.[134] The federal regulations governing judgment in civil cases in CFR courts form the core of what has been called Indian tort law. When tribes adopt these federal regulations into their tribal codes, Indian tort law becomes tribal tort law. Tribal courts can and should review, expand, refine, or replace these rules.

Reported tribal tort cases show how tribal courts experiment with legal hybridity in resolving tort disputes.[135] There is an apparent need for tribal law addressing specific tort claims and doctrines including, for example, wrongful death, negligence, assault, battery, excessive force, qualified immunity, public immunity, premises liability, constructive notice, and *res ipsa loquitor*. These and other areas of tort law, particularly product liability, should also be articulated by tribal courts and codified by tribal legislatures.

Although federal, state, and common law tort rules often serve the needs of tribal communities, tribal courts should also interpret, apply, and (re)incorporate[136] tribal concepts of fault, risk, injury, duty, care, breach, causation, damages, reasonableness, foreseeability, immunity, and others into their tort jurisprudence. Although tribal nations must walk a fine line in moving from Indian tort law to tribal tort law,[137] interpreting and blending tribal concepts with different bodies of tort law is, in itself, an act of tribal sovereignty.[138]

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[134] *See* FLETCHER, *supra* note 16, at 573.

[135] Although legal hybridity has been the theme of this Article, it should not be understood as an uncritical celebration of the 'hybrid,' which, as Jodi Byrd and Gayatri Spivak have pointed out, "inadvertently legitimizes the 'pure' by reversal." *See* BYRD, *supra* note 3, at 141 (quoting GAYATRI CHAKRAVORTY SPIVAK, A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT 65 (1999)).

[136] *See generally* Zuni Cruz, *supra* note 43.

[137] *See* BYRD, *supra* note 3, at 51 (describing the fine line "between deconstructing a process of signification and reinscribing the discourses that continue to justify the codification of knowledge production that orders the native as colonized.").

[138] *Id*. at 222 ("That interpretation is an act of sovereignty is something well known and practiced by the imperial hegemon that uses juridical, military, and ontological force to police interpretation and interpellate what is and is not seen, what can and cannot be said.").