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J. Matthew Martin

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# Federal Malpractice in Indian Country and the "Law of the Place": A Re-examination of *Williams v. United States* Under Existing Law of the Eastern Band of Cherokee Indians

J. MATTHEW MARTIN\*

## I. INTRODUCTION

Perhaps not surprisingly, the Government's initial involvement in the health care issues of Indians came through the attempts of War Department military physicians to contain the spread of smallpox and other contagions from spilling over from Tribal lands into non-Indian enclaves.<sup>1</sup> Following the forced removal of the Eastern Indians, treaties began to provide for health care services partially in exchange for native lands.<sup>2</sup>

In 1849, medical care for Indians passed from military hands to civilian control in the form of the Bureau of Indian Affairs (BIA), a division of the newly created Department of the Interior.<sup>3</sup> Services to Native Americans were haphazard and inadequate, however. At roughly the time of the close of the frontier, "by 1880, there were only four hospitals and 77 physicians" serving the entire national Indian population.<sup>4</sup> "By 1917, the Commissioner of Indian Affairs was finally able to declare that more Indians were being born than were dying."<sup>5</sup> The first statutory authority for Federal health care delivery to Indians came in the Snyder Act of 1921.<sup>6</sup>

Recognizing the BIA's inadequate response to the medical needs of Indians, in 1954 Congress transferred responsibility of Indian health care to the Department of Health, Education and Welfare's Pub-

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\* Associate Judge, The Cherokee Court, Qualla Boundary, Cherokee, North Carolina. The author would like to thank Dick Bjur, J.D., Ph.D.; John Loftin, J.D., Ph.D.; Craig Nova; Andrew Cahan; and the Honorable Harry C. Martin, each of whom read earlier drafts of this paper and provided excellent critiques.

1. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 1375-76 (Nell Jessup Newton ed., 2005) (1941).

2. *Id.* at 1376.

3. *Id.*

4. *Id.*

5. *Id.* at 1377.

6. 25 U.S.C. § 13 (2000).

lic Health Service (PHS).<sup>7</sup> Shortly thereafter, a new division of the PHS, the Indian Health Service (IHS) was born.<sup>8</sup>

The IHS resulted in significant improvements in health care delivery to Indians: “The last decades have seen significant increase in preventative care and public health services, [and] infant and mortality rates have dropped dramatically. . . .”<sup>9</sup> Although the IHS is permitted to out-source services where needed “and Tribes now administer 52 percent of federal funding for Indian health services,” 1.6 million people still use the IHS.<sup>10</sup>

Just as elsewhere in the dominant culture, allegations of medical negligence arise regularly in Indian Country.<sup>11</sup> However, in Indian Country, unlike almost anywhere else, malpractice is often committed by Federal employees.<sup>12</sup>

7. 42 U.S.C. §§ 2001-05f (2000).

8. Cohen, *supra* note 1, at 1377-78; 25 U.S.C. § 1661(b) (2000).

9. *Id.* at 1378.

10. *Id.* at 1378-79.

11. “Indian Country” is a concept originating in Federal criminal law and includes: (1) “all land within the limits of” federally recognized Indian reservations, regardless of ownership status; (2) all “dependent Indian communities,” a phrase which has been construed as including the Pueblos in New Mexico; and (3) all allotted land held in trust by the United States. The definition of Indian country may also include land “owned” by non-Indians.

Katherine C. Pearson, *Departing from the Routine: Application of Indian Tribal Law Under the Federal Tort Claims Act*, 32 ARIZ. ST. L.J. 695, 726 (2000). See, e.g., *Staggs v. United States ex rel. Dept. of Health and Human Serv.*, 425 F.3d 881 (10th Cir. 2005) (Permanent brain damage inflicted during delivery); *Woodruff v. Covington*, 389 F.3d 1117 (10th Cir. 2004) (alleging negligence resulting in the surgical removal of bladder); *Haceesa v. United States*, 309 F.3d 722 (10th Cir. 2002) (alleging misdiagnosis of hantavirus pulmonary syndrome); *Benavidez v. United States*, 177 F.3d 927 (10th Cir. 1999) (sexual contact with patient); *Miner v. United States*, 94 F.3d 1127 (8th Cir. 1996) (alleging botched mid-forceps delivery); *Champagne v. United States*, 40 F.3d 946 (8th Cir., 1994) (Patient suicide following hospitalization); *Goodman v. United States*, 2 F.3d 291 (8th Cir. 1993) (alleging delay in diagnosing vertebral osteomyelitis); *Hull by Hull v. United States*, 971 F.2d 1499 (10th Cir. 1992) (admitted negligence during delivery causing permanent brain damage, cerebral palsy and quadriplegia); *Bird v. United States*, 949 F.2d 1079 (10th Cir. 1991) (death of patient).

12. The other major provider is the Veterans Health Administration. 38 U.S.C. § 301(c)(2) (2000); See also Pearson, *supra* note 11, at 732-33:

In 1996, Congress documented its finding that “unmet health needs of the American Indian people are [still] severe and the health status of the Indians is far below that of the general population of the United States,” and some commentators have concluded that despite improvements, the adequacy of Indian health care is chronically threatened by political tensions and “budget constraints at all levels of government.”

This paper analyzes the law applicable in malpractice cases occurring within Indian Country and brought under the Federal Tort Claims Act, applying the "Law of the Place." In particular, this paper argues that the law of the Eastern Band of Cherokee Indians, including the customs and traditions of the Tribe, should have been applied by the Federal Courts in lieu of the law of North Carolina in *Williams v. United States*.<sup>13</sup> The paper concludes by suggesting that a complete "laboratory" of Federalism should include the application of the laws of the respective Tribes where Federal medical negligence occurs.

## II. THE SAD AND LONESOME DEATH OF BERLIE WHITE

On October 4, 1997, Mr. Berlie White began to experience shortness of breath while dining at a restaurant in Cherokee, North Carolina on the Qualla Boundary, the Reservation of the Eastern Band of Cherokee Indians.<sup>14</sup> Mr. White's companion rushed him to the closest medical facility, just a few blocks away, the Emergency Room of the Cherokee Indian Hospital (the Hospital).<sup>15</sup> At that time, the United States, through the Public Health Service, operated the Hospital.<sup>16,17</sup>

Breathlessly, Mr. White sought emergency treatment, but was turned away by employees of the United States because he was a non-Indian.<sup>18</sup> Incredibly, "[t]he employees refused to allow Mr. White to refill his oxygen tank, which was empty at this point."<sup>19</sup> By the time of his admission in the Swain County Hospital, the nearest hospital facility to the Qualla Boundary, Mr. White was still alive, but "in extreme respiratory distress."<sup>20</sup> Mr. White died early in the morning of October 5, 1997.<sup>21</sup> Mr. White's Administratrix filed suit against the United States alleging violation of the Federal Tort Claims Act, 28 U.S.C.

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13. 242 F.3d 169 (4th Cir. 2001) (*Williams II*).

14. *Williams v. United States*, No. CIV. 2:99CV17-T, slip op. at 1 (W.D.N.C. Oct. 15, 1999) (*Williams I*).

15. *Id.*

16. *Williams II*, 242 F. 3d at 171.

17. In 2002, the Eastern Band of Cherokee Indians assumed operative control over the Hospital and contracted with the government for additional services through the Indian Self Determination and Education Assistance Act, 25 C.F.R. § 900.1, *et. seq.*, also known as a "638 contract." See Cherokee Code § 130B *et seq.* Despite this, uniformed officers of the Public Health Service remain on staff at the Hospital.

18. *Williams I*, slip op. at 1.

19. *Id.*

20. *Williams II*, 242 F. 3d at 171.

21. *Williams I*, slip op. at 1.

§ 1346(b)(1) (FTCA), for refusing to provide care and for failing to stabilize his condition.<sup>22</sup>

### III. DETERMINING THE STANDARD OF REVIEW OF FTCA MALPRACTICE CLAIMS IN INDIAN COUNTRY: "THE LAW OF THE PLACE."

At a hearing on the government's motion to dismiss pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure, the United States District Court for the Western District of North Carolina gave the plaintiff an opportunity to show that, in determining the motion, the Court should look not to the law of North Carolina, but rather to the law of the Eastern Band of Cherokee Indians.<sup>23</sup> In particular, the Court found "that Plaintiff may have incorrectly looked to state law instead of Cherokee law as the 'law of the place' under the FTCA."<sup>24</sup>

The FTCA waives the ordinary sovereign immunity of the United States and operates as a grant of consent, allowing the government to be sued in tort "in the same manner and to the same extent as a private individual in like circumstances. . . ."<sup>25</sup> Under the FTCA the liability of the United States must be determined "in accordance with the law of the place where the act or omission occurred."<sup>26</sup> "In other words, the applicable law in an FTCA claim is determined by the 'law of the place' of the alleged occurrences that give rise to the suit."<sup>27</sup>

In *Louis v. United States*, the District Court observed that since the alleged malpractice "occurred on a federal facility within both the State of New Mexico, and within 'Indian Country', unique questions are raised about 'the law of the place' as defined by the FTCA."<sup>28</sup> The Supreme Court has stated that the term "place" in the Federal Tort Claims Act means the "political entity," and not necessarily "the state,"

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22. *Williams II*, 242 F.3d at 172. At a preliminary hearing, the Administratrix abandoned a *Bivens* style Federal tort claim as well as a claim pursuant to the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd (2000). *Williams I*, slip op. at 1.

23. *Williams I*, slip op. at 4.

24. *Id.*

25. 28 U.S.C. § 2674 (2000). The waiver of sovereign immunity is "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1) (2000).

26. 28 U.S.C. § 1346(b)(1) (2000).

27. *Louis v. United States*, 54 F. Supp. 2d 1207, 1209 (D.N.M. 1999).

28. *Id.*

where the alleged tortious activity occurred.<sup>29</sup> Nevertheless, “[i]t has often been assumed without discussion by the courts that, in cases that arise on an Indian reservation within a State, the substantive law of the State is controlling in such situations.”<sup>30</sup> Perhaps because of this assumption, many courts have indeed equated “the law of the place” under the FTCA with “the law of the state.”<sup>31</sup>

Other courts have recognized that this calculus is not quite so easy and have held that the meaning of the “law of the place” is “a federal question to be determined by construction of the Act.”<sup>32</sup> Thus, “[w]hile most courts have applied state law in a nearly reflexive manner, recently a small number of courts have been conflicted as to whether tribal law should apply in these circumstances.”<sup>33</sup>

In *Cheromiah v. United States*, the District Court in New Mexico confronted directly the issue of the law of the place in medical negligence actions occurring in Indian Country.<sup>34</sup> The court in *Cheromiah* recognized that the FTCA should mean what it says, and that “place” does not mean “state,” despite the opposite conclusions of other courts.<sup>35</sup> Since the alleged malpractice occurred on the Acoma Reservation “therefore, pursuant to the plain language of the text, the law of the tribe controls this case.”<sup>36</sup> The Court found the “logic of this simple syllogism . . . compelling.”<sup>37</sup>

The Court noted that no court had ever held Tribal law to be the “law of the place” for an act of alleged malpractice in Indian Country:

Yet, in none of these cases was the application of tribal law ever raised as an issue. Perhaps this is because the idea did not occur to the plaintiffs, or perhaps it is because the tort law of the particular tribe was not well developed. Regardless, all this demonstrates is that tribal law has never before been applied to an FTCA claim. But the fact that it has never been done, standing alone, does not mean that it is not what the law requires.<sup>38</sup>

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29. *Hess v. United States*, 361 U.S. 314, 319 n.7 (1960).

30. *Louis*, 54 F. Supp. 2d. at 1209.

31. See, e.g., *Global Mail Ltd. v. United States Postal Service*, 142 F.3d 208, 211 (4th Cir. 1998) (quoting *F.D.I.C. v. Meyer*, 510 U.S. 471, 477-78 (1994)).

32. D. A. MORRIS, *FEDERAL TORT CLAIMS* § 2:2 (2005); *Molzof v. United States*, 502 U.S. 301, 303-07 (1992) (stating that while liability issues are determined by state law, meaning of term employed in FTCA “is by definition a federal question”).

33. *LaFramboise v. Thompson*, 329 F. Supp. 2d 1054, 1056 (D.N.D. 2004).

34. 55 F. Supp. 2d. 1295 (D.N.M. 1999).

35. *Id.* at 1302.

36. *Id.*

37. *Id.*

38. *Id.* at 1306.

The Court correctly observed that, in FTCA cases occurring in the District of Columbia, the law of the District is applied;<sup>39</sup> in Puerto Rico, the law of Puerto Rico is applied;<sup>40</sup> in Guam, the law of Guam is applied;<sup>41</sup> in the U.S. Virgin Islands, the law of the Virgin Islands is applied;<sup>42</sup> and in the Canal Zone, the law of the Canal Zone was applied.<sup>43</sup> These are not states. Rather, they are “‘political entities’ in whose jurisdiction the alleged tort occurred. Thus, theirs is the ‘law of the place’ which controls the FTCA action.”<sup>44</sup>

The Indian Tribes are, similarly, “political entities”: they are dependent, sovereign nations.<sup>45</sup> The Supreme Court specifically acknowledged that the Cherokee Nation qualified as a “state,” although not a foreign one.<sup>46</sup> In particular Chief Justice Marshall found the Cherokee Nation to be “a distinct political society separated from others, capable of managing its own affairs and governing itself.”<sup>47</sup>

The law since the early days of the nation up through several major Supreme Court decisions of the modern era has been that self-governing powers of tribes survive to the extent the general government has not abolished them. While the tribes’ status as ‘domestic dependent nations’ frustrates their international political recognition, it does assure them self-government, free of most state law strictures, over their territory and members, and, to a more limited extent, over non-Indians.<sup>48</sup>

Tribes, therefore, possess their own source of power, unique in America.<sup>49</sup> Nevertheless, Tribal jurisdiction is vastly more complicated than that of the territories.<sup>50</sup>

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39. *Id.* at 1302 (citing *Gelley v. Astra Pharm. Prods. Inc.*, 610 F. 2d 558, 560 (8th Cir. 1979)).

40. *Id.* (citing *Soto v. United States*, 11 F.3d 15, 16 (1st Cir. 1993)).

41. *Id.* (citing *Taber v. Maine*, 67 F.3d 1029, 1033 (2nd Cir. 1995)).

42. *Id.* (citing *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537 (1st Cir. 1997)).

43. *Id.* (citing *Dean v. United States*, 239 F. Supp. 167, 169 (M.D. Ala. 1965)).

44. *Id.* at 1302.

45. *Cherokee Nation*, 30 U.S. (5 Pet.) 1 (1831).

46. *Id.*

47. *Id.* at 16. This, of course, was pre-removal. The Eastern Band of Cherokee Indians, however, remain on ancient Tribal lands, and have governed themselves continuously, even after the Cherokee Nation was removed to Oklahoma.

48. GETCHES, CASES AND MATERIALS ON FEDERAL INDIAN LAW 373-74 (2003).

49. WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 75 (4th ed. 2004).

50. Still, “Tribal courts have repeatedly been recognized as ‘appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.’” Robert McCarthy, *The Bureau of Indian*

Prior to applying Tribal law, the question of Tribal civil jurisdiction must first be addressed. The Tribal Court must have jurisdiction to hear a malpractice case against a private person because the FTCA only makes the government liable "under circumstances where the United States, if a private person, would be liable" according to the law of the place.<sup>51</sup> So, can a non-Indian private entity like the United States be held liable for tortious conduct in Tribal Court? Both the District Courts in *Cheromiah* and *Williams* said yes.<sup>52</sup>

The Supreme Court has established a general rule that the Indian Tribes do not have civil authority over the conduct of nonmembers on *non-Indian land* within a reservation, subject to two exceptions: (1) nonmembers who enter consensual relationships with the Tribe or its members; and (2) activity directly affecting the Tribe's political integrity, economic security, health, or welfare.<sup>53</sup> "[T]ribes retain considerable control over nonmember conduct on tribal land."<sup>54</sup>

In *Cheromiah*, the evidence was unclear as to how the land on which the hospital was situated was held.<sup>55</sup> In *Williams I*, the evidence was undisputed that the Hospital lay on the Tribal land of the Reservation.<sup>56</sup> Nevertheless, both District Courts applied the *Montana* test.<sup>57</sup> The *Cheromiah* Court found that both prongs of the *Montana* test were satisfied: The United States had entered into a consensual relationship with the Tribe by establishing the hospital and providing medical services; and the services provided effected health and welfare of the Tribe.<sup>58</sup> Judge Thornburg, the District Judge in *Williams I*, found that the Hospital directly affected the Tribe's health and welfare.<sup>59</sup> Thus, the United States could be held liable in Tribal Court for acts of medical malpractice by its employees.<sup>60</sup>

Criticism of the approaches of these two District Courts has primarily been one dimensional: application of Tribal laws to FTCA cases would be complicated.

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*Affairs and the Federal Trust Obligation to American Indians*, 19 BYU J. PUB. L. 1, 45 (2004) (citation omitted).

51. 28 U.S.C. § 1346(b)(1) (2000).

52. *Cheromiah*, 55 F. Supp. 2d. at 1305; *Williams I*, slip op. at 4.

53. *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997); *Montana v. United States*, 450 U.S. 544, 565 (1981).

54. *Strate*, 520 U.S. at 454.

55. *Cheromiah*, 55 F. Supp. 2d. at 1304.

56. *Williams I*, slip op. at 1.

57. *Cheromiah*, 55 F. Supp. 2d. at 1304-05; *Williams I*, slip op. at 4.

58. *Cheromiah*, 55 F. Supp. 2d. at 1304-05.

59. *Williams I*, slip op. at 4.

60. *Cheromiah*, 55 F. Supp. 2d. at 1305; *Williams I*, slip op. at 4.



[I]t would subject the United States to varying and often unpredictable degrees of liability, depending on the reservation that was the site of the occurrence. In the District of New Mexico alone, for example, there are great differences between the many tribes and their approaches to legal issues. In some instances, the difficulty in proving the existence and substance of any tribal law on the subject of the tort would be considerable. The court does not believe Congress intended such a result when adopting the FTCA. . . .<sup>61</sup>

Complicated does not necessarily mean wrong, though.

#### IV. THE KNOCK OF OPPORTUNITY

The Western District of North Carolina found, “the ‘law of the place’ should be Cherokee law, provided that body of law creates a cause of action.”<sup>62</sup> As a consequence, the Court found, “the United States, as a private person, could theoretically be held liable in Cherokee tribal court.”<sup>63</sup> The Court realized that “[t]he determinative question in this case becomes whether Cherokee Indian law provides a cause of action based upon the acts and omission alleged here.”<sup>64</sup>

Applying North Carolina law, the United States Magistrate recommended dismissal pursuant to rule 12(b)(6) of the Federal Rules of Civil Procedure.<sup>65</sup> The District Court, however, put the brakes on and gave the Plaintiff leave to amend her complaint.<sup>66</sup> She had not alleged that Tribal law should apply.<sup>67</sup> Apparently, plaintiffs rarely allege the applicability of Indian law.<sup>68</sup> Judge Thornburg correctly noted that the burden of investigating the applicable Tribal law fell on the Plaintiff, and declined to undertake a search of the Cherokee Code to see if a cause of action for negligence existed on the Qualla Boundary.<sup>69</sup>

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61. *Louis*, 54 F. Supp. at 1210 n.5; see also, *Bryant v. United States*, 147 F.Supp. 2d 953, 959 (D. Ariz. 2000) (“ . . . an abrupt judicial departure from the traditional rule of applying state law in FTCA cases is unwise in light of the potential difficulties application of tribal law would create.”); *Federal Express Corp. v. United States*, 228 F. Supp. 2d 1267, 1269-70 (D.N.M. 2002).

62. *Williams I*, slip op. at 4.

63. *Id.*

64. *Id.*

65. *Id.* at 6-8.

66. *Id.* at 4.

67. *Id.*

68. *LaFramboise*, 329 F. Supp. 2d at 1056 (“In this case, the Plaintiff makes no mention of any tribal laws regarding medical malpractice claims.”); *Cheromiah*, 55 F. Supp. 2d. at 1306.

69. *Williams I*, slip op. at 4 n.3.

The Plaintiff did not amend her complaint and the District Court consequently dismissed her case pursuant to North Carolina law.<sup>70</sup> Instead of amending, the parties agreed "that there is no tribal law applicable to the provision of emergency medical treatment and that any tribal resolution would look, in these circumstances, to applicable federal and North Carolina law."<sup>71</sup> The Fourth Circuit then considered the Plaintiff's claims only under Federal and North Carolina law and affirmed the District Court's dismissal.<sup>72</sup> The Court held that, under Federal law, any decision to decline to treat Mr. White was discretionary, and sovereign immunity is not waived for these sorts of abuse of discretion claims.<sup>73</sup> Under North Carolina contract law, the Court stated, "a physician has no duty to render services to every person seeking them."<sup>74</sup>

If the Plaintiff could have shown that the "law of the place" recognized

a cause of action against a private person or hospital for a breach of duty to provide medical care in an emergency situation, a person aggrieved by a federal entity for breach of that duty could bring a suit against the federal entity in that state. In such a case, the Government would have waived its immunity from such a suit under the FTCA.<sup>75</sup>

The Plaintiff in *Williams* missed a golden opportunity to do just that.

## V. THE LAW OF THE QUALLA BOUNDARY

Cherokee Code section 1-2 provides as follows: "The Cherokee Court of Indian Offenses or any successor Cherokee Court shall exercise jurisdiction over tortious conduct of all persons where the conduct occurs on Indian trust land." The Cherokee Code does not go further in defining "tortious conduct," but it clearly contemplates negligence actions by virtue of Cherokee Code section 1-19, which adopts a comparative negligence standard for the finder of fact.<sup>76</sup>

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70. *Williams II*, 242 F.3d at 171.

71. *Id.* at 176 n.2.

72. *Id.* at 177.

73. *Id.* at 175.

74. *Id.* at 176.

75. *Id.* at 178 n.2 (Boyle, J., concurring).

76. Cherokee Code § 1-19(a) (2006) provides as follows:

In all actions hereunder brought in the Cherokee Court for personal injuries, wrongful death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property, may not have exercised due care, shall not bar a recovery, but damages shall be diminished by the finder of fact in proportion to the percentage of negligence

Having checked these two Tribal statutes, counsel for Ms. Williams should have realized that the Eastern Band of Cherokee Indians had a framework of negligence law at that time. Nevertheless, the case required further investigation to determine whether, as Judge Boyle noted in his *Williams II* concurrence, a claim for relief existed on the Qualla Boundary for breach of a duty to provide medical care.<sup>77</sup>

Such a cause of action existed under Cherokee custom and tradition. At the time of the *Williams* case, the Tribal judicial system in Cherokee was established as a Court of Indian Offenses pursuant to 25 C.F.R. § 11.100(a)(8).<sup>78</sup> With regard to civil actions, the law applicable on the Qualla Boundary at the time of the *Williams* case was controlled by 25 C.F.R. § 11.500. These regulations provided as follows:

(a) In all civil cases the Court of Indian Offenses shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department, and any ordinances or customs of the tribe occupying the area of Indian country over which the court has jurisdiction, not prohibited by Federal laws.

(b) Where any doubt arises as to the customs and usages of the tribe the court may request the advice of counselors familiar with these customs and usages.

(c) Any matters that are not covered by the traditional customs and usages of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the law of the State in which the matter of dispute lies.<sup>79</sup>

Traditional Cherokee customs would have applied to Mr. White's unfortunate situation. "For untold generations the Cherokee lived in hundreds of small villages and were governed by public consensus and harmony within the group. . ."<sup>80</sup> This "Harmony Ethic" remains a hall-

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attributable to the person injured, or the owner of the property or the person having control of the property.

North Carolina, by comparison, is one of the remaining States which has a fact finding standard of contributory negligence. See, e.g., *Myers v. McGrady*, 628 S.E.2d. 761 (N.C. 2006).

77. *Williams II*, 242 F.3d at 178 n.2 (Boyle, J., concurring).

78. As of April 1, 2000, the Tribe adopted a Judicial Branch of Government, and thus owns and operates its own Tribal Courts: the Cherokee Court and the Cherokee Supreme Court. Cherokee Code §§ 7-1(a) (2006). The Code of Federal Regulations no longer applies. Nowadays, the Cherokee Court is specifically directed by statute to consider Cherokee customs and traditions in reaching its decisions. Cherokee Code § 7-3(a) (2006).

79. 25 C.F.R. § 11.500 (2004).

80. G. KEITH PARKER, *SEVEN CHEROKEE MYTHS* 167 (McFarland & Company 2005).

mark of traditional life to this day.<sup>81</sup> The "Harmony Ethic" emerges from a spirit of balanced connectedness to reality, the universe, and the Creator.<sup>82</sup> Parker captures this emergence in the words of Tribal elder, Freeman Owle, who "says that the Cherokee 'secret' is that we are all part of creation."<sup>83</sup> This "secret," according to Mr. Owle, includes "ability to feel life in all things around them."<sup>84</sup>

An aspect of the "Harmony Ethic" includes as a manifestation of aboriginal religious values: "[a] pattern of generosity that varies greatly in the extent to which it is a formalized social device without emotional depth."<sup>85</sup> Generosity is such an important component of the "Harmony Ethic" that "it occurs even when people cannot afford to be generous."<sup>86</sup> Indeed, "[o]ne of the worst things that can be said about a traditionalist Cherokee is that he is stingy."<sup>87</sup> Generosity extends to non-Indians, particularly guests.<sup>88</sup> Mr. White, as a tourist, was an invited guest.

"[O]ne can see traditionalist Indian behavior on a daily basis, particularly a concern with the good of the group beyond one's immediate family," including involvement in issues relating to health.<sup>89</sup> Neely clearly finds that this concern extends to delivering emergency health care services to non-Indians.<sup>90</sup>

81. John D. Loftin, *The "Harmony Ethic" of the Conservative Eastern Cherokees: A Religious Interpretation*, J. CHEROKEE STUD., Spring 1983, at 40.

82. PARKER, *supra* note 80, at 181; Theda Perdue, *Our Indian Heritage*, in *OUR MOUNTAIN HERITAGE* 39 (Clifford R. Lovin ed., 1979) ("The categories into which they divided the world balanced each other; that is, men balanced women, summer winter, north south, and plants animals. Order depended on keeping everything in its appropriate category and in a state of equilibrium. To do so assured harmony. Just as each sex had its particular task, each task had its appropriate season. Men hunted in winter and women gathered nuts and other wild foods. In summer women farmed and men went to war. Therefore sexes, tasks and seasons balanced each other.").

83. PARKER, *supra* note 80, at 181.

84. *Id.* at 182.

85. Loftin, *supra* note 81, at 40-41.

86. SHARLOTTE NEELY, *SNOWBIRD CHEROKEES* 36 (1991).

87. *Id.* at 65.

88. *Id.*; see also Parker, *supra* note 80, at 167 ("At the June 29, 2001, rededication of the Eternal Flame in Cherokee, N.C. Principal Chief Leon Jones said: 'this fire will burn forever as a symbol of friendship eternal between the white man and the red man.'").

89. NEELY, *supra* note 86, at 157.

90. *Id.* at 56 ("Since the Graham County Rescue Squad is available for the local white population, Snowbird's is almost exclusively for the use of the Indian community, although some squad members claim that in an emergency they would certainly transport non-Indians. Without doubt they would serve the non-Indian spouses of Snowbird's people.").

The culture of the Cherokees suggests that this generosity is actually a duty. As Principal Chief Michell Hicks, the chief executive of Tribal government, has recently stated: "We must find those who feel lost, heal those who are hurting, and give hope to the hopeless. This is the responsibility of every Cherokee person."<sup>91</sup>

The breach of this duty was, at the time of Mr. White's death, actionable under Tribal law as a part of the continuum of Cherokee culture and tradition. Ms. Williams should have pled it. Had she done so, it is highly likely, given the District Court's obvious interest in the issue, that her case would have progressed to the summary judgment phase, at least, and perhaps, depending upon the evidence adduced (including "counselors familiar with these customs and usages"), she may have been able to present her case to the jury.<sup>92</sup>

## VI. THE "LABORATORY" OF FEDERALISM

Tribal courts vary greatly. For example, the Cherokees and Navajos have traditions of judicial systems spanning not just decades, but centuries. Throughout Indian Country brand new Tribal Court models are emerging in the 21st Century. The usage of customs in Tribal courts might be seen as alien to pure western legal tradition but to Indian peoples, custom means more than a mere legality; invariably it is tied into cultural survival.<sup>93</sup>

The Supreme Court has long recognized that the several States function as a "laboratory" for the development of, among other things,

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91. Mitchell Hicks, *Chief's Community Report*, THE CHEROKEE ONE FEATHER, Feb. 8, 2006, at 3.

92. Development of this evidence may also have led to an explanation of why Mr. White was not treated. Although the Fourth Circuit referred to the named defendants who turned Mr. White away at the Hospital's door as Federal employees, it is also highly likely that they were enrolled members of the Eastern Band of Cherokee Indians. *Williams II*, 242 F.3d at 171. Such a response on the part of Tribal members to a guest's emergency distress might be due to a rejection of traditional values or represent a maladaptive, or other response to the "'dominant' society." *Accord*, Loftin, *supra* note 81, at 43; *see also*, NEELY, *supra* note 86, at 55 ("Until arrangements were worked out with tribal government, the hospital closest to the Snowbird community in Cherokee County refused to treat Indian patients, telling them to go to their 'own hospital' on the Qualla Boundary. Yet the hospital in Cherokee County is a regional facility, financed by three counties including Graham, and is supposed to serve any patient from the three-county area.").

93. *See* Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 230 (1994) ("Using custom is essential for the cultural survival of American Indians as a distinct people and as a governing entity.").

safeguards for protecting liberty interests.<sup>94</sup> The inevitable discussion and application of Tribal laws by the United States Courts will provide a new and fresh dynamic to the "Laboratory" of Federalism.<sup>95</sup> In particular, an injection of Native culture and tradition, some of it much more ancient than the common law, will serve to offer new opportunities to those seeking access to justice.

## VII. CONCLUSION

Just as Professor Pommersheim noted in the context of diversity jurisdiction within Indian Country, "we again see in microcosm how tribal courts, as they grow and develop, continually raise issues about the kind of 'fit' they have or ought to have within the federal system."<sup>96</sup> The circumstances surrounding the death of Mr. Berlie White created a cause of action under Tribal law for negligence, and perhaps even wrongful death. Plaintiff's counsel should have accepted Judge Thornburg's invitation to amend their pleadings to allege that the "Law of the Place" was the law of the Eastern Band of Cherokee Indians. Having realized that the "Law of the Place" was, in fact, Eastern Cherokee Law, they then should have inquired into the culture and tradition of the Eastern Band of Cherokee Indians for support of their claim on behalf of their client. This inquiry would have led them to the "Harmony Ethic."

Failure to take these invited steps doomed their lawsuit, but the matter has not been settled at the Circuit level.<sup>97</sup> So an open question remains in the Fourth Circuit as to whether medical malpractice claims on the Qualla Boundary are subject to the custom and tradition

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94. See, e.g., *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring).

95. It is already occurring. See, e.g., *Chilkat Indian Village v. Johnson*, 870 F.2d 1469 (9th Cir. 1989) (Construing the Tribal code); *Natural Arch and Bridge Society v. Alston*, 209 F.Supp. 2d 1207, 1210-11(D. Utah 2002) (Construing Navajo and other Tribes' culture and tradition surrounding the Rainbow Bridge feature); Frank Pommersheim, "Our Federalism" in *the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 169 n. 172 (2000) (Suggesting that one mechanism for interpreting Tribal laws is certification to the Tribal Court, if Tribal laws permit); Angela Riley, "Straight Stealing": *Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 123-128 (2005).

96. Pommersheim, *supra* note 95, at 169-170; see generally Richard Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617 (1994).

97. The parties in *Cheremiah* settled shortly after the District Court held that the New Mexico state malpractice damages caps did not apply. Pearson, *supra* note 11, at 740. So, no appeal to the Circuit Court was taken.

of the Eastern Cherokees as well as the Tribal code as part of the “law of the place.”<sup>98</sup> Creative lawyers with cases arising in Indian Country will always want to delve carefully into the potentially applicable Tribal law before filing their pleadings and certainly should do so upon invitation by the Federal Judge.<sup>99</sup>

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98. *Williams II*, 242 F.3d at 176 n.2.

99. Indeed, failure of counsel today to investigate Tribal law in Cherokee may, once again risk dismissal, this time for not filing the claim in Tribal Court. *Compare* Cherokee Code. § 7-2(a) (2006) (Providing *in pari materia*: “The Trial Court shall have original jurisdiction over all cases and controversies, both criminal and civil, in law or in equity, arising under the Charter, laws, customs, and traditions of the Eastern Band of Cherokee Indians, including cases in which the Eastern Band of Cherokee Indians, or its officials and employees, shall be a party. Any such case or controversy arising within the territory of the Eastern Band of Cherokee Indians shall be filed and exhausted in the Judicial Branch before it is filed in any other jurisdiction.”) *with* *Texaco, Inc. v. Zah*, 5 F.3d 1374, 1376 (10th Cir. 1993) (Discussing the Tribal Exemption Doctrine which provides that, as a matter of comity to Tribal courts, Federal courts will abstain from exercising jurisdiction over those cases also subject to Tribal jurisdiction until Tribal remedies have been exhausted).