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Curtailing Retroactive Liability Should Fall To Courts

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The California Supreme Court, in *Miller v. Los Angeles County Flood Control District*, recognized that the standard of care in the construction industry is determined by industry custom and practice at the relevant time.[1] Thereafter, the California Court of Appeal made the logical extension in a set of cases involving blood banks that no judge, jury or expert witness when aided by 20/20 hindsight can impose a professional standard of care on an industry based on what the industry "should" have done. Rather, the standard is what the industry was actually doing at the relevant time, and in the relevant place.

The reasoning in these cases focused on the desire to avoid judicial meddling with industry standards of care, and the desire to avoid imposing a hindsight-based standard of care that is impossible to meet — two valid justifications, especially in the context of negligence claims for decades-old environmental contamination. However, these cases also protect an important due process right — recognized by the U.S. Supreme Court — for civil defendants to be free of laws that "impose[] severe retroactive liability on a limited class of parties that could not have anticipated the liability."[2] Indeed, environmental and toxic tort litigation often involves both a long lapse of time with intervening technological advances as well as an unsympathetic defendant. In such cases, it is essential that trial courts actively exercise their gatekeeping function to exclude expert testimony that could lead to unconstitutional, post-hoc liability for unsuspecting defendants.

In *Miller v. Los Angeles County Flood Control District*, the California Supreme Court held that competent expert testimony on the custom and practice in the industry (in this case, the construction industry) is a necessary prerequisite to imposing negligence liability.[3] *Miller* involved a family who sued the company that built their home near a roadway that doubled as a flood control channel because the channel overflowed, destroyed their home, killed one family member and caused personal injuries to the surviving family members. The family alleged that the builder was negligent in designing the home,

and for locating the home at a 90 degree bend in the road, which put their house directly in the path of the flood when it overflowed the flood channel. Plaintiffs offered an engineer who was an expert on hydraulics and hydrology, but the trial court excluded his expert testimony on "reasonable construction practices of builders in the area," and granted nonsuit to the defendants.[4] The California Supreme Court affirmed the exclusion of the expert and the nonsuit, reasoning that the proffered expert "indicated no close involvement in the construction of homes and, indeed, an unfamiliarity with building practices."[5] And expert testimony was necessary to establish due care because "[t]he average layman has neither training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in accordance with the standards prescribed by law or prevailing in the industry."[6]

The California Court of Appeal in *Osborn v. Irwin Memorial Blood Bank* considered the use of expert testimony to establish a standard of care based on technological advances that were not in practice in the industry at the time the suit arose.[7] The case involved a child who had contracted AIDS from a blood transfusion in 1983. The plaintiffs' negligence theory, as established by expert testimony, was that the blood bank should have adopted blood testing and donor screening protocols aimed at detecting AIDS prior to the child's transfusion. Based on this expert testimony, the jury returned a verdict for the plaintiffs, but the trial court granted judgment notwithstanding the verdict for the defense on the negligence claim, which plaintiffs appealed. The court noted that the first AIDS cases were reported in the U.S. just two years prior in 1981. The court also noted that in 1983, at the time of the plaintiff's blood transfusion, no other blood banks in the country had adopted the testing and screening procedures that the plaintiffs' experts argued the defendant should have adopted. The court ruled that an expert cannot "second-guess an entire profession" about what the industry should have done, and reversed the judgment in the plaintiffs' favor based on such testimony.[8] Underlying the court's decision was the concern that the court would "unwisely arrogate[] to itself medical decisions, superimposing its medical judgment upon the collective experience of the medical profession."[9]

Following *Osborn*, the California Court of Appeal considered two more negligence suits against blood banks and reaffirmed its prohibition on hindsight-based expert testimony to establish the standard of care. In *Spann v. Irwin Memorial Blood Centers*,[10] the court affirmed summary judgment in favor of the blood bank where the plaintiff's experts "could not name a single blood bank in the United States that was offering a [procedure] of the type he advocated."[11] And in *N.N.V. v. American Association of Blood Banks*,[12] the court affirmed summary judgment in favor of an association of blood banks because "[a]llowing an expert to second-guess the profession results in the standard of care being established by the lay opinion of the jury; i.e., the jury substitutes its opinion of what the standard of care should have been for what the standard of care was as established by the medical profession."[13] The court's decision focused on concerns that a hindsight-based standard of care would "chill[] scientific and medical debate on important issues"[14] and result in "litigation that might be impossible to avoid" because it would require not just ordinary care, but "extraordinary skill, knowledge, and insight."[15]

Around the time the blood bank cases were decided, the Supreme Court considered the imposition of retroactive liability in a different context. In *Eastern Enterprises v. Apfel*, the court considered the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, which retroactively imposed $50 million to $100 million in obligations on the plaintiff coal company.[16] A plurality of the court held the law to be unconstitutional. Four justices held the law to be an unconstitutional taking, but in doing so recognized that "legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[17] In Justice Anthony Kennedy's separate concurrence, he found that the statute's retroactive application violated due process. Justice Kennedy

noted the "legislative 'temptation to use retroactive legislation as a means of retribution against unpopular groups or individuals'" and the disruptive impact such laws have on parties' settled business and investment expectations.[18] Indeed, Justice Kennedy reasoned that "[b]oth stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation."[19]

Several years later, the California Supreme Court in *Myers v. Philip Morris Companies Inc.* relied on Justice Kennedy's concurrence in *Apfel* to invalidate a California law that would have retroactively repealed a safe harbor for tobacco companies.[20] The court reasoned that "'[g]roups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them.'"[21]

Attempts to impose hindsight-based negligence liability were rejected by California courts because of pragmatic concerns with disrupting established industry standards and imposing an extraordinary standard of care on a profession. In light of *Apfel* and *Myers*, these cases are supported by more than pragmatic concerns, but by the foundational requirements of due process.

All of these concerns are often implicated in negligence claims stemming from decades-old environmental contamination. Consider the example of a manufacturer who is sued by a group of individual plaintiffs for negligence based on its handling of substances in the 1950s that were not discovered to be harmful until half a century later, and which no other similarly situated manufacturer considered harmful at the time. At issue is: (1) an unpopular defendant, (2) interference with past business and investment expectancies and (3) liability far exceeding that which could have been anticipated at the time of the activity giving rise to liability.

For the court to permit negligence liability in such an instance would violate the defendant's due process rights in the same way as if the retroactive liability were imposed through legislation. The pragmatic concerns raised in the blood bank cases are the same concerns that underpin the due process clause analysis, namely that "'conduct should ordinarily be assessed under the law that existed when the conduct took place'" — a principle that has "'timeless and universal appeal.'"[22]

Jury verdicts are necessarily opaque, and juries are not required to explain their reasons for imposing liability on a particular defendant. The risk of rogue verdicts is greatest in cases where the defendant is particularly unsympathetic when compared to the plaintiff, as is often the case in environmental tort cases. In order to prevent a verdict based on impermissible theories of retroactive liability that would pull the rug out from under an entire industry and violate a defendant's due process rights, a trial court must exercise its "gatekeeping function"[23] to exclude any evidence — expert or otherwise — that would impose an unconstitutional hindsight-based standard of care on a defendant in a negligence action.

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[1] 8 Cal. 3d 689 (1973).

[2] *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

[3] 8 Cal. 3d 689 (1973).

[4] *Id.* at 700.

[5] *Id.* at 701.

[6] *Id.* at 702-703.

[7] 5 Cal. App. 4th 234 (1992).

[8] *Id.* at 276.

[9] *Id.* at 279 (quoting Joseph H. King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 Vand. L.Rev. 1213, 1250 (1975)).

[10] 34 Cal. App. 4th 644 (1995).

[11] *Id.* at 655.

[12] 75 Cal. App. 4th 1358 (1999).

[13] *Id.* at 1385.

[14] *Id.* at 1386.

[15] *Id*. at 1384.

[16] 524 U.S. 498 (1998).

[17] *Id.* at 528-529.

[18] *Id.* at 548-49 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

[19] *Id.* at 549.

[20] 28 Cal. 4th 828 (2002).

[21] *Id.* at 846 (quoting *Eastern Enterprises*, 524 U.S. 498 (Kennedy, J., concurring)).

[22] *Landgraf,* 511 U.S. at 265 (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990)).

[23] *Sargon Enterprises Inc. v. Univ. of S. Cal.*, 55 Cal. 4th 747, 768 (2012).