Catching a Negligence Case: A Framework of Business Negligence Liability for COVID-19

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COVID-19, the disease caused by the novel coronavirus, has become the most prominent health issue facing this country. The disease has led to an economic recession, [1] almost 500 million infections worldwide, and almost eighty million infections in the United States alone.[2] COVID-19 has impacted nearly every aspect of American life, and litigation will be no exception. In fact, barely a month after the disease's first documented appearance in the United States, litigation related to the spread of the novel coronavirus had already begun.[3]

This Article will address the degree to which businesses will be liable for negligence due to the spread of the coronavirus to its customers. It will also analyze circumstances where the spread of coronavirus may result in liability for the tort of negligence.[4] Further, it will examine the extent to which businesses owe a duty to their customers and how businesses might breach that duty. The Article will also address issues related to proving causation, which could be exceedingly difficult given the prevalence of the coronavirus and the ease with which it spreads. Finally, the Article will address potential damage awards plaintiffs may receive if they

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1. Ceri Parker, *World Vs Virus Podcast: An economist explains what COVID-19 has done to the global economy*, WORLD ECONOMIC FORUM (Sep. 25, 2020), https://www.weforum.org/agenda/2020/09/an-economist-explains-what-covid-19-has-done-to-the-global-economy/?msclkid=7d45cd76a7bf11ec8683c3c23383a0a1.

2. *WHO Coronavirus (COVID-19) Dashboard*, WORLD HEALTH ORGANIZATION, https://covid19.who.int/ (last visited Apr. 10, 2022).

3. Greg Allen, *Even With COVID-19 Cases, Suing Cruise Lines Is Extraordinarily Difficult*, NPR (Apr. 22, 2020, 8:00 AM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/22/840525310/even-with-covid-19-cases-suing-cruise-lines-is-extraordinarily-difficult.

4. The classic elements of negligence are duty, breach of duty, causation, and damages. 57A AM. JUR. 2d *Negligence* § 71 (2022).

can prove they became infected with the novel coronavirus on a business' premises.

I. POSSIBLE NEGLIGENCE DUTIES BUSINESS OWNERS MAY OWE TO THEIR CUSTOMERS

The first element of negligence is duty.[5] This element makes negligence a flexible tort that can provide plaintiffs with relief in almost any situation. At a base level, every person owes every other person a duty to behave reasonably under the circumstances.[6] What this means varies greatly based on the circumstances.[7] In some cases, the duty a person owes may be quite high. For example, when giving legal advice, attorneys have a duty to provide advice that a reasonably competent attorney would give, which should be much better advice than a reasonable layperson would give.[8] Conversely, the duty a person owes another person could be comparatively low. For example, children are usually held to only owe the duty to act as a child of similar age, intelligence, and experience would.[9] What the average twelve-year-old may do is certainly different than what a typical adult would do.

The varying duties that may be owed warrants a thorough examination of the potential duties a business owner might owe his or her customers. In addition to the general duty to prevent the spread of an infectious disease, business owners may run into more specific duties, especially ones resulting from premises liability and negligence per se.

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5. *Id.* at § 73.

6. *Id.* at § 75.

7. *Id.* at § 138 ("'Due care' is a relative term and much depends upon the facts of the particular case . . . Accordingly, while the rule that requires ordinary care prevails at all times, ordinary care may be a high degree of care under some circumstances but a slight degree of care under other circumstances. Thus, what may be deemed ordinary care in one case may, under different surroundings and circumstances, be negligence.").

8. *See, e.g.*, Dawson v. Toledano, 109 Cal. App. 4th 387, 389 (Cal. Ct. App. 2003) (laying out the elements for a malpractice claim against an attorney).

9. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 10 (2010).

A. The General Duty Not to Spread Infectious Disease

Courts have long held that people have a duty to not unreasonably spread communicable diseases to others.[10] As the Pennsylvania Supreme Court stated, "[t]o be stricken with disease through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from being struck with an automobile through another's negligence."[11] Courts have held parties responsible for the negligent spread of a significant number of diseases, including valley fever,[12] whooping cough,[13] salmonella,[14] tuberculosis,[15] smallpox,[16] diphtheria,[17] and typhoid.[18] Unless legislative acts intervene,[19] there is no reason to believe that the spread of the novel coronavirus will be treated differently than any other disease when it comes to negligence law.

When departing from specific common law or statutory duty rules, courts usually consider a series of factors.[20] Although the details of the lists vary from state to state, many of the same factors appear in each state.[21] When applied, these factors typically ask whether the defendant had a duty to act in a particular way in a certain situation.[22]

The most commonly used list was laid out by the California Supreme Court in *Rowland v. Christian*, which included the following factors: (1) whether harm is foreseeable to the plaintiff;

10. Berner v. Caldwell, 543 So. 2d 686, 688 (Ala. 1989) (overruled on other grounds) ("For over a century, liability has been imposed on individuals who have transmitted communicable diseases that have harmed others.").

11. Billo v. Allegheny Steel Co., 328 Pa. 97, 105 (Pa. 1937).

12. Crim v. International Harvester Co., 646 F.2d 161, 162–63 (5th Cir. 1981).

13. Smith v. Baker, 20 F. 709, 709–10 (C.C.S.D.N.Y. 1884).

14. Capelouto v. Kaiser Found. Hosp., 7 Cal. 3d 899, 891 (Cal. 1972).

15. Hofmann v. Blackmon, 241 So. 2d 752, 753 (Fla. 4th DCA 1970); Earle v. Kuklo, 98 A.2d 107, 109 (N.J. Super. Ct. App. Div. 1953).

16. Minor v. Sharon, 112 Mass. 477, 487 (Mass. 1873); Franklin v. Butcher, 129 S.W. 428, 430 (Mo. Ct. App. 1910); Jones v. Stanko, 160 N.E. 456, 457–58 (Ohio 1928).

17. Hewett v. Woman's Hospital Aid Ass'n, 64 A. 190, 193–94 (N.H. 1906).

18. Kliegel v. Aitken, 69 N.W. 67, 68 (Wis. 1896).

19. A handful of states have passed laws limiting a business' liability for the spread of the novel coronavirus, and Congress may pass a similar law nationally. Chris Marr, *Covid-19 Shield Laws Proliferate Even as Liability Suits Do Not*, BLOOMBERG LAW (June 8, 2021, 5:31AM), https://news.bloomberglaw.com/daily-labor-report/covid-19-shield-laws-proliferate-even-as-liability-suits-do-not.

20. *See* W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 B.U.L. REV. 1873, 1878 (2011).

21. *Id.* at 1878–79.

22. *Id.* at 1896–97.

(2) the degree to which it is certain harm will come to the plaintiff; (3) the closeness of the connection between the defendant's injury and the plaintiff's conduct; (4) the defendant's moral blameworthiness; (5) the likelihood liability would prevent future harm; (6) the burden placed on the defendant and the community; and (7) the insurability of defendant's conduct.[23] This list is far from exhaustive. At least thirty states have added factors to California's test, and, between the fifty states, at least twenty-two distinct factors are considered.[24]

Courts are not likely to engage in this kind of in-depth analysis given the fact that, as discussed above, courts have long held there is a duty not to spread communicable diseases.[25] However, a brief discussion of these factors as they relate to the spread of the novel coronavirus demonstrates that courts will not likely depart from the traditional duty rules regarding infectious diseases.

i. Whether Harm is Foreseeable to the Plaintiff

Foreseeability is arguably the most crucial factor upon which courts rely. However, courts disagree on the meaning of this factor. Most courts describe foreseeability as whether the type of harm suffered by the plaintiff was reasonably foreseeable or specifically foreseeable to the plaintiff.[26] There is little question that harm from contracting COVID-19 is foreseeable to the plaintiff. Although many people infected with the novel coronavirus are asymptomatic, the disease has killed almost one million people in the United States alone.[27] Further, thousands of others have suffered long hospital stays and horrific body aches, fevers, delirium, and an inability to breathe.[28]

In determining the foreseeability of harm, courts have also considered whether the defendant should have had knowledge of the danger.[29] Unless a business owner has been living under an

23. 443 P.2d 561, 564 (Cal. 1968) (rev'd on other grounds).
24. *See* Cardi, *supra* note 20, at 1878–79.
25. *See, e.g.*, *supra* text accompanying notes 12–18.
26. *See* Cardi, *supra* note 20, at 1884–85.
27. *Supra* note 2.
28. Ed Yong, *COVID-19 Can Last for Several Months*, THE ATLANTIC (June 4, 2020), https://www.theatlantic.com/health/archive/2020/06/covid-19-coronavirus-longterm-symptoms-months/612679/?msclkid=6f0922c5a7bb11eca675163ab6ee1047.
29. *See* 57A AM. JUR. 2d *Negligence* § 148 (2022).

unfathomably large rock, it is highly unlikely that they are unaware of the ease with which the novel coronavirus is spread. If a court also looks at whether the risk itself was foreseeable (and not just the harm), the question may become slightly closer, but probably not by much. The novel coronavirus has become omnipresent in American society and is spread in the air whenever a person coughs, sneezes, or speaks.[30] Thus, the risk of spread is obvious.

Foreseeability could be affected by a variety of elements, including the local prevalence of the disease at the time of the alleged infection and whether the business owner had reason to know an employee or customer was infected with the disease. Absent this, and given the considerable number of asymptomatic cases, it is hard to imagine a scenario where a patron potentially spreading the disease is not foreseeable.

ii. The Degree to Which Harm is Certain to the Plaintiff

The degree to which harm is certain to a plaintiff will vary based on activities engaged in by the business owner and the employee, as well as local conditions. The more precautions a business takes, including precautions that go beyond local government regulation, the less certain harm becomes. In addition, an employer that requires customers and employees to wash their hands, wear masks, and socially distance whenever possible decreases the likelihood of harm. For example, in Missouri, two mildly symptomatic hairdressers interacted closely with 139 clients while wearing a cloth mask and did not infect any clients with coronavirus.[31]

30. *Frequently Asked Questions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Spread (last visited Apr. 9, 2020).

31. M. Joshua Hendrix et al., *Absence of Apparent Transmission of SARS-CoV-2 from Two Stylists After Exposure at a Hair Salon with a Universal Face Covering Policy — Springfield, Missouri, May 2020*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 14, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6928e2.htm.

iii. The Closeness of the Connection Between the Defendant's Injury and the Plaintiff's Conduct

A plaintiff's injuries from contracting COVID-19 can vary significantly. There is a broad spectrum of symptoms between asymptomatic and mortality. Symptoms of COVID-19 include body aches, fevers, delirium, nausea, diarrhea, loss of taste, loss of smell, and an inability to breathe.[32] Further, patients with common underlying conditions like obesity, diabetes, cancer, chronic kidney disease, chronic obstructive pulmonary disease, and asthma are at risk for having more severe COVID-19 symptoms.[33]

These underlying conditions can make the true causes of the plaintiff's symptoms unclear. However, the coronavirus has become so common that it is evident that, if a plaintiff has contracted COVID-19, there is likely a close relationship between the plaintiff's injuries and the disease itself, as most of these symptoms would not have been caused, or at least would not have reached their significant extent, but for the plaintiff contracting COVID-19.[34]

iv. The Defendant's Moral Blameworthiness

A defendant's moral blameworthiness will vary based upon the situation. On the one hand, most people would agree that business owners are valuable to the economy and have a right to make a living. On the other hand, as the old saying goes, "[y]our right to swing your arms ends just where the other man's nose begins."[35] This means that one's legal right to engage in business activities does not include the right to injure others.

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32. *Symptoms of Coronavirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Mar. 19, 2022).

33. *People with Certain Medical Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html (last updated Feb. 25, 2022).

34. *Supra* note 30.

35. This quote has been attributed to both Abraham Lincoln and Chief Justice Oliver Wendell Holmes without support and likely comes from a 1919 Harvard Law Review article. *See* John William Draper, *Preserving Life by Ranking Rights*, 82 ALB. L. REV. 157, n. 420 (2018) (citing Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 HARV. L. REV. 932, 957 (1919)).

To assess moral blameworthiness, courts have looked to whether there were steps the defendant could have taken to avoid the injury and whether the defendant was more powerful and sophisticated than the plaintiff.[36] However, courts have noted that "the moral blame that attends ordinary negligence is generally not sufficient to tip the balance . . . in favor of liability."[37] For example, it is more likely that the moral blame sufficient to trigger a duty would attach if the defendant knew or should have known that an employee had tested positive for COVID-19.[38] Moreover, given that the novel coronavirus is extremely contagious and has deeply interrupted American society, juries may well impute knowledge on behalf of business owners.

v. The Likelihood Liability Would Prevent Future Harm

Assessing liability against a party likely decreases future harm from the coronavirus. People are less inclined to do something if there is a cost attached to it, especially profit-minded business owners. Though the novel coronavirus is so contagious that even the most reasonable precautions are not guaranteed to prevent all transmissions, the emerging scientific consensus has demonstrated that individuals can take reasonable steps to prevent its spread.[39] These precautions include wearing face masks, frequently washing ones hands, staying six feet away from others, and frequently cleaning touched surfaces.[40] Businesses can also reduce future harm by limiting both the number of customers allowed in a single space and in-person contact with employees.[41] There is little doubt that businesses can prevent future harm taking these precautions.

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36. *See, e.g.*, Vasilenko v. Grace Family Church, 3 Cal. 5th 1077, 1091 (Cal. 2017).

37. Day v. Lupo Vine Street L.P., 22 Cal. App. 5th 62, 75, 231 (Cal. App. 2d Dist. Apr. 11, 2018).

38. *See* Butcher v. Gay, 29 Cal. App. 4th 388, 403 (Cal. Ct. App. 1994) (considering whether Defendant knew or should have known about the spread of Lyme disease on his property in determining whether Defendant was morally blameworthy).

39. *How to Protect Yourself and Others*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited July 31, 2020).

40. *Id.*

41. *Id.*

vi. The Burden Placed on the Defendant Compared to the Consequences to the Community

There is no question that COVID-19 has significantly burdened businesses.[42] The U.S. economy gross domestic product contracted an annual rate of 32.9% in the second quarter of 2020, which was largely due to the coronavirus.[43] Although there was some growth in the fourth quarter of 2020, the U.S. economy still shrank overall for the year.[44] The more businesses are required to do to prevent COVID-19, the less profitable they become in the short term. Reductions in customer capacity are especially likely to burden businesses. However, many measures, such as mask mandates, temperature checks, and frequent cleaning of surfaces with disinfectants are far less costly than the profit loss businesses will incur by employing these additional preventive measures.

Further, over 900,000 people have been killed by COVID-19 in the United States, and countless more have been hospitalized.[45] In several communities, hospitals have been pushed to the brink of capacity. For example, Miami-Dade intensive care units were at 146% of their designed capacity in July 2020,[46] and hospitals in Texas were forced to send patients as far as 120 miles away to receive care because their facilities were full.[47] Additionally, hospitals in Los Angeles County in January 2021 were operating at as high as 320% of their designed capacity.[48]

While there are certainly public health consequences to economic contraction, the burden of increased COVID-19 spread in

42. Harriet Torry, *U.S. Economy Contracted at Record Rate Last Quarter; Jobless Claims Rise to 1.43 Million*, WALL STREET JOURNAL (July 30, 2020), https://www.wsj.com/articles/us-economy-gdp-report-second-quarter-coronavirus-11596061406.

43. *Id.*

44. *Id.*

45. *Supra* note 2.

46. Alexander Nazaryan, *Miami-Dade ICUs at 146% capacity with coronavirus patients, according to federal document*, YAHOO NEWS (July 30, 2020), https://news.yahoo.com/miami-dade-ic-us-at-146-percent-capacity-with-coronavirus-patients-151222876.html.

47. Edgar Walters et al., *Texas Hospitals Are Running Out of Drugs, Beds, Ventilators and Even Staff*, TEXAS TRIBUNE (July 14, 2020), https://www.texastribune.org/2020/07/14/texas-hospitals-coronavirus/.

48. Hayley Smith et al., *One L.A. County hospital ICU is operating at triple its capacity amid COVID-19 surge*, LOS ANGELES TIMES (Jan. 13, 2021), https://www.latimes.com/california/story/2021-01-13/covid-19-surge-pushes-la-hospital-320-percent-occupancy.

the community is greater than the one placed on individual businesses. Businesses will also benefit in the long run by taking measures to control the spread of the novel coronavirus. The faster the virus is controlled, the safer it will be for customers to return to businesses at pre-pandemic levels of capacity.

vii. Insurability of Defendant's Conduct

Business owners usually carry premises liability insurance to protect themselves in case a customer is injured on the premises. However, in the years leading up to the pandemic, insurance companies began significantly limiting disease coverage in their premises liability policies.[49] There is no reason to believe insurance companies will broaden the number of diseases that they insure in the middle of a pandemic.[50] This means many businesses are not, and may not be able to be, insured against the risk of the spread of the novel coronavirus on their premises, especially if significant liability is imposed.[51] Nevertheless, courts have determined that, despite the potential lack of insurance, businesses may still have a duty to not allow transmission of diseases.[52] For example, in *Kesner v. Superior Court*, the California Supreme Court held that a business had a duty to prevent the transmission of asbestos-related diseases even though imposing such liability may increase the cost of insurance or make it unavailable entirely.[53]

viii. Courts Are Unlikely to Deviate from the Rule that Businesses Owe a General Duty Not to Unreasonably Transmit Infectious Disease

Based on the factors discussed above, courts are unlikely to deviate from the rule establishing a general duty to not unreasonably transmit an infectious disease. In certain cases, the costs to take reasonable actions to prevent the spread of COVID-19 could be significant, such as limiting customer capacity. However, many actions such as mask mandates, temperature

49. David F. Klein, *Insuring Against the Business Risks of Coronavirus*, PILLSBURY LAW, https://www.pillsburylaw.com/en/news-and-insights/insuring-against-the-business-risks-of-coronavirus.html (last visited July 31, 2020).

50. *Id.*

51. *Id.*

52. *See* Kesner v. Superior Court, 1 Cal. 5th 1132, 1153 (Cal. 2016).

53. *Id.* at 1156.

checks, and frequent cleaning are not as costly. There are also significant community consequences from the spread of the novel coronavirus that range well beyond even the deaths of more than 900,000 Americans. The harms from coronavirus are also easily foreseeable. Without statutory intervention, there is little that separates the coronavirus from other viruses with regards to negligence liability.

B. Premises Liability Duties

In all fifty states, businesses owe customers on their premises the duty to protect them from dangerous conditions that may injure them.[54] This is known as "premises liability."[55] Although some states recognize premises liability as a separate cause of action from negligence, most courts consider it an extension of specialized duties under negligence law.[56] There are two distinct approaches to premises liability law that are used by courts in the United States. The first, and most common, is the common law approach.[57] The second approach is sometimes called the "modern" approach.[58]

i. Common Law Approach

Under the common law approach to premises liability, the duties owed by the defendant to the plaintiff depend on the status of the plaintiff.[59] Plaintiffs are classified into three broad groups: trespassers, invitees, and licensees.[60]

Trespassers are those who enter the premises without authorization or other right.[61] Business owners only owe the duty not to engage in willful or wanton conduct toward trespassers.[62] This is a high bar that is unlikely to lead to a recovery for the plaintiff.

54. 62 AM. JUR. 2D *Premises Liability* § 1 (2022).
55. *Id.*
56. *Id.*
57. *Id.* at § 70.
58. *Id.* at § 73.
59. *Id.* at § 70.
60. *Id.* at § 70.
61. *Id.* at § 119.
62. *Id.* at § 203.

Invitees are people who enter the premises at the invitation of the owner for the owner's benefit.[63] Importantly, this group includes a business' customers and employees.[64] Businesses owe invitees the highest duties under common law: the duty to use ordinary care to keep the premises in a safe condition.[65] Business owners must also warn invitees about dangerous conditions on the property about which the business owner should be aware of.[66] Since customers are considered invitees, business owners should be most concerned with this category relating to the potential transmission of COVID-19.

Licensees are a catchall category and encompass everything in between trespasser and invitee.[67] The licensee status usually includes people who enter the premises for their own purposes rather than for the benefit of the owner.[68] For example, in *French v. Sunburst Properties, Inc.*, the Indiana Court of Appeals held that a man injured while visiting an apartment complex in search of his dog was a licensee.[69] Businesses owe licensees similar duties to trespassers in traditional common law states. Business owners owe the duty not to engage in willful or wanton misconduct but have no duty to make the premises safe.[70] Business owners also owe licensees a duty to warn them of unsafe conditions they have no reason to be aware of.[71]

ii. The Modern Approach

Under the modern approach to premises liability, there is no distinction between trespassers, licensees, and invitees.[72] Instead, the same standard applies to everyone on the premises.[73] That standard is "reasonable care under the circumstances," which is the same standard used in general negligence cases.[74]

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63. *Id.* at § 83.
64. *See, e.g.*, Nivens v. 7-11 Hoagy's Corner, 943 P.2d 286, 291 (Wash. 1997) (noting that customers were invitees of a business at Common Law).
65. *Id.*
66. *Id.*
67. *Id.* at § 109.
68. *Id.*
69. 521 N.E.2d 1355 (Ind. Ct. App. 1988).
70. 62 AM. JUR. 2D *Premises Liability* § 184 (2022).
71. *Id.* at § 192.
72. *Id.* at § 73.
73. *Id.*
74. *Id.* at § 73.

In states that follow the modern approach, the foreseeability of the injury becomes a key factor in determining whether the business owner is liable for injuries upon their premises.[75] Business owners in these states are not likely to be treated much differently than those in common law jurisdictions.[76] The standard for invitees under common law is essentially the same as the modern approach standard for all people on the premises.[77] Invitees include customers and employees, individuals most likely to be on a business' premises.[78]

iii. Possibility of a Premises Liability Case

Though a premises liability claim is theoretically possible, general negligence claims are more commonly brought, as the claims are redundant to one another. Courts have, however, allowed cases to proceed under this theory. For example, in *Tynes v. Buccaneers Ltd. P'shp*, the Middle District of Florida allowed an NFL player's premises liability claim to proceed against the Tampa Bay Buccaneers on the theory that the team did not adequately protect him against the spread of methicillin-resistant staphylococcus aureus (MRSA).[79] As an employee of the team, the plaintiff was considered an invitee.[80] The presence of the novel coronavirus is a dangerous condition for premises liability law.

C. Negligence Per Se

The category of duty that businesses should be most concerned about is negligence per se. Under the doctrine of negligence per se, plaintiffs can use a statute, ordinance, or regulation to serve as the basis for a duty.[81]

Under the Restatement (Second) of Torts approach to negligence per se, a statute, regulation, or ordinance will become the duty the plaintiff owes the defendant when the statute, ordinance, or regulation is designed:

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75. *Id.* at § 79.
76. *Id.*
77. *Id.* at § 73.
78. *Nivens*, 943 P.2d at 291.
79. F. Supp. 3d 1351, 1354 (M.D. Fla. 2015).
80. *Id.* at 1356.
81. 57A AM. JUR. 2D *Negligence* § 685 (2022).

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.[82]

There has been extensive regulation on what businesses can and cannot do by regulators at the state and local level due to the novel coronavirus.[83] Because of this extensive and often specific regulation, business owners have more to worry about. It will be relatively easy for plaintiffs' lawyers to discover whether businesses have been following regulations. Pre-trial investigation, disclosure, and subsequent deposition testimony should yield whether mask mandates, cleaning requirements, and capacity restrictions were followed.

Failing to follow government regulations will likely lead to liability if the novel coronavirus is transmitted on a business owner's premises. The government designed these regulations to prevent the spread of coronavirus to everyone, so it is hard to imagine a person who these regulations are not meant to protect.

Moving back to the Restatement approach, the interest invaded, and the harm and hazards incurred when a plaintiff is infected with the novel coronavirus is a person's interest in not having the coronavirus. Someone contracting the novel coronavirus is the very thing government regulations are attempting to prevent. In *Diretto v. Country Inn & Suites by Carlson*, the Eastern District of Virginia denied a defendant hotel's motion to dismiss a plaintiff customer's negligence per se claim.[84] In that case, the plaintiff (the customer's estate) alleged that the customer contracted legionnaires' disease and died as a result of

82. RESTATEMENT (SECOND), TORTS § 286 (AM. L. INST. 1965).

83. *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Mar. 8, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html.

84. No. 1:16cv1037(JCC/IDD), 2017 U.S. Dist. LEXIS 15043, at *10–12 (E.D. Va. Feb. 2, 2017).

the hotel failing to comply with Virginia's administrative regulations about water supply facilities.[85]

Similarly, in *Casas v. Laquinta Holdings, Inc.*, the Western District of Tennessee denied defendant hotel's motions to dismiss several of plaintiffs' complaints regarding the negligent transmission of Legionnaires' disease, including one plaintiff's negligence per se claim.[86] As with Legionnaires' disease, COVID-19 can cause coughing, shortness of breath, fever, muscle aches, headaches, and death.[87]

II. BREACH

Assuming a diligent plaintiff's counsel can prove a business owner had a duty to prevent the spread of a communicable disease to customers and employees, the next hurdle is proving the business owner breached that duty. Overcoming this hurdle rests on plaintiff's counsel proving a causal connection between the duty owed and the alleged resulting harm. The novel coronavirus is unlike other communicable diseases, such as HIV and herpes, wherein plaintiffs have been successful in establishing a breach of the duty of care owed by a defendant to the plaintiff. In cases involving HIV and herpes, there is generally little mystery in attributing the source of transmission.[88] There have been an abundance of successful claims made nationwide for negligent transmission of HIV and herpes[89], in addition to claims based on intentional infliction of emotional distress and claims of fraud in the transmission between unmarried individuals.[90]

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85. *Id.*

86. No. 2: 16-cv-2951-JTF-dkv, 2018 U.S. Dist. LEXIS 222089, at *9–13 (W.D. Tenn. Sept. 26, 2018).

87. *Legionella (Legionnaires' Disease and Pontiac Fever)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/legionella/about/signs-symptoms.html (last visited Apr. 10, 2022).

88. *Sexually Transmitted Diseases, Diseases & Related Conditions*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/std/general/default.htm (last visited Apr. 10, 2022).

89. *See, e.g.*, Behr v. Redmond, 123 Cal. Rptr. 3d 97 (Cal. App. 4th Dist. 2011); Doe v. Dilling, 888 N.E.2d 24 (2008); Ray v. Wisdom, 166 S.W.3d 592 (Mo. App. E. Dist., 2005); Meany v. Meany, 639 So. 2d 229 (La. 1994); *see also* Deana A. Pollard, *Sex Torts*, 91 MINN. L. REV. 769 (2007); Louis A. Alexander, *Liability in Tort for the Sexual Transmission of Disease: Genital Herpes and the Law*, 70 CORNELL L. REV. 101 (Nov. 1984)

90. Claims between married couples for infection stemming from extramarital affairs have also been successful based on a theory of negligent transmission and battery. *See, e.g.*, Lori C. v. David C., 2012 Dolan Media Jury Verdicts, June 14, 2012, LEXIS 26312 (resulting in a $215,000 award after trial for the plaintiff wife).

Case precedent in the United States has held that infection from a communicable disease by another can lead to liability.[91] Of course, liability hinges on the ability to prove a defendant breached a duty of care owed to the plaintiff.[92] Breach in the HIV and herpes cases has been premised upon a defendant's knowledge of their infection and the risk inherent in their exposing others to the illness through sexual contact.[93] Knowledge comes from either testing positive for, or experiencing any of, the symptoms of either HIV or herpes.[94] Imputing knowledge, the legal requirement of scienter, to a potential defendant in a case of negligent transmission of COVID-19 would rely on the same basis: a positive test or signs of the well-documented symptoms of the coronavirus, which therefore places the potential defendant in breach for failure to avoid other individuals.[95]

The extent of a potential defendant's knowledge may vary across jurisdictions.[96] Actual notice is clearly present when an individual is diagnosed with a particular communicable disease and is thereby placed on notice of their infection and the inherent risk in its spread to others.[97] However, there can be constructive notice when an infected individual "consciously avoid[s] knowledge of infection even when suffering visible symptoms of a disease."[98] Some courts have eased this standard even further by applying a "reason to know" test.[99] In a case involving the negligent transmission of HIV, a California court imputed knowledge under the standard that an infected person "has information from which a person of reasonable intelligence . . . would infer that the fact in question exists."[100] The issue of a defendant's constructive notice

91. *See, e.g.*, Earle v. Kuklo, 98 A.2d 107 (N.J. Super. Ct. App. Div. 1953) (tuberculosis); Skillings v. Allen, 173 N.W. 663 (Minn. 1919) (scarlet fever).

92. *Earle*, 98 A.2d. at 109.

93. Endres v. Endres, 968 A.2d 336, 338 (Vt. 2008).

94. *Id.* at 339.

95. *See, e.g.*, Deuschle v. Jobe, 30 S.W.3d 215, 219 (Mo. Ct. App. 2000); Hendricks v. Butcher, 129 S.W. 431, 432 (Mo. Ct. App. 1910); Meany v. Meany, 639 So. 2d 229, 235–36 (La. 1994); M.M.D. v. B.L.G., 467 N.W.2d 645, 647 (Minn. Ct. App. 1991).

96. *Id.* at 342.

97. *Endres*, 968 A.2d at 342.

98. *Id.* at 341.

99. *See* John B. v. Superior Court, 137 P.3d. 153, 161 (Cal. 2006) (quoting RESTATEMENT (SECOND) OF TORTS §12, subd. (1) (1965)).

100. *Id.*

of infection is ultimately one to be left for the jury in a negligent transmission case.[101]

The relative ease in the spread of COVID-19 makes it all but certain that an infected person will transmit the disease to others. No better example is the national fool's parade of COVID-19 parties and the resulting infection rate of attendees witnessed throughout 2020.[102] A more tragic outcome occurred in San Antonio, Texas where a thirty-year-old man attended a COVID-19 party believing the disease was a hoax and subsequently died in a hospital from the virus.[103] Stories like this continued in the national media during the second half of the year, and one study found partisan differences in health outcomes relating to physical distancing.[104]

The difficulty linked to the contagion's spread is tracing the infection locus. Aside from COVID-19 parties, the ability of the coronavirus to spread airborne over a wide range and to last in aerosol form for three hours while airborne complicates tracing.[105] However, the unique aspects of the novel coronavirus and the potential difficulty in tracing an infection locus do not necessarily forestall inventive plaintiffs' counsel from initiating a claim. Contagion clusters, or "hot spots," can be useful in tracing infection if a plaintiff has been at the location or in contact with someone who has been there.[106] Additionally, federal, and individual state health agency contact tracing can be of assistance.[107] Unfortunately, a contagion contact point may be hard to determine.

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101. William S. Donnell, *You Wouldn't Give Me Anything, Would You? Tort Liability for Genital Herpes*, 20 CAL. WEST. L. REV. 60, 70 (2016).

102. Karin Brulliard, *At Dinner Parties and Game Nights, Casual American Life is Fueling the Coronavirus Surge as Daily Cases Exceed 150,000*, THE WASHINGTON POST (Nov. 12, 2020), https://www.washingtonpost.com/ health/2020/11/12/covid-social-gatherings/.

103. Robert Glutter, M.D., *Here's Why You Shouldn't Go to A 'Covid Party'*, FORBES (July 12, 2020, 7:48 PM), https://www.forbes.com/sites/robertglatter/2020/07/12/covid-parties-should-you-go-to-one/?sh=4e4fa3c92249.

104. Anton Gollwitzer et al., *Partisan differences in physical distancing are linked to health outcomes during the COVID-19 pandemic*, 4 NAT'L HUM. BEHAV. 1186 (Nov. 2, 2020), https://doi.org/10.1038/s41562-020-00977-7.

105. *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N382 NEW ENG. J. Med., 1564, 1564 (2020).

106. *Contact Tracing*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 11, 2022), https://www.cdc.gov/ coronavirus/ 2019-ncov/daily-life-coping/contact-tracing.html.

107. *Id*; *State Approaches to Contact Tracing during the COVID-19 Pandemic*, NASHP (Feb. 2, 2022), https://www.nashp.org/state-approaches-to-contact-tracing-covid-19/.

A severe acute respiratory syndrome (SARS) outbreak in 2003 was linked to a Chinese doctor who treated infected patients and then flew on a commercial airline.[108] This led to nearly 8,500 SARS cases worldwide and over 900 deaths.[109] In this case, there was the identification of an initial contact point and subsequent tracing.[110] However, when the H1N1 swine flu pandemic of 2009, lasting nineteen months from January 2009 to August 10, 2010, was first discovered in the United States on April 15, 2009, its infection of a second patient two days later was more problematic in tracing.[111] The second patient infected with the H1N1 virus lived 130 miles away and had no known contact with the first patient.[112] On April 23, two additional cases were reported in Texas, and the Center for Disease Control (CDC) declared a multi-state outbreak and response.[113] This type of initial outbreak is hard to trace and attribute blame. The inability to impute knowledge on the part of a potential defendant is a death knell for a negligent transmission claim. Of course, circumstances shift once the medical and scientific communities can provide more information from research and tracing.

By the time the H1N1 virus peaked in May and June 2009, there was a different standard of care owed.[114] On May 1, the CDC provided interim guidance on closing schools and childcare facilities and by mid-June all fifty states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico had reported outbreaks.[115] By June 19, over thirty summer camps in the United States experienced H1N1 flu outbreaks, and by early July, the reported cases nearly doubled since the prior month.[116] A second wave of the virus began in the United States in late August.[117] The first approved vaccine was not administered until October 5, 2009, with

108. Courtney Clegg, *The Aviation Industry and the Transmission of Communicable Disease: The Case of H1N1 Swine Influenza,* 75 J. AIR L. & COM. 437, 440 (2010).
109. *Id.*
110. *Id.*
111. *The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/h1n1flu/cdcresponse.htm (last visited Apr. 12, 2022).
112. *2009 H1N1 Pandemic Timeline*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-pandemic-timeline.html (last updated May 8, 2019).
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

the peak of the second wave of the virus occurring in late October.[118] Finally, on August 11, 2010, the World Health Organization (WHO) announced the end of the 2009 H1N1 influenza pandemic.[119] The H1N1 flu virus mostly impacted children and middle-aged adults.[120] Furthermore, it did not result in massive self-isolation and ordering non-essential businesses to shut down.

The worldwide mortality rate for the 2009 H1N1 virus was 0.0001 to 0.0007% of the world's population during the first year.[121] When the United States approached the one-year mark of the pandemic, the worldwide mortality rate for coronavirus was 0.0325% of the world's population.[122] The world population mortality rate during the 1968 H3N2 influenza pandemic was 0.03% of the population and during the Spanish Flu Pandemic of 1918 it was 1% to 3%.[123] While there is little solace to be taken from comparative mortality rates, the numbers do provide adequate evidence of the potential seriousness of infection. However, what further distinguishes coronavirus from its predecessors are the potential long-term health effects survivors of the illness may encounter.[124] This factor can impact potential damages in a negligent transmission case.

Proving breach of duty is imperative to successful litigation of a negligent transmission of a communicable disease case. The prevailing caselaw in the litany of HIV/AIDS cases from the 1980s and 1990s is instructive for COVID-19 litigants.[125] The element of scienter, implicit in a defendant's actions, can depend on many

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118. *Id.*

119. *Id.*

120. *2009 H1N1 Pandemic (H1N1pdm09 virus)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/flu/pandemic-resources/2009-h1n1-pandemic.html (last updated June 11, 2019).

121. *Id.*

122. *Mortality Analyses*, JOHN HOPKINS UNIVERSITY OF MEDICINE, https://coronavirus.jhu.edu/data/mortality (last visited Apr. 5, 2022).

123. *The global impact of the largest influenza pandemic in history*, OUR WORLD IN DATA (Mar. 4, 2020), https://ourworldindata.org/spanish-flu-largest-influenza-pandemic-in-history.

124. For further information on the potential long-term health effects of coronavirus *see infra* note 223 in the Damages section below.

125. See*, e.g.*, Bonnie E. Elber, *Negligence as a Cause of Action for Sexual Transmission of Aids*, 19 U. TOL. L. REV. 923, 937 (1987); Regina DelaRosa, *Viability of Negligence Actions for Sexual Transmission of the Acquired Immune Deficiency Syndrome Virus,* 17 CAP. U. L. REV. 101, 111 (1989); Matthew Seth Sarelson, *Toward a More Balanced Treatment of the Negligent Transmission of Sexually Transmitted Diseases and AIDS,* 12 GEO. MASON L. REV. 481, 485 (2003).

factors. The unique circumstances of each case drive the viability of the potential claim. A business owner who exhibits reckless and wanton conduct in ensuring proper safety precautions for customers and employees presents less of a breach barrier than an employer who has taken adequate precautions. The overriding question in any future litigation involving negligent transmission of coronavirus involves the exact nature of the adequate precautions a business owner is expected to take.

The changing nature of health protocols and warnings related to individual states re-opening created confusion and doubt regarding proper safety precautions. In late June 2020, twelve states had to pause or reverse their re-opening plans due to a surge in coronavirus cases.[126] Florida and Texas, two states that re-opened ahead of northeast states like Connecticut, Massachusetts, New Jersey, and New York, were experiencing sharp increases in daily infections by mid-July 2020, with Dallas County, Texas reporting its deadliest day on July 17.[127] Local health department guidance to businesses may vary from state to state, thereby creating different standards of care. At a minimum, however, a business' failure to enforce mask policies may create a definite line of attack where illness can be traced to that business.

While much of the discussion regarding breach is speculative, one should consider the first wrongful death case filed in the United States. In this case, the family of a deceased Walmart employee filed a wrongful death action against the company and the retail shopping center's management company in an Illinois court.[128] The civil complaint outlined causes of action for negligence and wanton and willful misconduct against the Evergreen Park store.[129] The negligence claims were based on allegations that the defendants failed to implement, promote, and enforce social distancing guidelines; failed to clean and sanitize the store to prevent the spread of the coronavirus; and failed to

126. Nicole Chavez & Madeline Holcombe, *12 states are pausing reopening over the surge in US coronavirus cases*, CNN (June 27, 2020, 6:10 PM), https://www.cnn.com/2020/06/27/health/us-coronavirus-saturday/index.html.

127. Tasha Tsiaperas, *COVID-19 updates: Texas reports its deadliest day with 174 new deaths*, WFAA (July 17, 2020, 5:21 PM), https://www.wfaa.com/article/news/health/coronavirus/coronavirus-updates-july-17-in-dallas-fort-worth/287-f53a00dd-52a6-4a8c-b3ec-b053aca07cff.

128. *See* Complaint, Toney Evans, Special Administrator of the Est. of Wando Evans v. Walmart, Inc., et al., No. 2020L003938 (Cir. Ct. Cook Cnty, Ill. Apr. 6, 2020).

129. *Id.*

monitor and prevent symptomatic employees from working.[130] A failure of the store to provide personal protective equipment—masks, latex gloves, antibacterial soaps—was also alleged.[131] It remains to be seen the extent to which the plaintiff's case is limited by workers' compensation insurance which the employer paid. The pleading alleged conduct rising to more than negligence with its wanton and willful misconduct claims, which may move the case outside the limits of workers' compensation.[132] While employee claims may be limited under state workers' compensation provisions, the success of customer claims will be limited by their ability to prove a breach.[133] A further limitation to customer claims will be specific state laws that do not recognize a cause of action for negligent transmission of a contagious or infectious disease.[134]

III. CAUSATION

The single, most significant hurdle to plaintiffs in a COVID-19 negligence lawsuit will be the causation element of negligence. To hold a defendant liable for negligence, a plaintiff must show that the defendant's breach of duty was both the factual cause and the proximate cause of a plaintiff's injuries.[135]

Though definitions and usage of these terms vary across jurisdictions, generally, factual cause is the requirement that, but for the defendant's breach of duty, the plaintiff's injuries would not have occurred.[136] Proximate causation evades a straight forward definition,[137] but it essentially means that the defendant's breach

130. *Id.* at 3–5.

131. *Id.* at 3–4, 8.

132. For different approaches to the "intentional harm exception" to workers compensation, *see* Acevedo v. Consolidated Edison Co. of N.Y., Inc., 189 A.D.2d 497, 500-01 (1st Dept. 1993) (requiring an employer's actual intent to harm); *see also* Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 177–79 (1985) (two-part test requiring employee to show 1) substantial certainty of injury or death resulting from employer's conduct, and 2) the circumstances under which injury or death arose were not an ordinary fact of industrial life).

133. *See generally id.*

134. Florida is a state who does not recognize this tort. *See* Quezada v. Circle K Stores, Inc., No. 2:04-cv-190-FtM-33DNF, 2005 U.S. Dist. LEXIS 20217, at *4–5 (M.D. Fla. July 7, 2005).

135. *See* Hiltgen v. Sumrall, 47 F.3d 695, 700 (5th Cir. 1995) ("The element of causation may be broken down into two parts: factual or "but-for" causation and legal or proximate causation.").

136. *Id.* ("Factual causation, or 'but for' causation, asks whether the complained of injury or damage would have occurred but for the act or omission of the party in question.").

137. 57A AM. JUR. 2D *Negligence* § 411 (2022).

of duty is closely related enough to the plaintiff's injuries that the law will consider it the legal cause and impose liability.[138] Many courts will focus on whether the defendant's breach of duty was a foreseeable cause of the plaintiff's injuries in a proximate cause analysis, a view famously expounded by Justice Cardozo in *Palsgraf v. Long Island Railroad Co.*[139]

i. Factual Causation

Factual causation is likely to be a plaintiff's most significant hurdle in proving a claim against a business for the negligent transmission of the novel coronavirus. Quite simply, the novel coronavirus is everywhere in the United States, and no part of the country has been unaffected. There were an estimated 26 million cases of COVID-19 in the United States between August 2020 and February 2021.[140] Comparable diseases like norovirus and legionnaires' disease were never nearly as widespread at once.[141]

Causation may be easier to prove in environments where plaintiffs were confined to close spaces for an extended span of several days, such as on cruise ships or in nursing homes. This type of confinement coextensive to an incubation period could ease the plaintiff's burden of proof. Even this, however, is not a guarantee. For example, in *Davis v. Cruise Operator, Inc.*, the Southern District of Florida granted a defendant cruise ship operator's motion for summary judgment.[142] In that case, the plaintiff contracted norovirus while on the defendant's cruise, but she had eaten at several places shortly before the cruise and had disembarked from the ship shortly before she began showing

138. *Id.*

139. 248 N.Y. 339, 344-45 (N.Y. 1928).

140. *COVID Data Tracker*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://covid.cdc.gov/covid-data-tracker/#datatracker-home (last visited Apr. 5, 2021).

141. *Trends and Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/ norovirus/trends-outbreaks/burden-us.html (last visited Apr. 5, 2021); *What Owners and Managers of Buildings and Healthcare Facilities Need to Know about the Growth and Spread of Legionella*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/legionella/wmp/overview/growth-and-spread.html (last updated Apr. 30, 2018).

142. No. 16-cv-62391-BLOOM/Valle, 2017 U.S. Dist. LEXIS 111860 (S.D. Fla. July 19, 2017).

symptoms of the norovirus.[143] Most importantly, there were no other outbreaks on board the cruise ship.[144]

A plaintiff's case for causation can be aided by proven outbreaks. For example, if the plaintiff can show that several people who visited the defendant's business location in the same time period as the plaintiff also contracted coronavirus, the case can become easier to prove. Similarly, if the plaintiff can show that employees were sick when plaintiff was present on defendant's premises, the plaintiff will have an easier time showing causation.

Nonetheless, in most cases, it will likely take expert epidemiological evidence to prove a business was the source of the plaintiff's infection, given the widespread nature of the coronavirus. Epidemiologists will then have to engage in an analysis that satisfies the standards of expert witness testimony, such as the federal rules standard laid out in *Daubert v. Merrell Dow Pharmaceuticals*.[145]

Satisfying *Daubert* can be challenging for plaintiffs. For example, in *Foster v. Legal Sea Foods, Inc.*, the District of Maryland refused to admit the expert testimony of two doctors who would have testified that plaintiffs likely contracted hepatitis by eating contaminated mussels at the defendant's restaurant.[146] The court held that even though the doctors had extensively reviewed the plaintiff's medical files and the defendant's sanitation practices, their testimony was not admissible because it did not sufficiently "minimize" other causes.[147] The court stated, "[e]ven if [the proposed expert] adequately ruled out alternative sources of the [plaintiff's hepatitis] as part of a reliable differential diagnosis, the available evidence was not sufficiently probative for [the expert] to have ruled *in*, from the universe of possible causes, [defendant's] mussels."[148]

This case is illustrative of how plaintiffs will have to ensure that their epidemiological experts can significantly narrow, if not eliminate, other sources of transmission. This was hard enough in cases like *Davis* and *Foster* that involved far less widespread diseases.

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143. *Id.* at 14–17.
144. *Id.* at 16.
145. 509 U.S. 579 (1993).
146. No. CCB-03-2512, 2008 U.S. Dist. LEXIS 57117 (D. Md. July 25, 2008).
147. *Id.* at *31, *35–36.
148. *Id.* at *36.

An analogy can also be drawn to toxic tort cases. In a toxic tort case, causation is often at issue because it becomes incredibly difficult to prove that plaintiff's injuries were caused by the defendant's products.[149] Those cases are different because, in a toxic-tort case, plaintiffs often must prove that the defendant's product is capable of causing injury in the first place.[150] That will not be as big an issue in novel coronavirus cases because coronavirus is so omnipresent, and its means of transmission are understood reasonably well.[151]

However, the novel coronavirus' relative omnipresence is what will make it ultimately hard to show causation. In toxic-tort cases, it is not enough to simply show that the plaintiff was exposed to the defendant's product.[152] It is also not enough to merely show a temporal connection between the onset of the plaintiff's symptoms and exposure to the defendant's product. There must be an actual scientific link between the plaintiff's condition and the defendant's product.[153]

Similarly, in coronavirus cases, showing a temporal connection between the plaintiff's symptoms and the plaintiff's visit(s) to the business' premises will not likely be enough. There are so many places where the novel coronavirus can be transmitted. Courts will likely lean on expert witness testimony from epidemiologists especially when determining whether a novel coronavirus case can even pass summary judgment.

ii. Proximate Causation

Even if a plaintiff can prove factual causation, the plaintiff will still have to prove proximate causation.[154] This task may be difficult. If a court focuses solely on whether the plaintiff's injuries were foreseeable, a plaintiff can likely overcome this hurdle. However, in many states, courts will also take policy considerations into account when determining whether proximate cause exists.[155]

149. 57A AM. JUR. 2D *Negligence* § 513 (2022).
150. *Supra* note 105.
151. *Supra* note 107.
152. *See* James v. Bessemer Processing Co., Inc., 714 A.2d 898, 907 (N.J. 1998).
153. 57A AM. JUR. 2D *Negligence* § 513 (2022).
154. *Id.* at § 417.
155. Curtis v. M&S Petroleum, Inc., 174 F.3d 661, 664 (5th Cir. 1999).

Foreseeability is an easy bar to meet. Most members of society are aware of the possibility of transmitting the novel coronavirus just about everywhere they go. Everyone from celebrities,[156] to government officials,[157] to average citizens on social media platforms,[158] have discussed the need to take common sense precautions against the spread of the novel coronavirus such as mask wearing, handwashing, and social distancing. Just about anyone can foresee getting COVID-19 from a business.

Some states, however, may choose to use proximate causation to require specific proof of causation as a policy matter. There has not been a pandemic on the scale of the novel coronavirus since the Spanish Influenza of 1918, which was ten years before the New York Court of Appeals decided the famous *Palsgraf v. Long Island Railroad Company* case in 1928.[159] Courts may well decide, given the economic difficulties caused by COVID-19, that, as a policy matter, it is best to hold plaintiffs to a higher standard of causation.

For example, a court could hold that a plaintiff can only show injuries are foreseeable when the defendant knew or was reckless as to the presence of the novel coronavirus on the business premises. This is similar to current standards for negligence. Negligence cases often require juries to determine whether the defendant should have been aware of a risk. For example, in *John B. v. Superior Court*¸ the California Supreme Court focused its inquiry on a negligent transmission of HIV case on whether the defendant knew or had reason to know he was HIV positive.[160]

This is only one step below recklessness, which usually requires knowledge of a risk and a disregard of the risk. Instead of asking, "should the defendant business have been aware of the risk," courts could use proximate causation to ask the question "did the defendant actually know there was novel coronavirus on the property or did the defendant make itself willfully blind to the risk

156. *See, e.g.*, Johnni Macke, *How Celebs Like Reese Witherspoon, Kim Kardashian and More Are Staying Safe with Masks and More Amid Coronavirus Pandemic*, US MAGAZINE (Mar. 15, 2021), https://www.usmagazine.com/celebrity-news/pictures/celebrities-take-precautions-during-coronavirus-outbreak-pics/.

157. Even President Trump begrudgingly praised mask wearing. Kevin Breuninger, *Trump says face masks are 'patriotic' after months of largely resisting wearing one*, CNBC (July 20, 2020, 6:40 PM), https://www.cnbc.com/2020/07/20/trump-says-coronavirus-masks-are-patriotic-after-months-of-largely-resisting-wearing-one.html.

158. As anyone with a mother can attest.

159. 248 N.Y. 339, 339 (N.Y. 1928).

160. 137 P.3d 153, 156 (Cal. 2006).

of coronavirus on the property?" Courts could also take the opposite approach and find that defendant businesses should be and often are more sophisticated than their customers. Thus, businesses should not be held to a lower standard for the spread of novel coronavirus than any other infectious disease. Courts' approach to proximate causation could differ wildly because policy considerations can become involved in proximate causation analyses.

IV. DAMAGES

Money damages are the *sine qua non* of negligence claims. In the case where "a person who negligently exposes another to an infection or contagious disease, which such other thereby contracts," the infected person passing the disease is liable in damages.[161] The issue thus becomes—after proving the necessary elements of duty, breach, and resulting harm—one of proving damages. However, an injury alone will not lead to damages.[162] Courts have tried many cases wherein jury verdicts leave plaintiffs with nothing.[163] Even if a plaintiff can prove a duty and breach of that duty, a failure to establish a causal connection between the breach and the resulting harm will defeat the damages element of a claim.[164] The recent COVID-19 pandemic presents some unique challenges for plaintiffs' counsel in proving damages through a causal connection showing a business owner's actions caused the negligent transmission of the virus.[165] These challenges are especially complicated by the nature of the coronavirus and its spread. As soon as medical science announced it had isolated an aspect of the nature of the virus and how it was spread, new and sometimes conflicting information was released, and any prior certainty was questioned. Presently, renewed concerns pertaining

161. 39 AM. JUR. 2D *Health* § 101 (2022).

162. 57A AM. JUR. 2D *Negligence* § 71 (2022). *See* Baltimore City Pass. Ry. Co. v. Nugent, 38 A. 779, 781 (Md. 1897); Morril v. Morril, 142 A. 337, 339 (N.J. 1928).

163. *See* Alexia Brunet Marks, Check Please: Using Legal Liability to Inform Food Safety Regulation, 50 HOUS. L. REV. 723, 768 (Winter 2013). Dr. Marks' study of the verdicts and settlements in 320 foodborne illness cases from 2000-2011 indicated a significant advantage to defendants whose cases went to verdict resulting in no recovery for the plaintiff.

164. 57A AM. JUR. 2D *Negligence* § 71 (2022).

165. Russel W. Hartigan & Sarah Norkus, *Workers' Comp, Negligence, and COVID-19*, 108 ILL. B.J. 28, 29 (2020). *See also* Kantrow v. Celebrity Cruises Inc., 553 F. Supp. 3d 1203, 1222 (S.D. Fla. 2021) (holding that the plaintiffs sufficiently alleged causation at the motion to dismiss stage).

to aerosol spread of the coronavirus have dispelled earlier scientific community assertions that droplet spread was the main source of transmission.[166] Reduced concerns of surface spread through fomites has lessened the importance of disinfecting objects and packages, while the necessity for cleaning common surfaces and thorough handwashing remain.[167] The lack of certainty in the actual spread of the virus and its specific pathway to infecting a potential plaintiff provide little assurance to plaintiffs' counsel, though it does permit a formidable line of defense for opposing counsel. In addition, a plaintiff's behavior and lifestyle leading up to the time of infection can be another factor in mitigating or preventing damages.[168] An assumption of risk defense places the plaintiff equally on trial for a negligence of their own doing.[169] However, these issues aside, the question of damages for a COVID-19 lawsuit cannot be ignored. Cases have already been filed and more will follow as the scientific community learns more about the virus.[170] Treatments and vaccines will follow, and the mystery of coronavirus will subside, yet those attorneys who were the first to wade into the murky waters of litigation will have provided a template for future litigants.

The extent of potential damages for business owners due to COVID-19 related negligent transmission claims must be compared to past damage awards for communicable and infectious diseases. These types of claims fall into one of two distinct categories—cases wherein direct causality can be isolated and proven, and those wherein direct causation is specious and

166. Amanda D'Ambrosio, *Droplets vs Aerosols: What's More Important in COVID-19 Spread?*, MEDPAGE TODAY (May 13, 2021), https://www.medpagetoday.com/special-reports/exclusives/92564.

167. *See* Colleen R. Newey et al., *Presence and stability of SARS-CoV-2 on environmental currency and money cards in Utah reveals a lack of live virus* (Etsuro Ito ed. 2022); *compare with*, *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html.

168. Michele L. Mekel, *Kiss and Tell: Making the Case for the Tortious Transmission of Herpes and Human Papillomavirus*, 66 MO. L. REV. 929, 954 (2001) ("[T]he case could be vulnerable to attack if the victim had prior or subsequent sexual partners.").

169. 57B AM. JUR. 2D *Negligence* § 759 (2022).

170. *COVID-19 Employment Litigation Tracker and Insights*, FISHER PHILLIPS, https://www.fisherphillips.com/innovations-center/covid-19-employment-litigation-tracker-and-insights/index.html (last visited Apr. 13, 2022); Tom Hals, *U.S. business fears never ending liability from 'take-home' COVID-19 lawsuits*, REUTERS (Jan. 12, 2022, 11:14 AM), https://www.reuters.com/world/us/us-business-fears-never-ending-liability-take-home-covid-19-lawsuits-2022-01-12/.

vague.[171] An additional factor impacting both categories are pre-existing conditions of the plaintiff which complicate the alleged injury.[172] In insurance parlance, a pre-existing condition is any condition from which the insured is already suffering before applying for insurance, and where there has been a prior diagnosis or treatment.[173] For litigation purposes, the definition is expanded to include a diagnosis or treatment of a condition or illness preceding the injury and harm alleged in the negligence complaint.[174]

A pre-existing condition is a significant factor for a jury denying damages.[175] For instance, in a 2009 jury trial out of Michigan, a plaintiff, who was one of 450 people contracting norovirus at a Carrabba's Italian Grill in Lansing, sought $6 million in damages as a result of a colon removal, a future permanent colostomy bag, and diminished life expectancy.[176] The defendant restaurant admitted liability for the spread of norovirus to its patrons, but contested the plaintiff's claim that the virus led to the removal of his colon.[177] Plaintiff had an underlying, untreated case of ulcerative colitis which the defendant argued was the reason for his colon removal.[178] The jury, after three hours of deliberation, returned a verdict in favor of the defendant restaurant.[179]

In a more recent 2019 case involving a food-based infection claim, the plaintiff became ill after eating a taco at a Del Taco

171. *See* Struve v. GMRI, Inc., d/b/a Olive Garden, 1:09-cv-00637-LJM-JMS, 2010 Jury Verdicts LEXIS 51426 (S.D. Ind. Jan. 20, 2010); Kamell v. Del Taco, LLC, 30-2016-00891419-CU-PO-CJC, 2019 Jury Verdicts LEXIS 13015 (Cal. Super. Ct., Jan. 22, 2019).

172. Stevens v. Bangor & Aroostook R.R., 97 F.3d 594, 601 (1st Cir. 1996) ("[A]s a general matter, when a defendant's negligence aggravates a plaintiff's pre-existing health condition, the defendant is liable only for the additional increment caused by the negligence and not for the pain and impairment that the plaintiff would have suffered even if the accident had never occurred.").

173. *What is a Pre-Existing Condition?*, CIGNA (July 2018), https://www.cigna.com/individuals-families/understanding-insurance/what-is-a-pre-existing-condition; *see also What is PREEXISTING CONDITION*, THE LAW DICTIONARY, https://thelawdictionary.org/preexisting-condition/ (last visited Apr. 13, 2022).

174. *See* Sauer v. Burlington Northern R. Co., 106 F.3d 1490, 1492-93 (10th Cir. 1996); Harris v. ShopKo Stores, Inc., 308 P.3d 449, 456-57 (Utah 2013); Komlodi v. Picciano, 89 A.3d 1234, 1249 (N.J. 2014).

175. *Stevens*, 97 F. 3d at 601.

176. Wininger, et al. v. Carrabba's Italian Grill, Inc., 08-000225-NO, 2009 Jury Verdicts LEXIS 425932 (Mich. Cir. Ct. Oct. 6, 2009).

177. *Id.*

178. *Id.*

179. *Id.*

restaurant in La Habra, California.[180] Extensive vomiting led to a tear in his esophagus.[181] The plaintiff claimed he was sickened by the bacteria infected food he consumed at the restaurant.[182] His epidemiological expert testified that staphylococcus bacteria in his food is the only type of bacteria that could have made him sick within hours of eating.[183] Plaintiff argued that an employee at the restaurant handling the food must have had a staph infection and passed it on when preparing the food.[184] Defense counsel noted that hospital tests of the plaintiff did not show any signs of a staph infection.[185] The defense attributed plaintiff's vomiting to acid reflux and presented an expert gastroenterologist who testified that people with acid reflux disease do experience bouts of vomiting.[186] The plaintiff's purchase of medications to reduce acid reflux, as well as plaintiff's complaint of indigestion and heartburn in the hours leading up to the vomiting attack, were also introduced into evidence.[187] In a final rebuttal to the plaintiff's claim, defense counsel said the vomiting could have been the result of norovirus, which is more prevalent in the winter, and the symptoms of norovirus can appear several days after exposure, thus reducing the likelihood plaintiff's illness was attributable to his meal at Del Taco.[188] After three days of trial and a twenty-minute deliberation, the jury returned a verdict for the defendant.[189] A novel aspect of the defense in this case was the introduction of a symptomatic disease, the norovirus, to explain the plaintiff's condition and the assertion that causally connecting the plaintiff's injuries to that disease was too remote.[190] This is a marked contrast to the *Wininger* case, where the defendant admitted liability for the norovirus outbreak, but denied a causal connection between the food service and the plaintiff's colon removal, as the defense in this case never conceded liability for the infection.

180. *Kamell*, 2019 Jury Verdicts LEXIS 13015.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Kamell*, 2019 Jury Verdicts LEXIS 13015.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*

While norovirus is not a perfect comparator for coronavirus, there are some shared characteristics that make it a reasonable subject for comparison. Norovirus is an extremely contagious virus that attacks the gastrointestinal system, causing vomiting and diarrhea.[191] It is spread easily and people with norovirus "can shed billions of norovirus particles" and "only a few virus particles can make other people sick."[192] A virus spreads through contact with infected people, consuming contaminated food, and or touching contaminated surfaces.[193] There is no vaccine for norovirus, but preventive measures include handwashing, safe handling and preparation of food, cleansing and disinfecting surfaces, and distancing from infected persons.[194] A key difference between norovirus and coronavirus, in terms of assessing damages, is the fact that norovirus is spread through contaminated food and symptoms appear within twelve to forty-eight hours after exposure.[195] Also, the commonality of settings where the norovirus is spread, as reported by the Center for Disease Control, lends itself to a narrower tracing of viral contagion than coronavirus.[196]

A case in point is the 2010 Federal District Court, Southern District of Indiana matter of *Struve v. GMRI, Inc.*[197] Heath and Cherie Struve ate dinner at an Olive Garden restaurant with their minor child, and within twelve hours, the child began vomiting and experiencing nausea, dehydration, and diarrhea.[198] The minor child was treated at a local emergency room and released, but a few days later, he returned with continuing symptoms and was hospitalized for one week.[199] A report was made to the county health department and an investigation revealed two employees who were infected with norovirus were working at the restaurant

191. *About Norovirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/norovirus/about/index.html (last visited Mar. 5, 2021).

192. *Id.*

193. *Id.*

194. *Preventing Norovirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/norovirus/about/prevention.html (last visited Oct. 20, 2021).

195. *The Symptoms of Norovirus*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/norovirus/about/symptoms.html (last visited Mar. 5, 2021).

196. *Common Settings of Norovirus Outbreaks*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/norovirus/trends-outbreaks/outbreaks.html (last visited Mar. 5, 2021).

197. Struve v. GMRI, Inc., No. 1:09-cv-00637, 2010 Jury Verdicts LEXIS 51426 (S.D. Ind. Dist. Ct., Jan. 20, 2010).

198. *Id.*

199. *Id.*

at the time the Struves' dined there.[200] The plaintiffs alleged negligence on the part of the restaurant for providing an unreasonably dangerous environment and for breach of warranty of fitness for a particular purpose.[201] They also included a res ipsa loquitur claim predicated on the fact of the presence of the illness as proof of negligence.[202] Among the defendant's defenses were that superseding acts or omissions by persons over whom they had no control caused the injuries, that it acted reasonably under the customs and usage in the food service industry, and that the plaintiffs were at least 50% at fault.[203] This latter defense was not further explained in the reporter, but it is a standard assumption of the risk defense inserted into many negligence defenses. The case did not go to trial; it settled for $65,000.00.[204] Other than a resulting illness that was prolonged beyond the usual one-to-three-day period for norovirus infection, there were no other damages.[205] The settlement amount was reasonable based on the facts. Causation was easily established through the county health department's investigation.[206]

A 2013 case from New York State represents the upper limits of norovirus damages. In *Baker v. SF HWP Mgt., LLC*, 600 guests stayed at the Six Flags Great Escape Lodge and Indoor Waterpark in March 2008 and contracted norovirus.[207] The property management was aware many guests were sick but did not close the park or warn guests of the outbreak.[208] A state health department investigation subsequently found that several employees at the park's restaurants were sick when the norovirus outbreak began.[209] The park was instructed to undertake infection control measures and disinfect the property.[210] Five guests who became sick initiated a class action lawsuit.[211] The class was limited to guests who experienced gastrointestinal illness within

200. *Id.*
201. *Id.*
202. *Struve*, 2010 Jury Verdicts LEXIS 51426, at 2.
203. *Id.* at 3.
204. *Id.*
205. *See id.* at 2.
206. *Id.*
207. Baker v. SF HWP Mgt., LLC, No. 50564, 2013 Jury Verdicts LEXIS 14774 (N.Y. Sup. Ct., May 7, 2013).
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*

seventy-two hours of leaving the park and reported their illness to the state health department.[212] Plaintiffs' complaint alleged failure to implement, monitor, and ensure proper sanitary conditions and safeguards; failure to properly train employees in infection control; failure to send ill workers home; and failure to warn guests.[213] The case settled for $1.3 million.[214] The number of plaintiffs in the class, coupled with the obvious neglect of guest health and safety, was a significant factor in the settlement amount.[215]

Unlike coronavirus, the mortality rate from norovirus is low. Of the reported average of 109,000 norovirus hospitalizations each year, there is an average of 900 deaths.[216] This is a little over 0.8% of hospitalized illnesses. The death rate is 0.04% when one factors in 2,270,000 overall norovirus outpatient visits.[217] Monetary damages from norovirus for physical injury do not present a significant recovery model due to low litigation rates,[218] the commonality of the disease,[219] and the inability to connect it to a source.[220] Conversely, coronavirus infection rates in the United States are more than seventy-nine million cases with more than 972,000 deaths.[221] This is slightly over a 1.2% U.S. mortality rate for coronavirus.[222] While coronavirus mortality remains a remote possibility, it is significantly higher than norovirus. The impact on damages from coronavirus infection exposure is a higher possibility of wrongful death claims for business owners. Absent death, there remains the long-term effect on health from

212. *Id.*
213. *See Baker*, 2013 Jury Verdicts LEXIS 14774, at 1.
214. *Id.* at 2.
215. *Id.*
216. *Burden of Norovirus Illness in the U.S.*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/norovirus/trends-outbreaks/burden-US.html (last visited Mar. 5, 2021).
217. *Id.*
218. *See* John Aloysius Cogan, Jr., *The Uneasy Case for Food Safety Liability Insurance*, 81 BROOKLYN L. REV. 1495, 1538 & n. 245 (2016).
219. Sandra Hoffman, Bryan Maculloch & Michael Batz, *Economic Burden of Major Foodborne Illnesses Acquired in the United States*, ECONOMIC INFORMATION BULLETIN NO. 140 (U.S. Department of Agriculture, May 2015), at 30 ("Norovirus causes 58 percent of foodborne illnesses in the United States that can be linked to a specific pathogen, 5.5 million cases in a typical year."]; *see also*, L. Barclay, et al., *Infection Control for Norovirus,* 20 CLINICAL MICROBIOLOGY AND INFECTION, 731, 732 (2014) (citing the high probability of shedding by infected persons, the low infectious dose, and environmental stability of the virus).
220. Cogan, *supra* note 220.
221. *Supra* note 2.
222. *Id.*

coronavirus exposure and illness. While medical evidence is still being gathered, the long-term effects can range from heart damage to lung damage to neurological symptoms.[223] Blood-clotting, strokes, and embolisms found in hospitalized patients also present significant coronavirus-related physical injuries that could be compensable in a lawsuit for negligent exposure. [224]

One might wonder how damages for more serious physical injuries or health effects resulting from negligent exposure to a communicable disease can be assessed. Even though comparisons are hard to make at the present stage of the COVID-19 pandemic, other communicable disease outbreaks provide a guide for what might be expected if a claim for negligent exposure is brought against a business and the elements of causation can be proven. Sample cases indicate that the monetary damages can be in the low six-figure to seven-figure range.[225] In 2009, a worker's compensation trial resulted in a $226,000 settlement for a female correction officer who claimed she was infected with methicillin-resistant Staphylococcus aureus (MRSA) while working at a state prison.[226] The MRSA infection caused permanent scarring on her face, arms, and legs.[227] The plaintiff's attorney claimed the prison failed to maintain a sanitary facility.[228] The defendant prison countered that MRSA is found everywhere—in homes, cars, stores, and in the soil—thereby challenging her assertion that she contracted the infection while at work.[229] The defendant also relied on the overall low MRSA infection rate of its staff and the training it provides to staff relating to MRSA and infection control.[230] Plaintiff's counsel countered with an infectious disease expert who opined that plaintiff officer contracted the disease from her daily exposure to the unsanitary conditions of the prison and estimated

223. *Looking Forward: Understanding the Long-Term Effects of COVID-19*, NATIONAL HEART, LUNG, AND BLOOD INSTITUTE (June 3, 2020), https://www.nhlbi.nih.gov/news/2020/looking-forward-understanding-long-term-effects-covid-19.

224. *What we know (so far) about the long-term health effects of Covid-19*, ADVISORY BOARD (June 2, 2020), https://www.advisory.com/daily-briefing/2020/06/02/covid-health-effects.

225. *See, e.g.*, Snyder v. Dept. of Corr. (Graterford), 3100315, 2008 Jury Verdicts LEXIS 32380 (Pa. Bureau of Workers' Comp., Dec. 8, 2008).

226. Snyder v. Dept. of Corr. (Graterford), 3100315, 2008 Jury Verdicts LEXIS 32380 (Pa. Bureau of Workers' Comp., Dec. 8, 2008).

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

that over 100 prisoners were infected.[231] MRSA would seem to present similar problems with isolating infection to a specific location; however, the unique set of facts and occupation of the plaintiff contributed to a monetary recovery.[232]

Cases involving E-coli transmission appear to result in the upper range of monetary damage settlements or verdicts. Two cases are illustrative.[233] In *Almquist v. Finley School District #53*, eleven grade school children in Kennewick, Washington became ill after eating school lunch tacos.[234] Their symptoms were related to E-coli infection and included severe stomach pains, cramping, vomiting, and bloody diarrhea.[235] All of the children received emergency medical care, and four had to be hospitalized for critical care relating to a potentially deadly complication due to the E-coli infection.[236] One victim had signs of permanent kidney damage that would require a transplant.[237] After several years of litigation, the case settled before trial for $4,750,000.[238]

In *Mayfield v. The Learning Vine, LLC*, a two-year-old contracted E-coli from a teacher at his daycare who was allowed to work despite their infection.[239] The day care center did not require the teacher to be tested, nor did it take any action to improve sanitary conditions once it became aware of the teacher's illness.[240] The exposed two-year-old began to first experience loose stools on and off for two weeks, then more severe symptoms of stomach pains, cramping, and severe diarrhea.[241] His parents took him to the emergency room where he was diagnosed with hemolytic uremic syndrome, a complication from E-coli found in young children.[242] His kidneys began to shut down, and he was admitted to the pediatric intensive care unit, where he was placed on

231. *Id.*
232. *Snyder*, 2008 Jury Verdicts LEXIS 32380.
233. Almquist v. Finley School District #53, 99-2-01123-3, 2009 Jury Verdicts LEXIS 48121 (Wash. Super. Ct., Feb. 2001).
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. Mayfield v. The Learning Vine, LLC, 015-CP-24-00794, 2016 LexisNexis Jury Verdicts & Settlements 125 (S.C. Comm. Pls., 8th Jud. Cir., Mar. 21, 2016).
240. *Id.*
241. *Id.*
242. *Id.*

dialysis and a ventilator.[243] The child died five days later.[244] A state health department investigation found there were fourteen cases of E-coli involving individuals connected to the day care center the victim toddler attended.[245] Under South Carolina law, anyone infected with a communicable disease is not allowed to work around children.[246] The day care center failed to notify the department of health of the teacher's exposure.[247] In a deposition, the owner of the day care center testified that she was unaware of the dangers of E-coli to children at the time they became sick.[248] The case settled for $1 million.[249]

The deceased child in *Mayfield* case suffered the same complication from E-coli as the toddler in the *Almquist* case, hemolytic uremic syndrome.[250] This is a syndrome anyone can get, but it is more common in children exposed to E-coli infection.[251] Untreated, it can cause death, although it is treatable with early detection and medication.[252] However, in its severe form it can cause lasting kidney damage.[253] The variables leading to seven-figure settlements in each of these two cases are child victims and severe complications causally related to E-coli infections. These cases present sobering considerations for similar businesses seeking to re-open amid the ongoing COVID-19 pandemic. Even for those businesses in states where there is a reduction in reported cases and mortality, the heightened precaution mandated by most states must be scrupulously followed since contact tracing is more readily available and pinpointed in these environments. This portends trouble for any business not strictly adhering to minimum state mandated health and safety protocols.

The potential for courts to award money damages in a successfully litigated case pertaining to the negligent transmission of coronavirus can be significant. Minimum adherence to state

243. *Id.*
244. *Id.*
245. *Mayfield*, Jury Verdicts LEXIS 125.
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
251. *Hemolytic Uremic Syndrome (HUS)*, MAYO CLINIC (July 22, 2021), https://www.mayoclinic.org/diseases-conditions/hemolytic-uremic-syndrome/symptoms-causes/syc-20352399.
252. *Id.*
253. *Id.*

guidelines may not be enough in defending against a negligent transmission claim, especially if those guidelines are followed in a perfunctory manner. In an often-quoted line from Justice Byron White's 1986 U.S. Supreme Court opinion in *Malley v. Briggs,* he wrote that qualified immunity is a form of sovereign immunity, less strict than absolute immunity, protecting "all but the plainly incompetent or those who knowingly violate the law."[254] To paraphrase Justice White and apply his observation to business owners potentially courting a coronavirus negligent transmission claim, it can be said that the underlying common-law principles required to plead a successful case and the high bar a plaintiff's counsel must meet will protect all except for the plainly incompetent or those who knowingly violate the law.

254. 475 U.S. 335, 341 (1986).