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# The Invisible Tort: Preparing For The Defense Of COVID-19 Negligence Claims

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# Commentary

## The Invisible Tort: Preparing For The Defense Of COVID-19 Negligence Claims

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The reopening of the economy that has already occurred in several states and is being contemplated by the remainder of the states carries with it an ongoing risk of infection if localities do not take steps to put in place stringent requirements for ensuring the safety of their constituents. Still, even with adherence to those requirements, businesses will nevertheless face a threat to their well-being that has the potential to be as lethal as the infection itself no matter how committed they may be to ensuring a safe environment for employees and customers. That threat comes not from the virus itself but by lawsuits brought by customers who may become infected and believe that the source of the infection is exposure in your business.

In a state where litigation ensues over coffee being too hot, it is almost a certainty that COVID-19 negligence cases will be filed in New York. But can such actions prevail under the principles of basic tort law? Unlike the traditional tort action arising out of a dangerous condition on the premises or a toxic tort such as lead paint or asbestos, COVID-19 is an entirely different animal. With asymptomatic carriers and an incubation period still unknown, the precise time that premises become arguably "unsafe" or the exact moment that the "injury" occurs is unknown. Moreover, given the prevalence of the disease, it is similarly difficult if not impossible for a litigant to establish that a particular establishment was the source of the infection from which he or she now suffers. The exact time or date for contracting the virus, for that matter, may be unknown. New York Governor Andrew Cuomo reported on May 6, 2020, that preliminary data from 100 New York hospitals involving about 1,000 patients showed that 66% of new hospital admissions were patients who had actually been staying home in quarantine.[1] The moment a person becomes infected with COVID-19 becomes impossible to pinpoint. A customer may be infected well before even entering the store premises, even if that individual left home just one time to go to the store. Consequently, these factors may serve as their own bases for dismissal of a complaint.

In the most basic sense, to maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty owed by defendant to plaintiff and that a breach of this duty proximately caused injury to the plaintiff. In New York, tort law principles provide that a property owner shall only be subject to liability for a dangerous condition on its premises if the owner either created the alleged defect or had actual or constructive notice of the dangerous condition.[2] Unless there is legislation limiting liability for COVID-19 claims, the traditional tort

analysis will be no different when it comes to litigating COVID-19 claims that may arise as businesses open their doors in the next few months.

## Duty

While COVID-19 may be a new and novel disease that is constantly changing, the duty owed by a premises owner/landowner is well-established and has not changed. A property owner must act in a reasonable manner in maintaining its premises in a reasonably safe condition under existing circumstances, including the likelihood of injury to third parties. With the litigation that is expected to ensue in connection with COVID-19, unless by judicial or legislative fiat that obligation is limited should customers become infected, the failure to maintain the premises in a reasonably safe condition may provide your customers with a basis to bring suit and seek compensation for their having been rendered ill due to conditions that they claim existed in and about your property.

## Notice

Unlike the traditional slip-and-fall case, the actual injury producing event in a COVID-19 negligence case is not identifiable to store employees. There is no sudden event. Unlike a pothole or a spilled liquid, there is no visible condition to be discovered by employees. So how then, under the traditional tort analysis, can a premises owner be on constructive notice of COVID-19 within its property?

It is well established in New York that in order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.[3] In order to trigger constructive notice at the most fundamental level, the particular defect must be visible and apparent.

In the absence of evidence demonstrating how long a condition existed prior to plaintiff's alleged incident, a plaintiff cannot establish constructive notice as a matter of law. Speculation as to how long a condition existed will not suffice. That is because for constructive notice to exist, there must be evidence that the alleged defective condition was present for a long enough period before the accident occurred for it to be discovered and remedied by the responsible party.[4] Speculation as to how long a condition existed is insufficient as a matter of law.[5]

Critically, the level of notice required is more than general notice and must be for the exact condition alleged at the specific location alleged.[6] Let's take, for example, a snow and ice case. A defendant's general awareness that the lot may have contained "patches of ice" is insufficient, as a matter of law, to charge it with constructive notice of the specific icy condition that allegedly caused plaintiff to slip and fall.[7]

So how can a defendant be on notice of COVID-19 in its premises? How can there be constructive notice of a condition that cannot be observed by the naked eye? Arguably, general awareness that COVID-19 is an ongoing health concern is not enough under well-established case law. It seems that the notice triggering event would arguably be a positive testing report of a person who had been in the building while infected with COVID-19.

Even with positive testing results establishing that there was an infected person within defendant's space, a critical question is whether the specific plaintiff actually contracted the virus at the defendant's premises and, if so, where within the building? This brings us to the next hurdle plaintiffs will face in a COVID-19 negligence case.

## Causation

A significant obstacle in maintaining a COVID-19 negligent exposure case will be causation. This may ultimately be the strongest defense to such claims. Can a plaintiff prove that a business' purported failure to maintain its premises safely caused him or her to contract COVID-19? The answer is most assuredly fraught with complexity.

For there to be a finding of liability in a traditional negligence case, there must then be a causal connection between the premises owner's failure to exercise due care and the ultimate injury. In the context of COVID-19, what precisely is due care? A defendant's conduct is considered a cause of an injury "if it was a substantial factor in bringing about the injury."[8] To be a substantial cause of the injury, it cannot be slight or trivial.[9] Plaintiff must come forward with evidence, not speculation or unfounded assumptions, that a defendant's conduct caused the injury to plaintiff.

Where the time, place and manner of plaintiff's injury is unclear, how can plaintiff establish that a defendant's

conduct was a substantial factor in bringing about the injury in a COVID-19 claim? In addition, how many other potential causes exist? Do any of these other causes constitute an intervening act which would sever the casual connection between a defendant's actions (or inactions) and the injury to a plaintiff?

These questions will require expert testimony, depositions and targeted discovery demands seeking a plaintiff's purchase history, all packages received at home, cell phone location data, credit card bills, social media, employment records, medical questionnaires completed for entrance into any building and a detailed listing of all individuals that plaintiff came into contact with for several weeks leading up to the alleged date of infection.

### What Can a Business or Premises Owner Do Now to Prepare Itself to Defend These Cases Later?

We find ourselves in a quickly changing environment and it is uncertain whether there will be legislation to limit liability of premises owners or whether legislation will implement presumptions to assist plaintiffs in overcoming the challenges in establishing liability in COVID-19 negligence cases.

In a COVID-19 negligence case, your defense will rely upon your ability to document the reasonable measures implemented by the business to protect customers from contracting COVID-19 on its premises at the specific time that plaintiff claims he or she was in the store or was on the premises. To that end, written policies and procedures documenting the business' COVID-19 action plan and safety checklists showing that employees were regularly maintaining the business in accordance with that action plan may go a long way in defending COVID-19 claims down the road. Along these same lines, employees should be informed and reminded of reporting requirements if a customer raises a concern of being exposed to COVID-19 on the premises. The business should consider taking periodic photographs of its business upon reopening and documenting the reasonable precautions being implemented.

If there is a report of an individual with COVID-19 on the premises, then the premises owner's response after learning such information also becomes important, especially if this is found to be the event triggering in a constructive notice analysis.

Assessing the business owner's conduct will necessarily hinge upon complex questions of medicine and science, which themselves may be extraordinarily difficult to resolve. If one thing has emerged from this morass, it is the complexity of the disease and its ability to evolve quickly. This makes it all the more difficult, if not impossible, to make a determination of precisely how to combat the disease. The fact that the disease presents such complex scientific challenges can only work to the business owner's benefit. If, at trial, scientific experts cannot say, within a reasonable degree of certainty, why an infection has occurred and/or why an infection has evolved, then there should be no basis for a jury to conclude that the owner failed to act in a way to prevent the infection from occurring in the first instance.

Alternatively, is simple compliance with government guidance about maintaining a safe environment enough to shield a business owner from liability should a suit be brought? In the more traditional analysis, what constitutes an unsafe condition on the affected property is normally established through case law that looks to what is and is not considered reasonable under the circumstances. While what is and is not reasonable under the circumstances may yet be based upon community norms, when it comes to COVID-19, it is the existence of government guidance which distinguishes a business' response to the pandemic from that which it is normally measured against. This raises the question, again, whether adherence to government guidance will be enough to shield a property owner from exposure to litigation. At the very least, the answer, we believe, is yes, but whether that in fact proves to be the case remains to be tested in court once the expected onslaught of litigation takes hold.

Beyond efforts to keep premises clean and providing employees with the necessary personal protective equipment (PPE) to reduce the risk of infecting customers, what is a business owner to do when customers enter who refuse to wear a face mask or other PPE? That is a complex subject that necessarily involves not only more traditional tort analyses, but that touches on a host of questions that, in some instances, have created a political flashpoint.

The bottom line is if reasonable procedures are established in accordance with local, state and county government orders, incorporate guidance from industry standards and guidance from the Centers for Disease Control and Prevention (CDC) and the Occupational Safety

and Health Administration (OSHA), a defendant will be better situated to meet its burden in establishing that it maintained its property in a reasonably safe condition under the existing circumstances. The more precautions that a business takes, the harder it will be for a plaintiff to prove causation and the harder it will be for a plaintiff to argue that a defendant did not act reasonably.

Making the premises safe for employees and customers is not only the best way to protect your staff and the customers, but it will be critical to your defense in an eventual COVID-19 negligence case.

## Endnotes

1. https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-briefing-transcript-may-6.

2. *Hoffman v. United Methodist Church*, 76 A.D.3d 541, 906 N.Y.S.2d 328 (2d Dep't 2010).

3. *Gordon v. Am. Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 647 (1986).

4. *Lenti v. Initial Cleaning Servs., Inc.*, 52 A.D.3d 288, 289, 860 N.Y.S.2d 42, 43 (1st Dep't 2008).

5. *Id.*; *see McDuffie v. Fleet Fin. Group, Inc.*, 269 A.D.2d 575, 703 N.Y.S.2d 510, 510 (2d Dep't 2000) (in the absence of proof as to how long a puddle of water was on the floor, there is no evidence to permit an inference that the defendant had constructive notice of the condition in question).

6. *Id.*

7. *Voss v. D&C Parking*, 299 A.D.2d 346, 347, 749 N.Y.S.2d 76, 77 (2d Dep't 2002).

8. N.Y. Pattern Jury Instructions 2:70.

9. *Id.* ■

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