



# Jacob O. Malatesta

Litigation Partner

- Licensed and Practicing in Alabama, Arkansas, Georgia, Mississippi, North Carolina, and Tennessee
- Representative Clients include Casinos, Hotels, Hospitals, and Medical Professionals
- Representative matters include Premises Liability, Dram Shop, and Employment Discrimination.

VIRTUAL



OCTOBER 7, 2020

# “BUT FOR” COVID-19

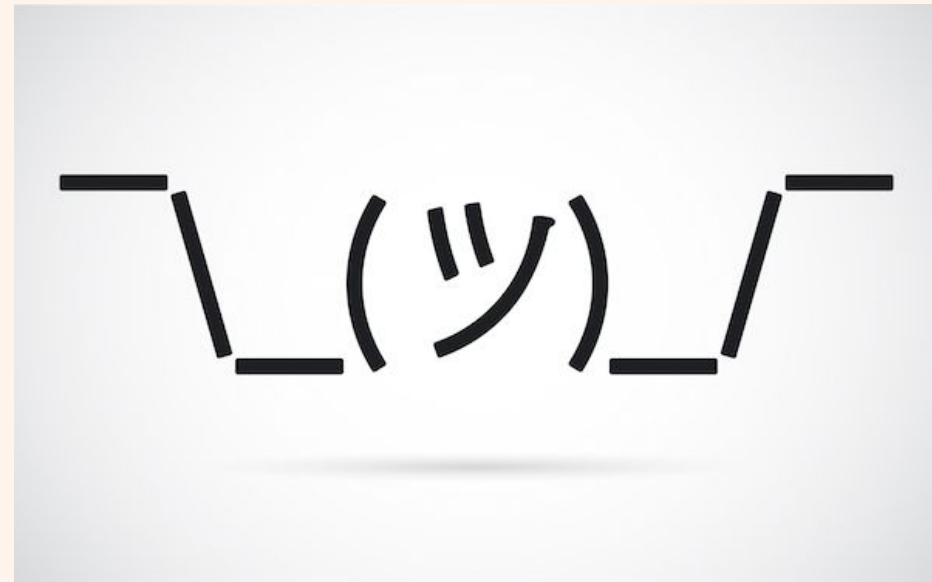
Trending Causation Theories in COVID-19 Litigation

# What is a “legal cause” for negligence?

- It Depends...(We'll look at the Restatements)
- Factual Cause
  - Actual cause
  - “But for”
- Proximate Cause
  - Scope of Liability and Reasonably Foreseeability
  - Two Types of People

# Causation Discussions in General

- Start from a Position of Negligent Conduct
  - We had a duty to do/not to do a thing
  - We breached that duty
  - Avoid “Proximate Cause”  
when developing a defense.



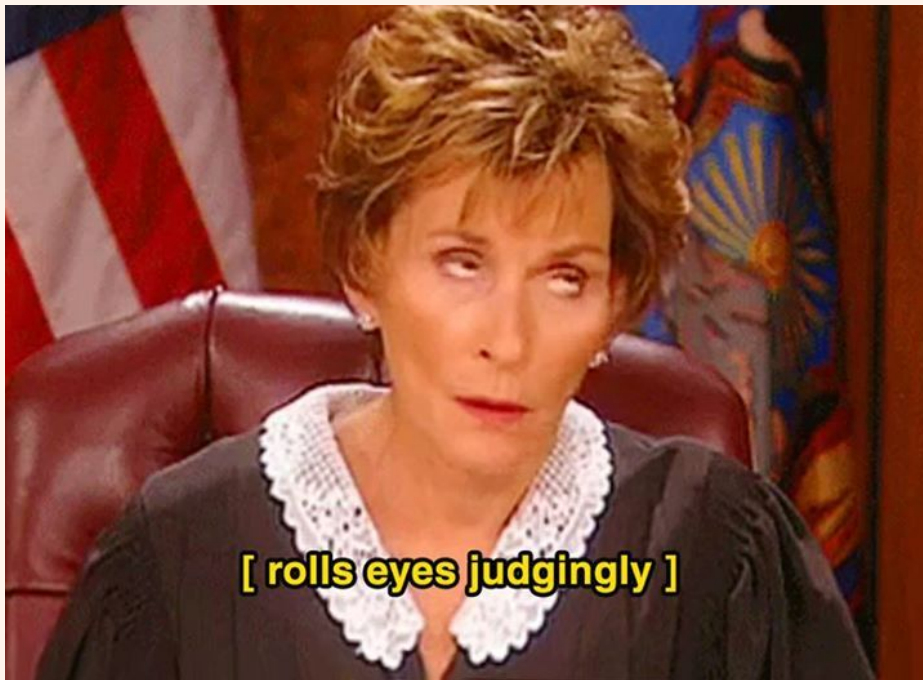


# Proving “but for” Causation

- What is the Plaintiff's Bar up to?
  - Princess Cruise Lines Cases
    - Failed to establish a timeline, allowed to amend the complaint
  - Experts
    - More likely than not v. “is consistent with”
    - \$\$\$\$
  - Public Nuisance Doctrine
    - You caused a public health disaster
    - Usually brought by a municipality or class
    - Employment Claims

# Battling “But For” Causation

- “Your honor, the plaintiff bears the burden of proof.”



# Battling “But For” Causation

- Knowing the Plaintiff
  - Social Media
  - Location Applications on Phone and Devices
  - Text messaging
  - Phone Records
- Experts
  - Getting rid of “is consistent with”
  - Epidemiologist
  - Virologist

# What about Worker's Compensation?

- Generally...
  - Must occur in the course of the employment
  - Arises out of the employment
- Occupational Disease?
  - Contracted During the Course of the Employment
  - Peculiar to the Employment
  - Employment Created a Greater Risk
- Wal-Mart was sued in April 2020 for wrongful death of worker