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A Journal of the Plague Years: Texas Litigation in Times of Pandemic and Epidemic

BY STEPHEN PATE

FINES FOR NOT WEARING A MASK IN A PANDEMIC? Forced quarantines? Mandatory vaccinations? Riots while a disease rages? Courthouses closed for fear of spreading a virus? Jury trials paused—even in the middle of a criminal trial? Those all sound familiar—but they are episodes from over a century ago in Texas. The Covid-19 pandemic has stretched on and on. Courthouses are shuttered, and most lawyers cannot regularly go to their own offices. How much of today's crisis is a repetition of what came before? With some extra time, many Texas litigators with a sense of history have looked for past historical parallels that may guide them regarding how this crisis will play out. Most have read about the Spanish Flu Pandemic of 1918-1920. Few, however, realize quite how many epidemics has Texas suffered over the course of its history or their effect on Texas law.

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There were major outbreaks of cholera in 1833 and 1849, the latter outbreak killing approximately 500 people in San Antonio. Worse than cholera, the most dangerous and recurrent disease to hit Texas was yellow fever—the dreaded "Yellow Jack"—so called because a victim's skin would turn yellow because of the liver failure the disease produced. That disease caused epidemic conditions in only two weeks, killing many in a horrible death that arrived about a week after infection. It caused a systematic breakdown of the clotting system, causing a body's organs to hemorrhage. Galveston, which was Texas' largest city during the nineteenth century, experienced at least nine major yellow fever epidemics between 1839 and 1867, and smaller outbreaks until 1905. Another outbreak in 1873 caused Victoria, Corpus Christi, Beaumont, and San Antonio to be quarantined. Texas has also seen major outbreaks of smallpox, encephalitis, polio, dengue fever, and measles. Smallpox was especially prevalent, with a notable outbreak occurring in Laredo in 1898.

What effect did these "plagues" have upon Texas lawyers and litigation? Were courts shuttered, as many are now? Today, we have seen an early raft of Coronavirus lawsuits over lockdowns and mask mandates. Moreover, many claims against insurance carriers have been filed because of business closures. Did comparable litigation arise from these outbreaks?

The answers we have are often incomplete. We have a fair idea of court closures during the Spanish flu. Before that, it is difficult to find a complete picture of how lawyers were affected. The historical records reflect that some epidemics—especially yellow fever—ground commerce to a standstill. Quarantines were in place, but more importantly, people were afraid to congregate. Given this, courts must have been shuttered and trials non-existent. Many of these epidemics occurred when Texas was still a frontier society, with only a nascent legal practice. Events unrelated to epidemics would also have affected court operations. For example, the worst yellow fever epidemic to hit Galveston was in 1867, in the midst of Reconstruction. This was a time when famed early Texas attorney W.P. Ballinger described Texas courts as disorganized and barely functioning. "Yellow Jack" and other diseases certainly kept courts from opening—but they were already limited.

The Spanish Flu Pandemic of 1918-1920 provides a much clearer picture. When the flu struck, courts began to close in October 1918—but not all of them, and some with much reluctance. In Fort Worth, lawyers themselves forced the issue. On October 21, 1918, the Tarrant County Bar Association met and unanimously passed a resolution to adjourn all courts until the influenza epidemic had subsided. A committee of three then notified all four state judges of the resolution—and all four recessed their courts. One court was impaneling a jury when it received the resolution, and immediately adjourned. The criminal district court dismissed a venire panel of 200. On October 25, 1918, Travis County District Judge George Calhoun announced a postponement of jury trials in Austin for a week, based on advice from the Health Board and different physicians. Judge Calhoun did this despite having been told (quite wrongly) that "the epidemic is beginning to wane[.]" He said that "the fact remains those who have had [the

influenza] are yet carrying and it would be next to impossible for the crowd that will assemble at the courthouse Monday should court be held to be free altogether as carriers." Both federal and state courts in El Paso also adjourned. Smaller counties were not exempt. In Ballinger, a murder trial was already under way when the trial judge adjourned it until the next term because of the influenza outbreak. In rural Bowie County, trials were adjourned from October until November.

Yet strangely, some courts remained defiantly open. Some federal courts remained open even as state courts closed. In Dallas County, jurors already hearing cases were allowed to vote regarding whether to recess the trials in light of the pandemic. They voted to continue by the narrow margin of 27-24.

Even so, many courts that wanted to go forward simply could not. In San Antonio, just before the quarantine, both the fact that potential jurors were in the army and others were sick depleted the venire panels. Obviously, many summoned for jury duty were not reporting because of fear of contagion. In El Paso, Judge W.D. Howe solemnly warned a jury panel not to dodge jury duty. The *Dallas Morning News* wrote "there was little activity in any court. Judges find it difficult to get cases to trial. Often witnesses cannot be found. At other times, lawyers cannot be present." By late 1918, courts opened again, and despite flare-ups in 1919 and 1920, they remained open.

Even if we do not know the exact status of courts during other epidemics, except by surmise, we at least know about the litigation related to them. Indeed, with some, we can say there were some litigation "trends." In 1852, in *Young v. Lewis,* the Texas Supreme Court decided an odd case arising out of the 1849 cholera epidemic—one that related to treating humans as mere property, a scourge even worse than and far longer lasting than cholera. A forever-unnamed slave woman had been hired out by her owner on a month-to-month basis. When she died of cholera during the hire-out, the owner sought her full value of $500. The Court said there was no averment of negligence that caused her to contract cholera and no showing of lack of due diligence by the renter in caring for her. Thus, there could be no recovery. The first Texas Supreme Court case on yellow fever came in 1858. In *Fulton v. Alexander*, a bailment case, Alexander, a Texas merchant, entrusted Fulton, another merchant, with delivering a package to an attorney named Hays in New Orleans. Fulton arrived in New Orleans in the midst of a yellow fever epidemic. Feeling it was unsafe to remain, he left the package with a commercial firm he knew and left the same day. He also deposited his own money with the firm. The firm tried on several occasions to deliver the package to Hays, but never could. Later, Hays called the firm to get his money, only to find the firm had failed. Alexander sued Fulton. The Texas Supreme Court held in 1858 that Fulton had acted in good faith in leaving the money with a firm that he had confidence in, as evidenced by the fact he had left his own money there and that he had every right to do so instead of delivering the money himself, which would have protracted his stay in a city in which a "malignant epidemic" was raging. There was no recovery.

Apart from commercial situations, many reported cases dealt with legal issues relating to controlling the spread of yellow fever. Cities, especially San Antonio and Galveston, would impose quarantines upon an outbreak. More notably were the bans on commerce with neighboring states. In 1895, the Texas Legislature passed an act granting the Governor extensive powers to order quarantines and embargoes. In 1899, a case of yellow fever was reported in New Orleans. Texas immediately embargoed all interstate commerce with New Orleans, prohibiting all freight, passengers, and even U.S. mail from entering Texas from that city. Not surprisingly, Louisiana sued Texas complaining of an unreasonable restraint on interstate commerce. Louisiana brought the case in the United States Supreme Court, invoking its original jurisdiction in controversies between the states. However, the Supreme Court rejected the case because it said Louisiana was acting on behalf of its private citizens who were losing money. This was not a true "controversy between states," and thus there was no jurisdiction.

There were many reported cases arising out of this yellow fever quarantine. A merchant in San Antonio received a delayed and damaged shipment of bananas. The damage occurred because the bananas had been re-routed to avoid New Orleans, then quarantined because of the fever. When the merchant sued the shipper, the San Antonio Court of Civil Appeals denied relief, holding that the merchant ordered the bananas knowing full well there was a quarantine—he should have expected a delay.

George White, owner of the Maverick Hotel in San Antonio, sued the City of San Antonio over the New Orleans Quarantine. A theatrical troupe left News Orleans on the last train before the quarantine was declared and made it to San Antonio. Some of the troupe registered at the Maverick Hotel. The troupe was rehearsing at the Opera House, when, under the direction of the Mayor and his Health Officer, the police took charge of them and delivered them all to the Maverick, over White's protest. The troupe was quarantined

there as "yellow fever" suspects for six days. The effect of this confinement ruined the Hotel's business for months. White was forced to sell out. He sued the Mayor, the Health Officer, and the City for trespass. White dismissed the Mayor and Health Officer before trial. He obtained a verdict against the City. In reversing that verdict, the Court of Civil Appeals did not rely on the City's argument that the City's charter gave it the right to order quarantines. Instead, the court ruled that the actions of the Mayor and Health Officer were not those of the City. In fact, it held that the Mayor and Health Officer were "probably liable" for "unwarranted trespass." Yet, since they had already been dismissed, there was no recovery.

All these cases were decided in 1900. This was the year that Dr. Walter Reed discovered that yellow fever was not spread person to person. Instead, it was spread by the bite of a mosquito. The quarantines were useless.

There do not seem to be any reported cases regarding a business owner's liability for serving customers in the midst of a yellow fever epidemic. There are cases involving mental anguish suffered when a telegraph warning of yellow fever was not delivered. In the first decade of the twentieth century, R.B. Rich of Crockett and other members of his family were planning to go to San Antonio to take Rich's father-in-law for medical treatment with a Dr. Dupuy. Yellow fever broke out in San Antonio, and Dr. Dupuy sent a telegram through Western Union warning Rich to stay away. Though the Crockett Western Union agent received the telegram before the San Antonio train left, it was not delivered, and Rich departed. Sometime later, the telegram was delivered to Rich's home. Rich's wife, in a panic, sought to have Western Union deliver the telegram at some stop along the way. Western Union refused, the train arrived in San Antonio, and Rich and his family members spent eighteen hours in San Antonio before they could depart. No one contracted Yellow Fever and the court made a point of saying that there were only three active cases in San Antonio while Rich was there. Amazingly, even though the court was writing in 1910, long after Dr. Reed's discovery, it held that it was common knowledge that yellow fever was a "contagious or infectious disease." When Rich attempted to recover for his fear of contracting yellow fever, the court held that Western Union's negligence had led to mental anguish.

Science and preventive efforts would triumph over yellow fever. By 1918, the worry was the Spanish Flu Pandemic. Like today, some lawyers saw a way to generate business from the virus. In early December 1918, this headline appeared in the *Austin American Statesman*: "Chance for Damage Suits Looms Big Say Texas Lawyers." The accompanying article related that attorneys were discussing the "revival of the damage suit industry" in Texas because of the influenza pandemic. The theory was that owners of theatres and other public gathering places owed a duty to the public to keep their premises safe and influenza free. A review of case law, however, reveals no appellate decisions on this point. There was no hullabaloo about "business interruption" insurance claims as there is today. For one thing, businesses were closed only a short period of time. For another, few, if any, companies would have had such coverage.

There was, however, much litigation centered around life insurance claims. "Life insurance" was a relatively new concept. Many cases involved misrepresentation, as carriers denied claims on the grounds that the deceased hid their influenza when applying for insurance. Carriers also tried to deny claims based on a "War Service" exclusion. This exclusion voided coverage for deaths while on active military service. Since this was the end of a war and Spanish flu was prevalent in the services, this caused controversy. Ultimately, Texas courts frowned on these denials, holding that having influenza was not equivalent to being killed in military action. Worker's compensation was also comparatively new in Texas, and litigation ensued, with many courts ruling that catching the flu while at work was indeed within the course and scope of employment.

Smallpox was another major scourge of early Texas. As opposed to yellow fever, and like the Spanish flu, smallpox was a contagious disease. Yet alone of these, smallpox was easily preventable in the early years of the last century. Edward Jenner had developed a smallpox vaccine in the 1800s. By the end of the nineteenth century, many states, including Texas, had some form of compulsory vaccination. Many objected to being vaccinated. In 1899, smallpox hit Laredo hard. The Texas State Health Officer and Laredo's mayor ordered compulsory vaccinations, fumigations, and what was in effect a quarantine. There was a $1000 fine for not wearing a mask. Anyone refusing vaccination was subject to immediate arrest.

Most of these orders were directed to Laredo's Hispanic population. Many resisted the health orders. The Texas Rangers were called in to help with the immunization efforts. When the Rangers met resistance, they broke down doors and removed suspected victims by force. Eventually a riot broke out, with open warfare between the Rangers and Mexican Americans. There were deaths, many wounded, and arrests. Eventually, however, the brutal tactics of the Rangers did aid in ending the epidemic.

Gradually, compulsory vaccination became the norm, at least for children attending public school. There is a line of cases challenging the vaccination requirements. In 1909, one high school student developed smallpox in Fort Worth. The school district thus ordered all schoolchildren to be immunized. Mrs. M.H. McSween refused to vaccinate her daughter—for reasons unknown to us—and the daughter was suspended from school. Mrs. McSween sued the School Board, alleging that its actions violated the Texas and United States Constitutions. The Fort Worth Court of Civil Appeals disagreed. In *McSween v. Board of Trustees of City of Fort Worth*, it held that the Texas Legislature had enacted a special charter for Fort Worth, establishing its school district, and that charter gave the Fort Worth Board broad powers that included the right to protect students' health. Even if only one student had smallpox, the rest could be forced to be vaccinated.

Still, over a course of years, several more cases challenged compulsory vaccination. In *Staffel v. San Antonio School Board of Education*, a case from the San Antonio Court of Civil Appeals, five residents of San Antonio, parents of school age children, sought to enjoin a San Antonio School Board Resolution requiring students to be vaccinated against smallpox. This time we know why there was an objection: "plaintiffs and their children are conscientiously opposed to vaccination; …their faith, religion and conscience forbid them to submit to vaccination." Indeed, they called vaccination "loathsome, terrible and dangerous." They also alleged, against all scientific evidence, that the vaccine did not prevent smallpox. The Court of Civil Appeals would not even discuss their arguments, saying they had no bearing on the School Board's Resolution. The State had given control of the schools to the School Board, and not to individual parents, no matter what their convictions were. Compulsory vaccination was reasonably necessary to preserve public health and was thus upheld.

The issue arose in the Texas Supreme Court in late 1918. *City of New Braunfels v Waldschmidt* involved a suit not against a school board, but against a city. The New Braunfels City Council passed an ordinance denying pupils to attend either public or *private* school unless vaccinated for smallpox. Fritz Waldschmidt and his two children were Christian Scientists who refused vaccination because they believed in, as the Court said, "the Christian Science treatment of Smallpox, which is 'a denial of the reality of sickness and disease.'" The Waldschmidt children, denied entry to the schools, sued. They claimed the Ordinance deprived them of their liberty to care for their own health as they saw fit and that they had property rights in local and state school funds which they would lose if the Ordinance was enforced. Finally, they contended that there was no smallpox epidemic in New Braunfels, and that the Ordinance was therefore unreasonable. The Court of Civil Appeals actually ruled for the Waldschmidts—this was in the heydays of the *Lochner* era and substantive due process—saying that no city had the power to adopt such an ordinance. The court added that there was no epidemic in New Braunfels and the Ordinance was thus unreasonable.

The Supreme Court, however, had none of it. It held the Ordinance to be a legitimate exercise of the police power the state of Texas gave to the city by charter to protect the health of its residents.

The Court went further however, using unfortunate language that, alas, reflects the time and place. It was true that when the trial court heard the case there had been only one case of smallpox in New Braunfels, but there was a reasonable *fear* of an epidemic spreading. Why? Because the city was 30% "Mexican." Mexicans, according to the Court and its understanding of the record, were known to spread smallpox. The Court's opinion reflects that a doctor had testified at trial that "in winter the Mexican population in New Braunfels increased, when they gathered together in unventilated little huts, and the disease was most likely to originate among them and spread to all the people." This fear made the Ordinance "reasonable." This decision is not the only example of thinking along these lines. Indeed, in 1934, in the last reported opinion regarding compulsory smallpox vaccination, the Fort Worth Court of Civil Appeals referred to the "large Negro and Mexican population" of Fort Worth and their supposed tendency to spread smallpox as a reason to uphold compulsory vaccination.

Preventative measures eliminated yellow fever and cholera in Texas. Spanish flu ran its course by about March 1920. Vaccination has now caused the global eradication of smallpox. Before these diseases went, though, they left a mark on Texas's legal landscape. Though we do not yet know to what extent, Coronavirus will leave its mark, too. What we do know is that the past is prologue—and that, in another century, another article, perhaps in the *Advocate*, will unearth the happenings of 2020 just as we scour the records of the past today.

Stephen Pate is a partner at Cozen O'Connor in Houston and the Executive Editor of the Texas Supreme Court Historical Society Journal. ★