

# TEXAS LAWYER

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## Column Ignores Structure of Texas Common Law

BY PETER M. KELLY

In the May 18 issue of Texas Lawyer, Robert B. Gilbreath and Matthew C. Sapp argued in “Ending Punitive Damages for ‘Fraudulent Fraud,’” that under Texas law a plaintiff must prove some level of super-fraud to be entitled to anything more than actual damages. The article ignores the structure of Texas common law and the plain language of the relevant statute.

Any analysis of the requisite mens rea for the imposition of exemplary damages for fraud must begin with the recognition that fraud is not a tort. Lawyers of a certain age will recall when the Civil Practice & Remedies Code did not specify a limitations



### REBUTTAL

period for tort claims, so the courts had to determine whether to apply the two-year period that applied to almost all tort claims, or the four-year period that applied to contract claims. The Texas Supreme Court imposed the four-year period, concluding that the cause of action is quasi-contractual, and thus not a tort.

In 1990 in *Williams v. Khalaf*, the Texas Supreme Court noted that under the English common law, torts are derived from the writ of trespass, which involved some measure, however small, of violence to a person’s rights. This left no protection against fraud or deceit; this gap was filled by a new cause of action derived from the writ of assumpsit, “a contractual or quasi-contractual action involving a promise and leading to a claim of debt (but not the pure common law action for a debt).”

**No matter how the distinction is explained, no court that has specifically examined the differences between fraud and tort has held that the term “tort” encompasses fraud.**

While a fraud cause of action may resemble a tort in the type of damages that are permitted, it is quasi-contractual. Texas courts have defined “tort” to exclude actions that are contractual or quasi-contractual in nature. In 1995, in *Moore v. Collins*, the First Court of Appeals in Houston said that “[a] tort is a breach of some duty, other than a contractual or quasi-contractual duty, which gives rise to an action of damages.”

Thus: Torts are not quasi-contractual. Fraud is quasi-contractual. Generally, it seems that fraud involves the victim’s surrender of a legal right, while tort involves the tortfeasor’s violation of a right. No matter how the distinction is explained, no court that has specifically examined the differences between fraud and tort has held that the term “tort” encompasses fraud.

Because fraud is not a tort, the progression of tortious mental states—negligence, gross negligence, and malice—are not applicable to fraud. There is no such thing as “negligent fraud,” or “grossly negligent fraud.” That is because liability for fraud, by definition, only arises if there has been intentional conduct, both in the making of a misrepresentation and the intent that

the plaintiff rely on it. It is that specific intent that separates fraud from negligent misrepresentation, or “mere” bad faith. (A distinction between the two is that fraud, unlike negligent misrepresentation, requires scienter on the part of the defendant).

With this distinction in mind, we can turn to the plain language of the statute, Tex. Civ. Prac. & Rem. Code § 41.003, which reads: “STANDARDS FOR RECOVERY OF EXEMPLARY DAMAGES. (a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: 1. fraud; 2. malice; or 3. gross negligence.”

Under the statute, exemplary damages cannot be awarded for a mere breach of the standard of care (negligence), so the plaintiff must establish either a specific intent to cause harm (malice) or that the defendant acted with conscious indifference to the risk of harm (gross negligence). But if there has been a predicate finding of fraud, then the jury has already found a specific intent. That is why the statute is phrased in the disjunctive—exemplary damages may be awarded in instances of fraud *or* malice. Gilbreath and Sapp would have the courts deliberately misread the statute to only award exemplary damages if there has been fraud *and* malice.

The Legislature understood that fraud, standing alone, is by definition aggravated conduct, performed with intent to cause harm, and thus saw no need to require even further aggravation for an award of exemplary damages. Gilbreath and Sapp’s suggestion that courts should require that a jury must find that fraud was committed with malice before awarding exemplary damages ignores the distinction between fraud and tort, as well as the plain language of §41.003. Texas law is clear: Fraud is an aggravating circumstance that supports both actual and exemplary damages, just as it should be.



**Peter M. Kelly** is a partner in Kelly, Durham & Pittard in Houston.

## advertisersindex

|  |    |
|--|----|
| Androvett Legal Media & Marketing.....       | 14 |
| Attorneys Serving the Community.....         | 11 |
| The Buzbee Law Firm.....                     | 7  |
| Dallas Bar Foundation.....                   | 3  |
| Dykema Cox Smith.....                        | 2  |
| Texas Academy of Distinguished Neutrals..... | 17 |
| Texas Club.....                              | 6  |