

# GASLIGHTING

## Should it be recognized as a tort in Texas?

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The common law tradition is based on experience, not logic.<sup>1</sup> Though we live in an era when busy legislatures keep enacting statutes for specific claims and causes of action in response to general cries that “there ought to be a law against this or that,” the common law has not yet been formally abolished in Texas.<sup>2</sup>

Although the Texas Supreme Court has been reluctant in the past two decades to expand tort common law claims,<sup>3</sup> the common law has been the traditional method where courts recognize evolving legal norms over time.<sup>4</sup> Over time, available common law tort claims and the names of various injurious acts visited upon people have been transformed, morphed, or abandoned.<sup>5</sup> According to the Texas Supreme Court, “[w]hen recognizing a new cause of action and the accompanying expansion of duty, we must perform something akin to a cost-benefit analysis to assure that this expansion of liability is justified.”<sup>6</sup>

Is it time for the common law tort of gaslighting? Gaslighting refers to a particular species of manipulation or psychological abuse preying on the vulnerability of another to suggest to them that something that is not in fact true, is in fact true. Gaslighting has been described by a psychologist in a Texas case as:

manipulative behavior used to confuse people into questioning their reactions to events, so much so that the victims of gaslighting begin to question their own sanity. . . . [g]aslighting is often referred to as “crazy-making” as it makes otherwise ordinary functioning individuals act “crazy” in the face of such discrepant pieces of information.<sup>7</sup>

The term originates from a psychological thriller play and movie from the early 20th century called *Gaslight*,<sup>8</sup> but the term and concept still permeates pop culture today.<sup>9</sup>

While somewhat akin to causes of action we are familiar with like fraud, invasion of privacy, and intentional infliction of emotional distress, gaslighting does not exactly match any of these and appears to be a concern in the internet era with its “deepfakes,” “ghosting,” and other forms of truth manipulation. It may be more difficult to uncover and detect than existing causes of action, even by a person using reasonable diligence.

Gaslighting is different from fraud because it often flows from a campaign of activity rather than specific statements, omissions, or representations. It may consist of a series of minor, seemingly harmless acts that combine to create an alternate reality leading to psychological abuse. Gaslighting is often—by design—equivocal or stated in the form of “opinions” or “questions,” which may not constitute actionable fraud and may not be material. While it does involve false representations made so that a person relies on the untruth, the harms that flow from relying on gaslighting are not completely captured by the fraud cause of action: It can cause

emotional and mental anguish rather than the pure financial or economic damages more commonly associated with fraud.

Gaslighting also is not covered by defamation because it is not a reputational tort. In other words, the core function of defamation is to protect or restore the reputation, honor, character, or good standing of a plaintiff who has been maligned publicly by false statements.<sup>10</sup> By contrast, a gaslighting claim can stand without the defendant having “published” a false statement to any third party.<sup>11</sup> The harm inflicted on the plaintiff does not arise (primarily or perhaps at all) from what third-party members of the community may think about the plaintiff, but rather from the plaintiff’s own cognitive existential crisis or damage in processing the manipulative behavior.

Gaslighting is also not fully captured by the three Texas privacy torts (public disclosure of private facts, intrusion on seclusion, and appropriation of name or likeness)<sup>12</sup> because the conduct goes beyond merely invading a person’s privacy or right to be left alone, although it is closely related to these claims. Finally, intentional infliction of emotional distress<sup>13</sup>—a gap-filler tort that can only be used where other causes of action do not provide for recovery—by definition does not provide for redress when the harm suffered is not just emotional but financial as well.

Opinions in caselaw have generally mentioned gaslighting with increasing frequency in the past few years in various contexts.<sup>14</sup> Additionally, murmurs of gaslighting as a potential cause of action have recently appeared in a range of contexts across the country, without much detailed discussion as to the elements of what an independent cause of action may require by way of pleading and proof.<sup>15</sup>

Texas could recognize the gaslighting tort in appropriate cases because it would provide for the recovery of both general types of damages or harms (economic and emotional). Arising injuries are often psychological,<sup>16</sup> suggesting that this tort would allow for the recovery of damages for either mental anguish or emotional distress proximately caused.<sup>17</sup> Apart from psychological harm, gaslighting may also result in financial or economic harms. Finally, equitable relief in the form of protective orders should also be available to stop harassment.

Apart from damages and causation, tort theories generally require a duty and standard of applicable culpability.<sup>18</sup> If gaslighting were a recognized tort, what would be the required standard for culpability: intentional, negligent, or strict liability? For a gaslighting tort, requiring intentional conduct would be the most appropriate. Apart from wanting to discourage claims based solely on inadvertent or even negligent acts, the nature of gaslighting rests on intentional manipulation of the victim’s ability to perceive and react to the gaslighting conduct. Having an intentional-conduct requirement is also consistent with the three invasion of privacy torts that Texas currently recognizes,<sup>19</sup> as well as the intentional-conduct standards that the Legislature adopted in recent statutory-based claims.<sup>20</sup> Additionally, the intentional standard is consistent with Texas’ general law limiting the recovery of mental anguish and emotional distress, which disfavors the recovery of these types of damages without a physical injury with rare exceptions.<sup>21</sup>

In sum, a gaslighting tort would likely require a plaintiff to show that the defendant intentionally gaslighted the plaintiff,

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resulting in the plaintiff sustaining damages or injuries. Perhaps the time has come to recognize this tort to deter this type of destructive, manipulative behavior. **TBJ**

## NOTES

1. Oliver Wendell Holmes, *The Common Law* 1 (1881).
2. Like other jurisdictions, Texas tort law has recently evolved less through court action in our traditional common law style, but more like the civil law traditions in Mexico or Europe: The Texas Legislature enacts statutes specifically addressing tort-like activity, creating new statutory civil causes of action and sometimes allowing the recovery of attorneys' fees, injunctive relief, or exemplary damages. See, e.g., Tex. Bus. & Com. Code § 109.005; Tex. Civ. Prac. & Rem. Code § 98B.003(a)(3); Tex. Civ. Prac. & Rem. Code § 123.004; Texas Gov't. Code § 423.006(b), (d); See also, Guido Calabresi, *A Common Law for the Age of Statutes* (1982).
3. *Archer v. Anderson*, 556 S.W.3d 228, 239 (Tex. 2018) (rejecting cause of action of intentional interference with inheritance); *Ritchie v. Rupe*, 443 S.W.3d 856, 878, 891 (Tex. 2014) (declining to recognize a common law cause of action for shareholder oppression); *Trevino v. Ortega*, 969 S.W.2d 950, 953 (Tex. 1998) (refusing to recognize a tort of spoliation).
4. *Billings v. Atkinson*, 489 S.W.2d 858, 859–60 (Tex. 1973) (recognizing tort cause of action for invasion of privacy and holding that “an unwarranted invasion of the right of privacy constitutes a legal injury for which a remedy will be granted”); *Dugger v. Arredondo*, 408 S.W.3d 825, 830–31 (Tex. 2013) (describing effect of Legislature adopting Chapter 33's comparative responsibility scheme as derogation of the common law).
5. For example, Texas abolished the tort of “alienation of affections” or “criminal conversations.” Tex. Fam. Code § 4.06.
6. *Kinsel v. Lindsey*, 526 S.W.3d 411, 423 n.6 (Tex. 2017), citing *Roberts v. Williamson*, 111 S.W.3d 113, 118 (Tex. 2003); *Ritchie*, 443 S.W.3d at 878. The court describes the full analysis as “complex, requiring consideration of a number of non-dispositive factors including, but not limited to: the foreseeability, likelihood, and magnitude of the risk of injury; the existence and adequacy of other protections against the risk; the magnitude of the burden of guarding against the injury and the consequences of placing that burden on the persons in question; and the consequences of imposing the new duty, including whether Texas's public policies are served or disserved; whether the new duty may upset legislative balancing-of-interests; and the extent to which the new duty provides clear standards of conduct so as to deter undesirable conduct without impeding desirable conduct or unduly restricting freedoms.” *Id.*
7. *Coburn v. Moreland*, 433 S.W.3d 809, 818–19 (Tex. App.—Austin 2014, no pet.). In an employment context, another case quoted the plaintiff's allegations describing gaslighting behavior as an effort “to induce a severe sense of anxiety into the target and to cause others to regard him as mentally unstable” by completely annihilating the target's reputation and causing the target “personal disasters such as job loss, divorce, financial devastation—even jail.” *Williams v. Rosenblatt Securities Inc.*, 136 F.Supp.3d 593, 601 n.3 (S.D.N.Y. 2015). In a recent domestic abuse case, the court quoted a licensed clinical social worker's definition of gaslighting as “psychological form of abuse in which the perpetrator places seeds of doubt and insecurity in the victim and turning -- turning reality into -- into a falsehood, redirecting with lies and manipulation, intimidation through these methods and leaving the victim unsure, uncertain, insecure about what is -- what is real, what is true.” *Aguillard v. Aguillard*, 19-757, 2020 WL 3818159, \*4 (La. App. 3 Cir. July 8, 2020). See generally Robin Stern, *The Gaslight Effect* (2010).
8. *Brown v. Bratton*, ELH-19-1450, 2020 WL 886142, \*15 n.7 (D. Md. Feb. 21, 2020) (Title VII and employment discrimination case). The *Brown v. Bratton* court described the term as originating from the 1944 film *Gaslight*. See *Gaslight* (Metro-Goldwin-Mayer 1944). The court continued to quote the National Domestic Violence Hotline, stating “[g]aslighting” describes a kind of psychological abuse in which a person denies another person's reality in order to cause that person to second-guess himself and his perceptions.” (quoting *What is Gaslighting?*, National Domestic Violence Hotline (May 29, 2014), <https://www.thehotline.org/2014/05/29/what-is-gaslighting/>).
9. For example, the country band The Chicks released an album called *Gaslighter* in July 2020, including the lead single and title track song “Gaslighter.” The Chicks, *Gaslighter* (Columbia Records 2020).
10. See *Innovative Block of South Texas, Ltd. v. Valley Builders Supply, Inc.*, 603 S.W.3d 409, 417 (Tex. 2020) (distinguishing between defamation involving character and reputation and business disparagement that applies to economic interests and financial harm affecting the marketability of goods and services).
11. Publication to a third party is an essential element of defamation. *Dallas Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 623 (Tex. 2018); *Glassdoor, Inc. v. Andra Group, LP*, 575 S.W.3d 523, 528 (Tex. 2019) (stating defamation claims “generally accrue when the allegedly defamatory matter is published or circulated”).
12. Three privacy torts Texas recognizes are: (1) intrusion upon seclusion, *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993); Tex. PJC § 110.16 (2016 ed.); (2) appropriation of name or likeness, *K-mart Corp. v. Trotti*, 677 S.W.2d 632, 638 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.), 686 S.W.2d 593 (Tex. 1985); *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); Tex. PJC § 110.18 (2016 ed.); and (3) public disclosure of private facts, *Indus. Foundation of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683–85 (Tex. 1976), cert denied, 430 U.S. 931 (1977); Tex. PJC § 110.17 (2016 ed.). Texas does not recognize a claim for “false light” invasion of privacy. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994).
13. A claim for intentional infliction of emotional distress, or IIED, requires a plaintiff to show that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that proximately caused severe emotional distress. *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). Courts limit the applicability of IIED. See, e.g.,

*Creditwatch, Inc. v. Jackson*, 157 S.W.3d 814, 815 (Tex. 2005) (noting that “[f]or the tenth time in little more than six years, we must reverse an intentional infliction of emotional distress claim for failing to meet the exacting requirements of that tort”).

14. See, e.g., *Krauss v. Wal-Mart, Inc.*, 2:19-cv-00838-JAM-DB, 2020 WL 1874072, \*8 (E.D. Cal. 2020) (calling a party's argument an attempt to “gaslight[ ] the Court”); *Garrett v. Cape Fox Facilities Servs.*, 1:19-cv-579, 2020 WL 265869, \*2, 10 (E.D. Va. 2020) (dismissing pro se Title VII and ADA employment complaint including allegations of gaslighting); *Edwards v. Schwartz*, 378 F.Supp.3d 468, 484 (W.D. Va. 2019) (“gaslighting” claim part of defamation claim asserted in context of Flint, Michigan poisoned water crisis); see *supra*, note 6.
15. See, e.g., *Sissom v. Univ. of Texas H.S.*, 927 F.3d 343, 346, 349 n.4 (5th Cir. 2019) (affirming dismissal of gaslighting and RICO claims based on lack of jurisdiction and without reaching merits of whether claims survived as plead a 12(b)(6) challenge); *Shulman v. Facebook.com*, 17–764 (JMV) (LDW), 2018 WL 3344236, \*8 (D.N.J. July 9, 2018) (dismissing gaslighting claim asserted under California statute CAN-SPAM for failing to establish allegation arising from email sent by defendant); *Tantaro v. Fox News Network, LLC*, 17 Civ. 2958 (GBD), 2018 WL 2731268, \*4 n.9 (S.D.N.Y. May 18, 2018) (dismissing employment-related complaint including allegations of targeting plaintiff “for retaliation through online intimidation and smear campaigns. . . . Such campaigns allegedly involved the use of fake social media accounts to defame, discredit, gaslight, and otherwise influence the public perception of their intended victims.”); *White v. Green County Sheriff's Dept.*, 2:09–CV–211, 2014 WL 3058393, \*10 (E.D. Tenn. July 7, 2014) (dismissing amended complaint including a claim of gaslighting by the sheriff's department together with “gang stalkers” because of failure to prove facts supporting claim).
16. Typically to recover for mental anguish damages, a plaintiff must show direct evidence of the nature, duration, and severity of their mental anguish thereby establishing a substantial disruption in his or her daily routine. *SCI Texas Funeral Services Inc. v. Nelson*, 540 S.W.3d 539, 544 (Tex. 2018), citing *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441–44 (Tex. 1995). This is more than mere worry, anxiety, vexation, embarrassment, or anger (although it may include all or some of these). *Woodruff*, 901 S.W.2d at 444. Similar testimony may support an award of future mental anguish damages. *Fifth Club v. Ramirez*, 196 S.W.3d 788, 797 (Tex. 2006). In the area of non-physical, non-economic damages, it is unclear what the difference is between “mental anguish” and “emotional distress.” Some cases distinguish between “garden-variety” mental anguish and other types of emotional insult and injury. *In re Whipple*, 373 S.W.3d 119, 123 (Tex. App.—San Antonio 2012, orig. proceeding).
17. Virtually all tort claims under Texas law have a proximate cause requirement of both “cause in fact” or “substantial factor” and foreseeability. See, e.g., *Transcontinental Ins. Co. v. Crump*, 330 S.W.3d 211, 221–23 (Tex. 2010); *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).
18. “Whether a duty exists is a question of law for the court and turns on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.” *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010) (internal quotations omitted).
19. See *supra*, note 12.
20. See *supra*, note 2.
21. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993). In the state of Texas, for “many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish.” *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1997). However, tortious negligent conduct may still give rise to claims for personal injury damages without physical invasion or touching of the body in some limited and specific circumstances: bystander claims, mishandling of a dead body, or specific instances where a “special relationship” exists. *Service Corp. Int'l v. Guerra*, 348 S.W.3d 221, 231 (Tex. 2013); *Likes*, 962 S.W.2d at 496 (Tex. 1997). As a 2018 Supreme Court of Texas case summarizes: “Historically, Texas law did not afford damages for mental anguish unless (1) accompanied by a physical injury resulting from a physical impact, or (2) produced by a particularly upsetting or disturbing event.” *Nelson*, 540 S.W.3d at 543.



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