

TRUST LAW

Fraudulent calumny: an emerging cause of action

By Anthony Grant

Although we live longer these days, our bodies aren't keeping pace. And one of the worst problems we face is declining cognition and dementia.

The elderly are increasingly subject to the manipulative influence of younger generations who wish to accelerate the transfer of family wealth.

In this environment, three causes of action are typically employed to protect the elderly and infirm who have been persuaded to make wills that favour manipulative relatives.

The first is a claim of testamentary incapacity. In this cause of action, it is claimed that a will is invalid because the will-maker lacked sufficient mental capacity to understand what he or she was doing when the will was signed.

If this fails, the next cause of action in sequence is a claim that although the will-maker had sufficient mental capacity to make a will, he or she didn't know or approve of its contents.

The third cause of action in sequence is a claim of undue influence. In this cause of action it is conceded that the will-maker had sufficient mental competency to make a will and had sufficient cognition to know and approve what he or she was doing, but it is said the person's judgment was overwhelmed by the undue influence of another.

In what will be a surprise to many lawyers in New Zealand, there is a fourth cause of action that can follow these three. Its name is "fraudulent calumny."

Fraudulent calumny consists of making false and defamatory statements about someone to damage their reputation in the hope that the will-maker will reduce the provision he or she would otherwise give them. In *Re Edwards* [2007] WTLR 1387 Lewison J explained it this way:



Anthony Grant

Although fraudulent calumny has sometimes been treated as a species of undue influence, it is different

"The basic idea is that if A poisons the testator's mind against B who would otherwise be a natural beneficiary of the testator's bounty, by casting dishonest aspersions on his character, then the Will is liable to be set aside.

"The essence of fraudulent calumny is that the person alleged to have been poisoning the testator's mind must either know that the aspersions are false or not care whether they are true or false. In my judgment if a person believes that he is telling the truth about a

potential beneficiary then even if what he tells the testator is objectively untrue, the Will is not liable to set aside on that ground alone."

The law for this cause of action goes back a long way. In the 1775 case of *Butterfield v Scawen*, Sir S J Fust said that:

"If it should appear... that an old and infirm testator who had bequeathed a legacy to AB had been induced by false and fraudulent representations with reference to the conduct of AB made to him for the purpose by CD to make a subsequent codicil revoking that bequest, and substituting for it a much smaller legacy, the effect of which would be to give a larger share of the residue to CD than he otherwise would take, I conceive that the Ecclesiastical Court would not... grant probate of such revoking codicil provided it could be clearly established... that such act and intention were produced by such false and fraudulent representations."

Although fraudulent calumny has sometimes been treated as a species of undue influence, it is different.

Undue influence overpowers the volition of a person without convincing the judgment.

By comparison, in a case of fraudulent calumny, it is the testator's free decision to make the disposition, albeit on an erroneous basis.

For a claim of fraudulent calumny to succeed, it must be shown that the person who made the false aspersions either knew, or didn't care, that they were false.

Anthony Grant is an Auckland barrister specialising in trusts and estates

Anthony Grant is a speaker at ADLS' Cradle to Grave conference.

For more information, click here for [Auckland](#) or [Christchurch](#) ❧