



FRAUDULENT CALUMNY

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What is calumny?

- Origin: late Middle English, from the French “calomnie”; originally from the Latin “calumnia” meaning slander or deception
- **The making of false and defamatory statements about someone in order to damage their reputation**
- *Per Lewison J in Re Edwards [2007] WTLR 1387 (Ch): “There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is “fraudulent calumny”. 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”*

When does the word “calumny” first appear in the authorities?

- Later than you might think
- The phrase “fraudulent calumny” is not used in *Allen-v-M’Pherson* [1845, 1847] 1 HLC 189 at 208:
- *““ If a testator be circumvented by fraud, the testament loseth its force ” (Swinb., part i., sec. 3, plac. 32). There cannot be a stronger instance of fraud than a false representation respecting the character of an individual to a weak old man, for the purpose of inducing him to revoke a bequest made in favour of the person so calumniated.” (Lord Lyndhurst)*
- The practitioners’ texts refer to wills obtained “by fraud” rather than “fraudulent calumny” until the 1970 edition of William Mortimer & Sunnucks which has a paragraph heading “fraudulent calumniation” (amended to “Fraudulent calumny” in the 1982 edition. (The current online edition misquotes Lord Lyndhurst, replacing “calumniated” with “culminated”.)

Is fraudulent calumny a species of undue influence?

- If a yes or no answer is required, then yes, but
- *Per Recorder Cohen QC in Christodoulides-v-Marcou at first instance, para. 1.1: “Andre’s case is that Agni’s Will was procured by the undue influence of Niki and, so far as it is different, her fraudulent calumny.”*
- **But note: fraud misleads a testator whereas undue influence coerces him**
- Williams, Mortimer & Sunnucks at para. 13-60: *“From early times fraud has been a ground for setting aside a will. Fraud has sometimes been regarded as a species of undue influence, which, no doubt, it is in a general sense. But as already shown, undue influence as understood in the probate court involves a degree of coercion, while fraud does not. Furthermore from a pleading point of view fraud and undue influence are regarded as separate and distinct. Fraud must be specifically pleaded and cannot be raised indirectly under the head of undue influence.*

Pleading fraud

- Fraud must be specifically pleaded; what does this mean?
- The pleadings were attacked in *Christodoulides-v-Marcou* at both first instance and on appeal, but upheld as satisfactory by both judges (see Recorder Cohen QC at paras. 147-150 of his judgment, set out at para. 29 of Morgan J's judgment and by Morgan J at paras. 33 – 36)
- NB Lord Millett in *Three Rivers DC-v-Bank of England (No 3)* [2003] 2 AC 1 at [183] – [190] and Lord Hope at [47] and [50] on what amounts to sufficient particulars and the respective roles played by pleadings and witness statements

The modern formulation of the test (*Re Edwards* [2007])

Per Lewison J at paragraph 47:

“There is no serious dispute about the law. The approach that I should adopt may be summarised as follows:

- i) In a case of a testamentary disposition of assets, unlike a lifetime disposition, there is no presumption of undue influence;
- ii) Whether undue influence has procured the execution of a will is therefore a question of fact;
- iii) The burden of proving it lies on the person who asserts it. It is not enough to prove that the facts are consistent with the hypothesis of undue influence. What must be shown is that the facts are inconsistent with any other hypothesis. In the modern law this is, perhaps no more than a reminder of the high burden, even on the civil standard, that a claimant bears in proving undue influence as vitiating a testamentary disposition;

.... Re Edwards continued (1).

- iv) In this context undue influence means influence exercised either by coercion, in the sense that the testator's will must be overborne, or by fraud.
- v) Coercion is pressure that overpowers the volition without convincing the testator's judgment. It is to be distinguished from mere persuasion, appeals to ties of affection or pity for future destitution, all of which are legitimate. Pressure which causes a testator to succumb for the sake of a quiet life, if carried to an extent that overbears the testator's free judgment discretion or wishes, is enough to amount to coercion in this sense;
- vi) The physical and mental strength of the testator are relevant factors in determining how much pressure is necessary in order to overbear the will. The will of a weak and ill person may be more easily overborne than that of a hale and hearty one. As was said in one case simply to talk to a weak and feeble testator may so fatigue the brain that a sick person may be induced for quietness' sake to do anything. A "drip drip" approach may be highly effective in sapping the will;

.... Re Edwards continued (2).

- vii) There is a separate ground for avoiding a testamentary disposition on the ground of fraud. The shorthand used to refer to this species of fraud is “fraudulent calumny”. 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;
- viii) 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 be set aside on that ground alone;
- ix) The question is not whether the court considers that the testator’s testamentary disposition is fair because, subject to statutory powers of intervention, a testator may dispose of his estate as he wishes. The question, in the end, is whether in making his dispositions, the testator has acted as a free agent.

Christodoulides-v-Marcou 2017 **at first instance**

- The family background
- Pani “the patriarch” - lifetime gifts with strings attached
- Pani’s death in 2011
- The Cyprus money: it all boiled down to Niki’s loss of control
- Take – steal – withdraw: what’s the difference?
- Poisoning Agni’s mind: the “annus horribilis”
- The trip to the will writer
- Agni’s death in 2012
- The “will claim” and the “transfer claim”

Christodoulides-v-Marcou 2017 on appeal

- Niki sought permission to appeal both decisions (will claim and transfer claim)
- 2 days of argument; permission not granted; why not?
- Essentially 3 grounds of appeal: (i) the pleading point; (ii) the challenge to findings of fact – the difference between “taken” and “withdrawn”; (iii) did the judge misapply the relevant legal principles – *Re Hayward* [2017] 4 WLR 32

Is there a new test for calumny? (*Hayward-v-Hayward*)

- No (at least not yet).
- The Appellant postulated a 6 stage test on the basis of what the judge in *Hayward* said at para. 122
- Two of these stages would introduce new requirements: (i) it would have to be shown that the fraudster's purpose or motive was to procure a change in the will (as opposed to it being sufficient that this was the *effect* of the calumny; (ii) that the impugned will was made *only* because of the fraudulent calumny
- Morgan J dealt with these points at paras. 52-6 and 58-60 **but has he left the door open for a future challenge on the “purpose” point?**

List of authorities

- ***Marsh-v-Tyrrell and Harding* (1828) 2 Hag Ecc 84**
- ***Grindall-v-Grindall* (1831) 4 Hagg. 10**
- ***Allen-v-M'Pherson* (1847) 1 HL Cas 191**
- ***Boyse-v-Rossborough* (1857) 6 HL Cas 2**
- ***White-v-White* (1862) 2 Sw & Tr. 504**
- ***Hall-v-Hall* [1868] LR 1 P&D 481**
- ***Craig-v-Lamoureux* [1920] AC 349**
- ***Carapeto-v-Good* [2002] EWHC 640 Ch**
- ***Re Edwards (Deceased); Edwards-v-Edwards* [2007] WTLR 1387**
- ***Cowderoy-v-Cranfield* [2011] EWHC 1616 (Ch)**
- ***Re Boyes (Deceased); Nesbitt-v-Nicholson* [2013] EWHC 4027 (Ch)**
- ***Bateman-v-Overy and another* [2014] EWHC 432**
- ***Re Hayward (Deceased); Kunicki-v-Hayward* [2017] 4 WLR 32**
- ***Christodoulides-v-Marcou* [2017] Recorder Cohen QC (Lawtel, Westlaw)**
- ***Christodoulides-v-Marcou* [2017] EWHC 2632 (Ch) Morgan J**
- ***Christodoulides-v-Marcou* [2017] EWHC 2691 (Ch) Morgan J (the “transfer” appeal)**

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