Overview

• Overview of the law of joint and several liability and examples
  – Several liability
  – Joint liability
  – Joint and several liability

• The proportionate liability provisions in Australia
  – Policy rationale
  – Scope and effect
  – Case law

• States and Territories legislation

• Proportionate liability under the Corporations Act
  – Providing the legislative context for Selig v Wealthsure
The law of joint and several liability

• **Several liability**
  – two or more obligors undertake separate obligations to another party
  – each obligor is liable only for its own obligations
  – if one of the obligors cannot meet its obligations, the other obligors are not liable

• **Joint liability**
  – two or more obligors undertake the same obligation in favour of another party
  – each obligor is liable in full for the performance of the relevant obligation
  – if one obligor pays the liability in full, it can require the other obligors to pay their share of the liability

• **Joint and several liability**
  – combination of several liability and joint liability
  – action can be taken against one or more of the obligors
  – if payment is not received in full, action can be taken against the other obligors.
Examples

• Contract:
  – Guarantees – may be joint, several or joint and several

• Tort:
  – Joint tortfeasors - cause of action is the same (e.g. tort by an agent)
  – Several (or concurrent) tortfeasors - different causes of action
  – Joint and several tortfeasors (e.g. two professional advisors owe a duty of care to a client and breach that duty of care)
• Policy rationale
  – Arguments for:
    • joint and several liability means that defendants with deep pockets disproportionately bear liability
    • This is inequitable and increases the cost of insurance
    • Ultimately, the question is who should bear the risk of an insolvent wrongdoer or an untraceable wrongdoer
    • In the case of financial loss or property damage (not personal injury), the risk should lie with the plaintiff
    • Encourages earlier settlement of disputes
  – Arguments against:
    • Plaintiffs have less flexibility when determining strategy
    • Plaintiffs incur time and cost in sorting out the implications
• State and Territories legislation:
  – *Wrongs Act 1958* (Vic)
  – Differences between jurisdictions in Australia
    • Legislation
    • Case law
  – Moves to achieve uniformity through the Standing Committee of Attorneys-General (SCAG)
• Scope and effect (see handout)
  – The concept of an “apportionable claim”
    • s 1041L(1) & (2)
      • Misleading or deceptive conduct under s 1041H is apportionable, but not a false or misleading statement under s 1041E
  – Who is a concurrent wrongdoer?
    • s 1041L(3)
  – How does proportionate liability work?
    • s 1041N(1)(a) & (b)
  – Note contributory negligence provisions
    • s 1041N(3)
      • Contributory negligence respecting a claim based on a contravention of s 1041H is provided for in s 1041I(1B)