



# Proportionate Liability

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22 July 2015



- 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*



- **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.



- **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)



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