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Legal Bulletin

PROPORTIONATE LIABILITY: THE VICTORIAN AND NEW SOUTH WALES REGIMES

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Too often the concept of proportionate liability and how it operates in courts and tribunals is not understood by lawyers and litigants. It is crucial to understand the regime as it operates in New South Wales and Victoria, particularly if one practices cross-jurisdictionally.

Below is an analysis of the New South Wales and Victorian regimes, and the similarities and differences between them.

VICTORIA	NEW SOUTH WALES
1. The definition of “apportionable claim” is the same under both regimes, that is a claim for economic loss or damage to property arising from a failure to take reasonable care. s24AE and 24AF(1) <i>Wrongs Act 1958</i>	s34(1) <i>Civil Liability Act 2002</i>
2. Neither applies to a personal injury claim. s24AG and s24AE <i>Wrongs Act 1958</i>	s34(1) and s5 <i>Civil Liability Act 2002</i>
3. Both regimes provide that two or more apportionable claims are to be determined as a single claim. Although both regimes express this concept differently, they have the same intent. s24AF(2) <i>Wrongs Act 1958</i>	s34(2) <i>Civil Liability Act 2002</i>
4. The definition of “concurrent wrongdoer” is the same. S24AH(1) <i>Wrongs Act 1958</i>	s34(2) <i>Civil Liability Act 2002</i>
5. The two regimes adopt a different approach to determining proportionate liability where a concurrent wrongdoer is not joined to the proceeding. s24AI <i>Wrongs Act 1958</i> s24AI(3) – the court shall not have regard to the comparative responsibility of a person not a party unless dead or insolvent.	s35(1) <i>Civil Liability Act 2002</i> s35(3), (4), (5) <i>Civil Liability Act 2002</i> – applies whether or not all concurrent wrongdoers are joined. See also s35A notification of potential concurrent wrongdoers and, leave to join.



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6. Both regimes provide for the joinder of concurrent wrongdoers.

s24AL <i>Wrongs Act 1958</i>	s38 <i>Civil Liability Act 2002</i>
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7. A defendant concurrent wrongdoer cannot be required to contribute towards damages awarded to another concurrent wrongdoer.

s24AJ <i>Wrongs Act 1958</i>	s36 <i>Civil Liability Act 2002</i>
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8. A subsequent action may be brought against a concurrent wrongdoer who was not party to the initial action:

s24AK <i>Wrongs Act 1958</i>	s37 <i>Civil Liability Act 2002</i>
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9. Fraud of defendant:

s24AM <i>Wrongs Act 1958</i> – a fraudulent defendant is jointly and severally liable for damages awarded against any other defendant.	s34A <i>Civil Liability Act 2002</i> – the NSW regime refers to an “excluded concurrent wrong doer” which extends wider than fraud. In that case the proportionate liability regime does not apply.
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10. It makes no difference if a concurrent wrongdoer is insolvent.

s24AH(1), s24AI(3) <i>Wrongs Act 1958</i>	s34(4) <i>Civil Liability Act 2002</i>
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There will be many instances where the concept of proportionate liability will apply. Multi-defendant proceedings are common, especially in construction litigation. It is necessary to be familiar with it.

For more legal advice and analysis on point, Lovegrove & Lord can be contacted for swift assistance.

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