PROPORTIONATE LIABILITY: HOW IT OPERATES

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The proportionate liability legislative framework

As a result of the Ipp Report, the Commonwealth Government, along with the states and territories, introduced proportionate liability legislative schemes. While each statute differs (some significantly), the basic concept of proportionate liability remains the same across the country.

What does ‘proportionate liability’ mean?

The legislative schemes enable defendants to take advantage of a proportionate liability defence.

In practice, this means that the defendant’s liability is limited to a percentage of a plaintiff’s notional damages that is fair and equitable having regard to the extent of the defendant’s responsibility for the plaintiff’s harm and the extent of the responsibility of other wrongdoers whose acts or omissions also caused or contributed to that harm.

What are the pre-conditions required to use a proportionate liability defence?

Generally speaking, the following pre-conditions are needed in order to use a proportionate liability defence:

- A plaintiff’s claim gives rise to a defendant’s liability in damages arising either under a law of tort for breach of a contractual duty of care or under legislation.
- The defendant’s liability is for harm consisting of economic loss, or loss of or damage to property, and (relevantly) not loss consequential upon personal injury.
- There is more than one wrongdoer (concurrent wrongdoers) who committed the wrongdoing from which harm arose.
- The liability of the wrongdoer who is entitled to the benefit of proportionate liability is negligent or innocent.

What are the general principles underlying proportionate liability legislation?

While each separate piece of legislation differs in form, a number of general principles underlie them all.

Proportionate liability schemes do not apply to personal injury actions. Each concurrent wrongdoer must have legal liability to the plaintiff for a defendant to rely on a proportionate defence.[1]

Selective pleading cannot generally avoid the operation of the proportionate liability regimes. [2]
Some states permit parties to contract out of the proportionate liability regimes, while others do not.[3]

Key case: how proportionate liability works in practice

The most significant decision in relation to proportionate liability is the seminal High Court decision of *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd.*[4]

**The facts**

In late 2005, Mr Caradonna and Mr Vella entered into a business venture to host a boxing event.

For this purpose, Mr Caradonna and Mr Vella opened a joint bank account.

At the same time, Mr Vella and Mr Caradonna visited Mr Vella’s solicitor and took possession of certificates of title of three properties owned by Mr Vella.

Mr Caradonna then approached Mitchell Morgan for a loan offering security over one of Mr Vella’s properties. Mitchell Morgan agreed to loan money to Mr Caradonna and Mr Vella, but required them to have their solicitor certify and identify the borrower on all loan and mortgage documents.

Mr Caradonna forged Mr Vella’s signature on the documentation and had his cousin, a solicitor, Mr Flammia, dishonestly certify the forged signature as being that of Mr Vella.

On the basis of the forged documents and the dishonest false certification, a mortgage was registered over Mr Vella’s property and funds of over $1 million were advanced to the joint bank account.

Both the mortgage and loan agreement documentation had been prepared by Hunt & Hunt Lawyers, a firm of solicitors who acted for Mitchell Morgan in the transaction.

After the money was forwarded to the joint account, Mr Caradonna withdrew the loan money by further forging Mr Vella’s signature and misappropriated the money for his own purposes.

By the time the proceedings were instituted by Mr Vella against Mitchell Morgan and others, Mr Caradonna and Mr Flammia (collectively defined by the High Court as ‘the fraudsters’) were bankrupt.

**The High Court’s decision**

The High Court held (in a majority decision) that Mitchell Morgan’s claim against Hunt & Hunt Lawyers was an apportionable claim.

The majority concluded that:

*The loss or damage which Mitchell Morgan suffered was its inability to recover the monies it advanced. Mitchell Morgan’s claim against Hunt & Hunt was based on a different cause of action from the claims it would have had against Mr Caradonna and Mr Flammia. But the claims against all of Hunt & Hunt, Mr Caradonna and Mr Flammia were founded on Mitchell Morgan’s inability to recover the monies advanced and the acts or omissions of all of them materially contributed to Mitchell Morgan’s inability to recover that amount.*[5]

The majority also looked closely at the relevant provision of the NSW legislation and held that, as a result, it needed to answer two questions:
1. What is the damage or loss that is the subject of the claim?
2. Is there a person other than the defendant whose acts or omissions also caused that damage or loss?

**What is the meaning of the word ‘damage’?**

The Court concluded that the word ‘damage’, properly understood, means the injury and other foreseeable consequences suffered by the plaintiff. In other words, the damage was Mitchell Morgan’s inability to recover the monies and interest that it had advanced to the joint bank account, whether from the fraudsters or from Mr Vella.

**What happens when two or more persons cause the ‘damage’?**

The effect of the majority’s reasoning was that two or more persons’ acts or omissions (or act or omission) caused, independently of each other, the damage or loss that was the subject of the claim of Mitchell Morgan.

As a result, the majority found that Hunt & Hunt Lawyers were entitled to the benefit of the proportionate liability regime and that their liability was limited to 12.5% of Mitchell Morgan’s total claim. The practical consequence was that Mitchell Morgan could not recover the balance of 87.5% of its claim, as the fraudsters were bankrupt.

**The significance of the decision for professionals**

Hunt & Hunt is a clear demonstration of how a professional’s exposure to an apportionable claim can be relatively insignificant if there are other wrongdoers also at fault.

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[3] The NSW version permits contracting out, while the Victorian version does not. The position in South Australia and in Queensland is unclear.


**AUTHORS**

**BILL CONOR**

SPECIAL COUNSEL

+61 8 8128 7734

bill.conor@bnlaw.com.au