2.0 SUMMARY

- **Causation** determines the existence of liability (as intuitively, one should be responsible for damage that one’s wrongful act creates), whereas remoteness restricts the scope or extent of liability (as a matter of substantive justice)
- **Factual causation** is proven through the satisfaction of the ‘but for’ test *(what case? March v Stramore?)*
  a) Some suggestions by Justice McHugh in High Court that the regular test should be supplemented with a ‘common sense’ qualification (such that where a causation test is satisfied but due to common sense, should be excused). Criticisms surround the fact that this is not a sophisticated test - the qualification is a bit vague and conceptually empty
  b) **NB:** Causation isn’t a big issue in contract cases so this is mainly an academic argument
- **Remoteness:** Two limbs test in Hadley v Baxendale: Loss which follows in the ordinary course of things OR a loss that the parties ought to have reasonably foreseen at the date of formation, as a consequence of the breach
  a) ‘Reasonably foreseen’ - an objective test
  b) **What likelihood is required?** Likely, probably or possible? Unsettled debate - see Carter
  c) Consent and assumption of risk are the fundamental principles underpinning this principle. That is why the relevant date is the time of formation.
  d) ‘The Achilleas’ - debate for problem question
- **Statutory Test in sSD CLA 2002**
  a) Per s3A this applies where harm is caused by negligence as a matter of fact OR where you breach a duty to exercise reasonable care or skill (the latter is a strict liability duty where negligence may or may not be present)
  b) **Test:** a factual causation test and a ‘scope of liability’ test (latter is policy-driven)
  - Interesting application:
    a) **Rhinehold v Lotteries** suggests that this statutory test gives plaintiffs motivation to plead unusually. Where there is a breach of duty as a matter of fact, then your pleadings should deny the wrongdoing, but in the alternative, they should plead that they should have negligently done the wrongdoing. *(Avoid non-negligent wrongdoing at all costs)*
    b) **Article:** Carter
  - **Different trading losses:** Victoria Laundry v Newman (general losses and extraordinary losses)
2.1 CONCEPTUAL DISTINCTION

— Causation: restricts legal liability only to acts which you are responsible for causing (therefore we have concepts such as novus actus etc.); this determines the existence of liability
  — Remoteness: defines the extent (scope) of liability
    o Because causation test (‘but for’) is easily satisfied even in absurd circumstances (think of the simultaneous shooting case).
    o If pursued relentlessly, relatively insignificant defaults by the defendants could render the defendant liable for unexpected or extraordinary losses to the plaintiff (it is therefore a matter of substantive justice)
    o Eg. Because of your carelessness, a warehouse that you maintain has fallen into disarray. A prospective client comes to inspect the warehouse because of its prime location, set upon leasing it but because it is so wrecked they decide to look at another warehouse to be sure. At this second warehouse, this client is unfortunate enough to be struck down by a loose barrel – causation tenuously satisfied but fails on remoteness (clearly).

— Mitigation also works to restrict the defendant’s liability
— Contrast to tests in Torts:
  o Causation: ‘but for’ test (*March v Stramare*) – would the plaintiff have suffered the harm but for the defendant’s negligence
    ▪ Suggestion (by Mason J in HC) that the causation test be supplemented by ‘common sense’ (to replace remoteness test) – however, this is arguably an unsophisticated, vague and conceptually empty suggestion
    ▪ Difficult to qualify and too discretionary
    ▪ Concept of novus actus interveniens
  o Remoteness: would a reasonable person in the position of the defendant be able to reasonably foresee the type of damage? (*Wagon Mound (No 1)*)

2.2 LOSS

— in a commercial contract concerning goods where it is in the contemplation of the parties that the proprietary interest in the goods may be transferred from one owner to another after the contract has been entered into and before the breach which causes loss or damage to the goods, an original party to the contract, if such be the intention of them both, is to be treated in law as having entered into the contract for the benefit of all persons who have or may acquire an interest in the goods before they were lost or damaged, and is entitled to recover by way of damages for breach of contract, the actual loss sustained by those for whose benefit the contract was entered into.

*Alfred McAlpine Construction Ltd v Panatown Ltd*

2.3 CAUSATION OF LOSS OR DAMAGE

— Damages must have been caused by the defendant (*Luna Park*)
— Establishes a connection between the breach and the loss suffered
— A sufficient connection is established if the plaintiff prove that the loss or damage would not have been suffered *but for* the defendant’s breach
— Eg. In *Reg Glass Pty Ltd v Rivers Locking Systems Pty Ltd*, the door-fitting company was found liable for subsequent burglaries which occurred as a result of failing to install proper doorways that were intended to keep out burglars. Causation would not have been satisfied if it was proven that the burglars could have gained
entry even if the door had been reasonably fit

Where there are multiple, concurrent causes, the defendant’s breach need only be a cause (however common sense operates to exclude causation where it is very minor)

**Statutory Test per s5D Civil Liability Act**

A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

Application

- Per s.3A: Where damage results from negligence as a matter of fact or where damage results from breach of a duty to exercise reasonable care or skill (whether brought in tort or contract)

Commentary per Rhinehold v Lotteries

- Where wrongdoing is found, pleadings should purport that this wrongdoing was done negligently. Must avoid a finding of wrongdoing done non-negligently, because

  - “the lottery of risk allocation” by Carter

**2.4 REMOTENESS OF DAMAGE**

Even if caused by the defendant’s breach, a plaintiff’s loss is not recoverable unless it falls within the test of remoteness (Hadley v Baxendale)

The Hadley test has two limbs:

- The damage must flow to all similarly placed plaintiffs in the ‘usual course of things’ from the defendant’s breach OR in the absence of actual knowledge, damage that the defendants ought to have contemplated that the plaintiff would suffer as a result of breach (‘reasonably foreseeable’)

  - In Victoria Laundry the supply of a boiler was delayed, causing loss of profits by plaintiff, particularly some lucrative contracts with the Ministry of Supply.
    - Held: The defendants did not know the precise role of the boiler (as extra unit or as substitution) so whilst damages were awarded for some profits whose loss was ‘reasonably expected,’ the loss of the particularly profitable contracts were not compensated for, because the defendants had no knowledge of this business
  - Look to what transpired during negotiations to infer knowledge

- This test is narrow than the remoteness test in torts

(a) What kind of loss is to be compensated?

- Hadley: The plaintiffs owned a flour mill and sought the defendants to ship a piece of equipment in order to manufacture a new shaft. The delivery was delayed causing the plaintiff’s mill to be stopped five days longer than necessary. Profits which would otherwise have been accrued were lost
  - Held: Defendants were not liable for the lost profit: they did not know that the mill would be stopped (the plaintiffs may have had a spare shaft if it was so crucial)

- Koufos: The defendants were contracted to carry sugar for the plaintiffs, but delivery was delayed. During the delay, sugar market prices fell and the plaintiffs suffered loss.
  - Held: Defendants were liable as this loss was held to be in the ‘usual course of things.’ This
conclusion was reached because they knew the plaintiffs were merchants and that the delivery was to a well-known sugar market. Therefore, in the absence of actual knowledge, they ought to have contemplated that the plaintiffs would have suffered the loss in question

— The Achilleas:
  o Per Lord Hoffman: ‘assumption of responsibility’ approach – a contracting party should only be held liable for damage that he thought was significant for the purposes of the risk he was undertaking ie. A defendant should only be held liable for damages which they actively assumed responsibility for at the time of contract formation
  o Hoffman regards the remoteness test as applicable only to losses for which a promisor has assumed responsibility
  o An additional requirement that goes above actual knowledge – a party needs to have actively assumed responsibility for the risk
  o NB: This point, while interesting, has not been ruled upon in Australia

(b) The Role of ‘Foreseeability’
  — How certain must we be about what is ‘usual’ ie. what role does probability play within this test? (‘foreseeability’) – Unsettled debate
    o Per Victoria Laundry (English Court of Appeal), it was described as ‘reasonably foreseeable losses’ or losses ‘likely to result’
    o In *Koufos* the House of Lords reviewed authorities, with each judge coming to a different conclusion (‘liable to result,’ ‘serious possibility’ or ‘real danger’) – ultimately inconclusive
    o Australian authorities favour Lord Reid’s preference – losses that are ‘not unlikely’ to result (note that it is narrower than ‘reasonably foreseeable’ requirement under torts)

(c) Other Issues
  — Where concurrent causes of action in T&C, which causation and remoteness test is applicable?
    o Recent English court cases have favoured the causation/remoteness test for contract cases as the duty that arises under tort can be subsumed under an explicit duty under contract
    o Lord Denning in *H Parsons (Livestock)* distinguished between claims for loss of profit consequent on breach and physical damage from breach. He posited that a contract test should apply to the former but that the latter should be regulated by a ‘reasonable foreseeability’ test
    o Facts – a storage food dispenser supplied by the defendant was defective, causing the food within to become mouldy and kill the pigs.
EXAM SCAFFOLD

Plaintiff who claims to have suffered loss (damage) must establish: that the loss was caused by the defendant’s breach and that it is not too remote.

**CAUSATION**
‘but for’ the defendant’s breach, the plaintiff’s loss would not have occurred (*March v Stramare*)

**REMITENESS**
*Hadley v Baxendale* test:
The damage is such as may be fairly and reasonably considered either arising naturally (ie. flows from the ‘usual course of things’) from the defendant’s breach OR such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it

⇒ Differentiate ordinary trading losses, and particularly lucrative ones (*Victoria Laundry*)

- Hadley v baxendale – 2 limbs
- Ordinary loss: arisen naturally, according usual course of things
- Special loss – actual knowledge

*s5D Civil Liability Act 2002* test:
Apply when (*s3A*): Where damage results from negligence as a matter of fact or where damage results from breach of a duty to exercise reasonable care or skill

**COMMENTARY**
- *Rhine Lotteries* commentary about application of statutory test of remoteness (*s5D*)
- Mason J’s suggestions about a ‘common sense’ qualification to causation tests
- Conflicting tests of remoteness and causation in concurrent liability cases
- The meaning of foreseeability in the remoteness (*HvB*) test