

systems in respect of liability for damage caused by products. These divergencies pertain to important issues such as the legal basis of liability, the grounds of exemption from liability and the kinds of damage for which compensation is recoverable. Depending on which law is applicable and in which jurisdiction damages are sought, the question whether compensation can be obtained and to what extent, and from whom and under what circumstances, will thus often receive a different answer.

2. In the setting of the international movement of goods, where increasingly goods produced in one country are used or consumed in others, the disharmony in the law of products liability has resulted in uncertainty from the point of view of both the consumer or user and the producer.

3. The survey made in parts I to IV of this report would appear to indicate that the preparation of rules establishing a uniform liability scheme is feasible.

4. The Commission may wish to consider whether there are *prima facie* sufficient grounds that would justify a continuation of work on products liability.

5. Should the Commission conclude that a continuation of work on products liability is at this stage justified, it may wish to consider in what direction such work should proceed and indicate the issues which in its view need further study.

6. It is suggested that further work be concentrated on the preparation of a preliminary draft set of rules for a uniform liability scheme. This draft set, to be accompanied by explanatory notes, should envisage alternative solutions, particularly in respect of the legal basis of liability and the persons incurring liability. It is expected that, if work were organized in this way, it would show more clearly the feasibility of a particular scheme and facilitate the policy decision which the Commission may wish to take at a later stage of the work, namely whether the subject-matter is of sufficient importance in the context of international trade to justify the drawing up of uniform rules and, if so, what would be the appropriate type of instrument.

7. If the Commission should conclude that work towards the preparation of uniform rules should proceed, the Secretariat suggests that such work should be guided by the following considerations.

(a) The scheme should be inspired by the general

policy considerations underlying the evolution of products liability law that were identified and evaluated in part I of this report.

(b) As to the legal basis of the scheme, for the reasons stated in part II of this report, the contract approach, including warranty, is not thought to constitute a suitable basis for a uniform liability scheme. The scheme should instead focus, by means of alternative sets of draft rules, on the following alternatives:

- (i) The traditional negligence concept under which the burden of proving fault would be on the plaintiff;
- (ii) The modified negligence concept under which negligence on the part of the defendant is presumed; in other words, under which the defendant has the burden of rebutting that presumption or proving absence of fault;
- (iii) The strict liability concept, based on the defective, dangerous condition of the product. As has been suggested in part II of this report, except for development or system risks which call for special consideration, strict liability can be viewed as virtually similar to the concept of "presumed negligence" ((b) (ii) above).

(c) As to the persons incurring liability, it has been submitted in part III of this report that producers, including suppliers of component parts, and commercial distributors, could be regarded as potential defendants. However, a case has been made in favour of limiting the number of potential defendants so as to provide greater certainty as to who is liable and to avoid the pyramiding of insurance costs. Although the report reflects a preference for channelling liability to the importer ("the first national distributor"), it is suggested that further consideration should be given to the possibility of channelling liability to the producer, or to the importer and the producer, and that alternative sets of draft rules should reflect such possible options.

(d) The preliminary draft rules would also be concerned with such issues as the types of product covered by the scheme, the persons who could claim compensation, the interests to be protected, what damages are recoverable, defences available to the person liable, periods of limitation, maximum amounts, the scope of application of the uniform scheme and its relationship to other liability rules.

B. Report of the Secretary-General: analysis of the replies of Governments to the questionnaire on liability for damage caused by products (A/CN.9/139)*

CONTENTS

	Paragraphs		Paragraphs
INTRODUCTION	1-4	Question 6: For what types of loss or damage can compensation be recovered?	1-26
I. QUESTIONNAIRE		Question 7: What defences are available, and what is their effect?	1-13
II. ANALYSIS OF REPLIES		Question 8: Are there fixed limits to liability? ..	1-16
A. Contractual liability		Question 9: In respect of what matters does the plaintiff have the burden of proof, and in respect of what matters does it rest on the defendant?	1-7
Questions 1 and 2:	1-28		
On what concepts is liability based?			
What acts or omissions may entail liability?			
Questions 3 and 5:	1-5		
What persons may be liable?			
What persons may be entitled to compensation?			
Question 4: Does liability differ depending on the kind of products causing the damage?	1-2	B. Extra-contractual liability	
		1. Delictual (tortious) liability	

* 13 April 1977.

CONTENTS (continued)

	Paragraphs		Paragraphs
Questions 1 and 2:	1-22	Question 6: For what types of loss or damage can compensation be recovered?	1-21
On what concepts is liability based?		Question 7: What defences are available, and what is their effect?	1-12
What acts or omissions may entail liability?		Question 8: Are there fixed limits to liability?	1-14
Question 3: What persons may be liable? . .	1-5	Question 9: In respect of what matters does the plaintiff have the burden of proof, and in respect of what matters does it rest on the defendant?	1-4
Question 4: Does liability differ depending on the kind of products causing the damage?	1-3	2. Other forms of extra-contractual liability . .	1-11
Question 5: What persons may be entitled to compensation?	1-3	C. Proposals for law reform	1-9

INTRODUCTION

1. At its eighth session (1-17 April 1975), the United Nations Commission on International Trade Law considered a report of the Secretary-General entitled "Liability for damage caused by products intended for or involved in international trade" (A/CN.9/103; Yearbook . . . 1975, part two, V), and requested the Secretary-General to prepare a further report examining specific issues deemed relevant by it in connexion with the continuation of work on the subject. The Commission was of the view that the Secretariat should also consider the advisability of circulating a questionnaire designed to elicit information on relevant legal rules and case law, and also on governmental attitudes to the issues involved.*

2. For the purpose of preparing the further report requested by the Commission, the Secretariat circulated a questionnaire to Governments under cover of a note verbale dated 26 March 1976. This questionnaire is reproduced in part I of this document. The following 35 Governments had replied to the questionnaire as at 31 March 1977: Afghanistan, Australia, Austria, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Chile, Cyprus, Denmark, Fiji, German Democratic Republic, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, Turkey, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and Venezuela.

These replies are analysed in the present document. The replies, which with their annexures comprise approximately 300 pages, are with the Secretariat and may be consulted by members of the Commission if they so desire.

3. In the analysis that follows, the replies have been considered under the three categories of "contractual liability", "extra-contractual liability" and "proposals for law reform". The division into contractual liability and extra-contractual liability was adopted both because it commands wide acceptance and because many replies adopted that division in setting forth the law. Within the category of extra-contractual liability, the area of delictual (tortious) liability was analysed separately because of its primary relevance to the subject under consideration.

4. The further report requested by the Commission

referred to above which is entitled "Liability for damage caused by products involved in international trade" is contained in document A/CN.9/133 (reproduced in this volume, part two, IV, A).

I. QUESTIONNAIRE

Information is requested on the national law in respect of liability for damage caused by products. It would be appreciated if a full account is given of statutory law and case law. The information should include the rules of contractual liability, tortious liability, and any other kind of extra-contractual liability in this field.

The questions listed below are provided as guidelines indicating the issues which should be dealt with in the description of each type of liability. Neither the issues raised in the questions nor the examples, which are based on distinctions made in some legal systems, are intended to restrict the scope of the account of the law. Thus, comments or information on any further relevant issues would be appreciated. It would be of assistance if the account would indicate any recent trends in the development of the law and any project for law reform on the subject at issue.

List of issues

1. On what concepts is liability based?
(E.g., express contractual promise; notion of implied warranty; principle of fault, particularly negligence; strict liability, based on defect in product)
2. What acts or omissions may entail liability?
(E.g., failure or mistake in manufacturing process; faulty design; misrepresentation of condition concerning safety; failure to give proper warning or instruction; circulation of product in unsafe condition not discoverable at the time of circulation with existing scientific knowledge)
3. What persons may be liable?
(E.g., producer or assembler of finished product; supplier of component parts; wholesaler, retailer; service contractor)
4. Does liability differ depending on the kind of products causing the damage?
(E.g., special categories such as pharmaceutical products, food motor vehicles; movables/immovables; mass produced goods/goods individually manufactured; crude or processed raw materials; natural products, agricultural products)

* Yearbook . . . , 1975, part one, II, A, paras. 102 and 103.

5. What persons may be entitled to compensation? (E.g., buyer only; also third party in some way related to him; private user or consumer; commercial user or consumer; any injured person)
6. For what types of loss or damage can compensation be recovered? (E.g., death, physical injury; damage to property other than product itself; economic loss unconnected with physical injury or property damage; infringement of non-pecuniary interest, "*dommage moral*")
7. What defences are available, and what is their effect? (E.g., assumption of risk; plaintiff's misconduct such as misuse of product; intervening act of third person; circumstances beyond human control, "*force majeure*")
8. Are there fixed limits to liability? (E.g., maximum amounts per product, injury or year; periods of limitation and other time-limits)
9. In respect of what matters does the plaintiff have the burden of proof, and in respect of what matters does it rest on the defendant?

II. ANALYSIS OF REPLIES

A. CONTRACTUAL LIABILITY¹

Question 1: On what concepts is liability based?

Question 2: What acts or omissions may entail liability?

1. The information given separately in reply to these two questions was interrelated, and is therefore analysed together.

Breach of contractual terms agreed to by the parties

2. The majority of States which replied noted that breach of agreed terms as to the quality or fitness of goods supplied entailed liability (Afghanistan, Australia, Barbados, Benin, Botswana, Burundi, Canada,² Cyprus, Denmark, Fiji, German Democratic Republic,³ Germany,

¹ The replies of the Byelorussian Soviet Socialist Republic and the Union of Soviet Socialist Republics were confined to extra-contractual liability. The reply of Turkey only indicated that the legislation of Turkey did not provide a special rule with regard to the civil liability of producers, but that producers incurred certain civil liabilities for defective products through the distributors of their goods. The reply of Hungary was mainly confined to extra-contractual liability.

² Information was given by Canada separately for the province of Quebec, which has a system of civil law in the field of products liability, and for its other provinces, which have systems based on the English common law. When Canada is cited without any restriction as to a province or provinces, the proposition for which the citation is made applies to all provinces.

³ The information given in the reply of the German Democratic Republic related to the law on international economic contracts adopted by the Peoples Chamber of the German Democratic Republic on 5 February 1976. The law applies to all international economic contracts and related legal relationships in so far as the law of the German Democratic Republic is applicable to them, unless otherwise provided in international agreements or conventions to which the German Democratic Republic is a party, or in specific laws of the German Democratic Republic.

Federal Republic of, Ireland, Madagascar, Mauritius, Netherlands, Norway, Pakistan, Philippines, Poland (provided the terms were in writing), Portugal, Romania, Senegal, Sierra Leone, Sweden, United Kingdom of Great Britain and Northern Ireland, Venezuela). The nature of the act or omission entailing liability depended on the contents of the term agreed to. No distinctions were drawn under this basis of liability depending on the type of supply contract in question (e.g. sale, hire, exchange, etc.).

3. Canada, in respect of the province of Quebec, noted that a contractual clause excluding liability for breach of agreed terms as to quality or fitness was of no effect in the following cases:

- (i) When the clause was against public order and morality;
- (ii) When the breach of contract involved *faute lourde* or gross negligence;
- (iii) In the case of fraud which was a cause of nullity of the contract and created liability for damages;
- (iv) Where one party had induced the other to accept the exclusionary clause by false representations;
- (v) Where the effect of the exclusionary clause would be impossibility to execute the fundamental obligations of the contract.

Breach of obligations imposed by law independently of agreement between the parties to a contract

(a) *Sale of goods*

4. The replies indicated that certain legal systems imposed special obligations in contracts for the sale of goods. Two predominant approaches were noted:

- (i) *The imposition of implied terms as to fitness and merchantability modelled on the provisions of the Sale of Goods Act 1893 of the United Kingdom.*

5. Australia, Barbados, Canada (for provinces other than Quebec), Fiji, Ireland, Pakistan, Sierra Leone and the United Kingdom noted that the following terms were implied in a contract for the sale of goods:

(a) Where the buyer made known to the seller the particular purpose for which the goods were required, so as to show that the buyer relied on the seller's skill or judgement, and the goods were of a description which it was in the course of the seller's business to supply, there was an implied condition that the goods should be reasonably fit for such purpose.

(b) Where goods were bought by description from a seller who dealt in goods of that description (whether he was the manufacturer or producer or not) there was an implied condition that the goods should be of merchantable quality.

(c) An implied warranty or condition as to quality or fitness for a particular purpose might be annexed by the usage of the trade.

6. The act entailing liability was the breach of such an implied term.

7. Australia, Barbados, Canada (for provinces other than Quebec), Ireland, Pakistan and the United Kingdom also noted that, in order to establish liability, the buyer had only to prove a breach of such an implied term,

and did not in addition have to prove absence of reasonable care on the part of the seller.

Exclusion of implied terms⁴

8. The extent to which liability for breach of these implied terms could be excluded by agreement between the parties varied. Ireland and Sierra Leone noted that such liability could be excluded. Australia and Canada (for provinces other than Quebec) noted that, while exclusion or variation was possible under the terms of the legislation on the sales of goods imposing the implied terms, other legislation had, with a view to consumer protection, either declared such exclusion to be ineffective, or had implied other terms as to quality and fitness which could not be excluded.

9. Thus Australia noted that:

(a) Under the Trade Practices Act 1974, which applied to contracts wherever made involving international trade to or from Australia and between states of Australia, where goods were to be supplied to a consumer, certain conditions as to quality and suitability were implied which the parties could not exclude, restrict or modify.

(b) Under the Manufacturers' Warranties Act 1974 of South Australia, which applied to goods sold by retail, a warranty that the goods were of merchantable quality was implied which could not be excluded by agreement.

10. Canada noted that:

(a) Under the Ontario Consumers Protection Act 1970, the implied terms applying to a contract of sale of goods could not be negated or varied by any written term or acknowledgement in the case of a "consumer sale" as defined by that Act.

(b) Under the Manitoba Consumer Protection Act 1970, terms closely corresponding to those set forth in paragraph 5 above were implied in a "retail sale" as defined in that Act and could not be excluded.

(c) Under the British Columbia Sale of Goods Act 1960, as amended, any term or agreement which purported to negate or in any way diminish the terms implied by that Act was void in the case of a "retail sale" as defined in that Act.

11. The United Kingdom noted that, under the Supply of Goods (Implied Terms) Act 1973, the implied terms set forth in paragraph 5 above could not be excluded in consumer contracts.

(ii) *The implied warranty against hidden defects, modelled on the provisions of the French Civil Code*

12. Belgium, Benin, Burundi, Canada (for the province of Quebec), Chile, Madagascar, Mauritius, Netherlands,⁵ Nicaragua, Senegal and Venezuela noted that a warranty was implied in a contract for the sale of goods in the following terms:

(a) The seller was liable on a warranty for hidden defects in the thing sold which rendered it unfit for the

use for which it was intended or which diminished its usefulness to such an extent that the buyer would not have acquired it, or would have paid a lower price for it, had he known of such defects;

(b) The seller was not liable if the defects were apparent, and the buyer could have ascertained them for himself;

(c) The seller was liable even if he was unaware of the defects;

(d) Where the seller was unaware of the defects, the buyer had the option of returning the thing sold and claiming back the price, or of keeping the thing and claiming a reduction of the price. The buyer could also claim the expenses occasioned by the sale;

(e) Where the seller was aware of the hidden defects at the time of the sale, he was liable not only to return the price, but to compensate for all damages suffered by the buyer.

13. The Philippines noted the existence of a similar scheme of liability having the following features:

(i) The seller was liable on a warranty for hidden defects in the thing sold;

(ii) The seller was so liable even if he was not aware of the defects;

(iii) An implied warranty as to quality or fitness for a particular purpose might be annexed by the usage of trade.

14. Romania noted the existence in its law of implied warranties against hidden defects in contracts for the sale of goods.

15. In respect of the provisions noted in paragraphs 12-14 above, the act entailing liability would consist of the breach of the implied warranty through the sale of goods having a hidden defect.

16. Belgium, Benin, Burundi, Madagascar and Mauritius noted that where the seller was a "professional" seller i.e. the sale occurred as part of his business, he was presumed to know of the defects. Belgium further noted that the "professional" seller could rebut the presumption by proof that, notwithstanding all possible precautions, it was impossible to foresee the defect, while Mauritius noted that the presumption was irrebuttable. Canada (for the province of Quebec) and the Netherlands noted, however, that there was no such presumption under their law.

Exclusion of implied warranty

17. Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Netherlands and Senegal noted that the implied warranty against hidden defects could be excluded by agreement between the parties. Canada (for the province of Quebec) and Senegal noted that the implied warranty was excluded when it was agreed between the parties that the buyer was purchasing the goods at his own risk. Such exclusion was not possible, however:

(a) If the seller knew of the defect (Belgium, Benin, Canada (for the province of Quebec), Madagascar, Mauritius, Netherlands, Senegal). Thus in those States mentioned in paragraph 16 above where a professional seller was presumed to know of the hidden defects, a clause excluding the implied warranty would be invalid where the seller was a professional seller, and the presumption could not be, or was not, rebutted;

⁴ An agreement between the parties excluding an implied term can be regarded as a defence to an action for breach of the implied term. Although the subject of possible defences is dealt with below (II, A, question 8), it would appear that the possible exclusion of implied terms is more appropriately dealt with at this point.

⁵ The implied warranty applies in the Netherlands only in a sale of specific goods.

(b) If the seller was guilty of *dolus* or bad faith (Belgium, Benin, Canada (for the province of Quebec), Madagascar, Mauritius, Netherlands, Senegal);

(c) If the exclusion endangered the essential object of the obligation (Belgium) or eliminated all responsibility on the part of the seller (Madagascar, Senegal).

18. The Netherlands noted that, in the case of a sale of *generic* goods, the law imposed liability when the goods delivered were defective as compared with other goods of the same species, or proper warnings or instructions relating to the goods were not given.

(iii) *Obligations imposed by the sales law of Scandinavian States*

19. Norway, Sweden and Denmark noted that, although their legislation on sales imposed liability on a seller who sold defective products, such liability was construed as extending only for defects making the products less valuable than they would be if they had not been defective; there was no liability under that legislation if the defects resulted in personal injury, or damage to property other than the product itself. Norway noted, however, that the liability might extend to damage to property of the buyer other than the product itself directly resulting from the defect (e.g. damage to clothing from a defective washing machine).

(iv) *Implied warranties in other States*

20. Botswana noted that under its law of sale of goods, a warranty against latent defects was implied. If the latent defect was not serious, the buyer could claim a reduction in the price (*actio quanti minoris*). If the latent defect was serious, the buyer could claim rescission of the contract, and compensation for resulting damages (*actio redhibitoria*).

21. Poland noted that the seller was liable on a warranty to the buyer when the thing sold had a defect which reduced its value or utility, when the thing did not possess the qualities which the seller had guaranteed, or when the thing had been delivered to the buyer in an incomplete state (guarantee against physical defects). However, he was not liable if the buyer knew of the defect at the time of the conclusion of the contract. If the thing sold had a defect, the buyer could rescind from the contract, or request a reduction of the price.

Other cases of contractual liability

22. The Federal Republic of Germany and Poland noted that the seller was liable when he had fraudulently concealed a defect in the thing sold from the buyer. The Federal Republic of Germany also noted that the seller was liable if he had fraudulently misrepresented that the product had qualities or features which it did not have.

23. The Federal Republic of Germany also noted that the seller was liable if he had violated a pre-contractual obligation towards the buyer to disclose or examine.

24. Austria noted that a producer was contractually liable, not only to a buyer to whom he sold his products, but to any consumer who became entitled to the goods through a chain of sales or service contracts, and who used such products trusting that they were in good order. The producer was liable if there was fault on his part in relation to the goods, e.g. defective design,

defective manufacture, or failure to give proper warnings of dangers inherent in the use of the products.

25. The German Democratic Republic noted that liability was based on the principle of fault.

(b) *Contracts of supply other than sale*

Hire-purchase

26. Australia noted that:

(a) The Hire-Purchase Acts implied in a contract of hire-purchase terms as to the quality and suitability of the goods, which could not be excluded. However, liability was dependent on fault.

(b) The Trade Practices Act 1974 implied in a contract of hire-purchase the same conditions as to quality and suitability of the goods as were implied by that Act in a contract of sale.⁶ The terms were implied in the same circumstances as they were implied in a sale, and could not be excluded, restricted or modified.

27. Canada noted that, under the Consumer Protection Act of Manitoba 1970, terms were implied in a contract of hire purchase, closely corresponding to those implied in the case of a retail sale,⁷ and that these terms could not be excluded by the parties.

Other supply contracts

28. Australia noted that the Trade Practices Act 1974⁸ implied terms corresponding to those implied if the contract were a sale, and in the same circumstances, in contracts such as exchange, lease, and hire. Such terms could not be excluded, restricted or modified. Canada (in relation to provinces other than Quebec), noted that terms as to quality and fitness similar to those implied in the case of a sale of goods⁹ were implied under the common law in contracts of bailment. Botswana noted that, in relation to immovable property, if an occupier of premises agreed to the use of the premises for reward, there was an implied term that the premises were as safe for the purposes of the contract as reasonable care and skill could make them.

Question 3: What persons may be liable?

Question 5: What persons may be entitled to compensation?

1. The information given separately in reply to these two questions was interrelated, and is therefore analysed together.

Restriction of rights and duties to the parties to the sale

2. The majority of States noted that, under their law of sales,

(a) Only the buyer was entitled under the contract to sue for compensation where a defective product caused damage; and

(b) Only the seller was liable to be sued under the contract (Afghanistan, Australia, Barbados, Canada, Chile, Cyprus, Denmark, Fiji, German Democratic Republic, Germany, Federal Republic of, Hungary, Ireland, Netherlands, Nicaragua, Norway, Pakistan, Philippines, Poland, Portugal, Sierra Leone, Sweden, Venezuela, the United Kingdom (in respect of English law)).

⁶ See para. 9 (a) above.

⁷ See para. 10 (b) above.

⁸ See para. 9 (a) above.

⁹ See para. 5 above.

3. Australia and Canada (for the province of Quebec) noted that a person contracting through an agent could be a party to a contract.

4. The following cases where contractual liability was imposed in favour of a person not a party to a sales contract were noted:

- (i) Sweden noted that the seller of a defective product might be liable on an undertaking about the quality of the product to the members of a buyer's family;
- (ii) The United Kingdom noted that, in Scots law, it was possible in limited circumstances for a third party on whom the parties to a contract had clearly intended to confer a benefit to sue on that contract.

Buyer entitled to compensation from a seller other than the one from whom he purchased

5. It was noted that in certain States (Belgium, Benin, Burundi, Madagascar, Mauritius, Senegal) the person entitled to compensation under a contract of sale when a defective product which had been sold caused damage was the buyer, while the person liable was the seller who had sold the product to that buyer. However, it was noted that in some of these States (Belgium, Benin, Burundi, Senegal) a buyer could sue not only his immediate seller, but any preceding seller in the line of sellers commencing with his immediate seller and ending with the producer. While, therefore, the person entitled to compensation would be a buyer, and the person liable would be a seller, such persons need not be buyer and seller in respect of the same contract of sale. Sweden noted that a manufacturer who gave an undertaking about the quality of a product might be liable on that undertaking to a buyer of that product other than the buyer to whom he had immediately sold the product.

Possible liability of producer to one who was not a buyer, or to a buyer with whom he was not in contractual relations

6. Austria noted that, under a sales contract, the buyer was entitled to claim compensation from the seller, while the seller was correspondingly liable to the buyer. Austria also noted, however, that a producer who put into circulation a product on the understanding that, through a chain of sales or service contracts the product would reach persons other than his immediate buyer, was liable to such other persons who, trusting that the product was in good order, exposed themselves or their assets to the possibility of suffering loss through defects in the product. The person entitled to compensation may in such circumstances not be party to any sales contract (i.e. he might be a member of the buyer's family) while the producer might not be in contractual relationship with the person to whom he was liable.

*Question 4: Does liability differ depending on the kind of products causing the damage?*¹⁰

1. The majority of States which replied indicated that in the sale of goods, in the absence of special agreement between the parties as to liability, the rules of

contractual liability did not differ depending on the kind of products causing the damage. (Afghanistan, Australia, Austria, Barbados, Belgium, Benin, Burundi, Canada, Denmark, Fiji, German Democratic Republic, Madagascar, Norway, Pakistan, Philippines, Poland, Romania, Senegal, Sierra Leone, Sweden, the United Kingdom, Venezuela).

2. Australia noted that the application of the legal rules specifying in general terms required standards of suitability and quality of products to different types of products might produce different standards of suitability and quality for the different products.

Question 6: For what types of loss or damage can compensation be recovered?

1. The information given in response to this question is analysed under the following heads:

- (a) Extent of liability for different types of loss.
- (b) Rules delimiting those consequences of a breach of contract for which compensation is recoverable.
- (c) Rules for assessing in money terms the compensation to be awarded for loss or damage.

(a) *Extent of liability for different types of loss*

2. The following observations were made on the extent of liability for different types of loss:

- (i) *Physical injury to the person: pecuniary loss and non-pecuniary loss*

3. The replies of Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius and Senegal¹¹ indicated that, where the seller knew of the existence of hidden defects in a product at the time of sale, he was liable to pay compensation for both pecuniary loss and non-pecuniary loss ("*dommage moral*") resulting from physical injury caused by the defect. Austria, Cyprus, Denmark, Fiji, the Philippines, Poland, Romania and the United Kingdom noted that if a breach of contract as to the quality of the goods caused physical injury, compensation was recoverable for the resulting pecuniary loss. However, while the Philippines and Poland noted that compensation was also generally payable for resulting non-pecuniary loss, the following States noted that compensation was payable for such loss in the following circumstances:

- (a) Austria, Fiji and the United Kingdom—only for pain and suffering;
- (b) Romania—only where the physical injury interfered with the enjoyment of social or family life.
- (c) Denmark—only if there was breach of an express warranty as to quality.

4. Botswana and Sweden noted that, where there was breach of an express undertaking as to quality, compensation was recoverable for pecuniary loss resulting from physical injury.

5. Afghanistan, Australia, Barbados, Canada (for provinces other than Quebec), Chile, Ireland, Nicaragua, Pakistan and Portugal noted that compensation was recoverable in case of physical injury.

- (ii) *Damage to property other than the product itself*

6. Belgium, Benin, Burundi, Canada (for the prov-

¹⁰ Many States noted that the manufacture and supply of certain products (e.g. food, drugs, explosives) were regulated by special laws outside the field of contractual liability. These instances are noted in II, B, 2, below.

¹¹ The sales law of all these States contains the implied warranty against hidden defects modelled on the provisions of the French Civil Code.

ince of Quebec), Madagascar, Mauritius and Senegal¹² noted that, where a seller knew of the existence of hidden defects at the time of the sale, he was liable to pay compensation for damage to property other than the product itself caused by the hidden defect.

7. Botswana noted that where a product sold had a serious latent defect, compensation was recoverable for damage to property other than the product itself.

8. Afghanistan, Australia, Austria, Barbados, Botswana, Canada (for provinces other than Quebec), Chile, Cyprus, Fiji, Ireland, Nicaragua, Pakistan, the Philippines, Poland, Portugal, Romania and the United Kingdom noted that, if a breach of contract as to the quality of the goods caused damage to property other than the product itself, the seller was liable to pay compensation. Norway noted that in these circumstances compensation was only payable for certain forms of direct damage to the buyer's property.

(iii) *Pecuniary loss caused by the defect unconnected with physical injury or property damage*

9. The replies of Afghanistan, Australia, Barbados, Chile, Cyprus, Denmark, Fiji, Ireland, Nicaragua, the Philippines, Poland, Portugal, Romania, Sweden and the United Kingdom indicated that compensation was recoverable where a breach of contract as to the quality of the goods caused pecuniary loss unconnected with physical injury or property damage.

10. Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius and Senegal noted that, where a seller knew of the existence of hidden defects at the time of sale, he was liable to pay compensation for pecuniary loss caused by the defect unconnected with physical injury or property damage. Where the seller did not know of the existence of the hidden defects, he was liable to pay compensation for the expenses occasioned by the sale, which might include pecuniary loss unconnected with physical injury or property damage.

11. The replies of Austria, Norway and Pakistan indicated that no compensation was recoverable for such loss.

(iv) *Infringement of non-pecuniary interest; "dommage moral"*¹³

12. The replies of Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius and Senegal¹⁴ indicated that, where the seller knew of the existence of hidden defects in a product at the time of sale he was liable to pay compensation for "*dommage moral*" (non-pecuniary loss) caused by the defect. Benin and Madagascar noted the need to prove a causal connection between the act entailing liability and the "*dommage moral*" before compensation was recoverable.

13. The replies of Afghanistan, Philippines and Poland also indicated that "*dommage moral*" (non-pecuniary loss) was recoverable where a breach as to the quality of the goods in a contract of sale caused such loss.

14. The replies of Barbados, Ireland and Portugal indicated that compensation was recoverable for infringement of a non-pecuniary interest through a breach as to

the quality of goods in a contract of sale, if loss resulted from the breach.

15. The replies of Cyprus, Fiji and the United Kingdom indicated that although normally compensation was only recoverable for pecuniary loss, there was a recent tendency to award compensation for "disappointment" suffered through a breach of contract.

16. Botswana and Pakistan noted that no compensation was recoverable for infringement of a non-pecuniary interest.

(v) *Death*

17. Afghanistan, Australia, Belgium, Pakistan and Portugal noted that compensation was recoverable where death resulted from the breach of contract.

18. Australia further noted that the compensation would be claimed by the estate of the deceased person, and that the amount recoverable would not necessarily correspond with that recoverable if the victim had lived.

19. Portugal also noted that compensation could be claimed for the following items:

- (i) All expenses incurred in the effort made to save the victim, and incidental expenses such as funeral expenses;
- (ii) Expenses of all persons who treated or attempted to assist the victim;
- (iii) Maintenance lost by persons entitled to demand maintenance from the victim.

(b) *Rules delimiting those consequences of a breach of contract for which compensation is recoverable*

20. Several States noted the existence of rules delimiting those consequences of a breach of contract for which compensation was recoverable.

21. Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Netherlands (in the case of a sale of specific goods) and Senegal¹⁵ noted that, where a seller had sold a product containing a hidden defect, the buyer could in addition to returning the goods and obtaining restitution of the price:

- (i) Where the seller was in good faith he was liable cover compensation for the expenses occasioned by the sale; and,
- (ii) Where the seller knew of the defects, recover compensation for all losses caused by the defect.

22. Chile, Canada (for the province of Quebec), and the Philippines formulated in somewhat similar terms a rule existing in their legal systems, i.e.:

- (i) Where the seller was in good faith he was liable to pay compensation for losses which were foreseen, or could reasonably have been foreseen, at the time of the conclusion of the contract; and
- (ii) Where the seller was guilty of fraud, he was liable for the losses which were:
 - (a) An immediate and direct consequence of the breach of contract (Canada (for the province of Quebec), Chile);
 - (b) Reasonably attributable to the breach of contract (Philippines).

23. Botswana, the German Democratic Republic and Ireland noted that the seller was liable to pay compensation for losses which were foreseen, or could rea-

¹² See foot-note 11.

¹³ Liability for physical injury resulting in "*dommage moral*" or non-pecuniary loss has been dealt with under (i) above.

¹⁴ See foot-note 11.

¹⁵ See foot-note 11.

sonably have been foreseen, at the time of the conclusion of the contract.

24. The Netherlands (in the case of a sale of generic goods) and Poland noted that, in general, compensation could be obtained for losses suffered by the injured party comprising both *damnum emergens* and *lucrum cessans*.

(c) *Rules for assessing in money terms the compensation for loss caused by a breach of contract*

25. In regard to the rules for assessing the monetary compensation to be awarded for loss or damage, Canada (for provinces other than Quebec), Portugal and Sierra Leone noted that the compensation must be such as to place the person suffering loss in the position he would have been if the contract had not been broken.

26. Canada (for provinces other than Quebec) and the German Democratic Republic noted that the injured party was obliged to take reasonable measures to mitigate the loss he had suffered.

Question 7: What defences are available, and what is their effect?

The following defences were noted:

(a) *Absence of conditions necessary for liability*

1. Australia, Barbados, Canada, Mauritius, Philippines and Sierra Leone noted that it was a defence to show the absence of conditions necessary for liability to arise.

(b) *Force majeure, inevitable accident and cas fortuit*

2. Many States (Afghanistan, Belgium, Benin, Botswana, Burundi, Canada (for the province of Quebec), German Democratic Republic, Madagascar, Nicaragua, Philippines, Poland, Romania, Senegal, Venezuela) noted that *force majeure* constituted a defence to a breach of contract. The following definitions of *force majeure* were given:

(i) A force which was unforeseeable and irresistible, having regard to circumstances of time and place (Burundi).

(ii) An extrinsic event both unforeseeable and irresistible (Romania).

(iii) All direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against (Botswana).

3. Canada (for the province of Quebec) noted that *force majeure* was not a defence if a party contractually bound himself to perform despite supervening *force majeure*.

4. Sierra Leone noted that inevitable accident was a defence.

5. Senegal and Venezuela noted that *cas fortuit* was a defence.

(c) *Fault of the injured party, and contributory (comparative) fault*

6. Many States (Afghanistan, Austria, Belgium, Benin, Burundi, Canada, Madagascar, Pakistan, Poland, Portugal, Romania, Senegal, Sweden, Venezuela) noted that fault of the injured party was a defence. Of these States, Austria also noted that contributory fault of the injured party only lessened the defendant's liability; Madagascar also noted that only fault exclusively on the part of the injured party was a defence, and Poland also noted that contributory action on the part of the injured party reduced the obligation to compensate depending

on the circumstances, and in particular, the degree of the respective fault of the two parties. The United Kingdom noted that contributory negligence of the buyer was probably not a defence available to the seller.

(d) *Intervening act of a third person*

7. Benin, Canada (for the province of Quebec), Senegal and Venezuela noted that the intervening act of a third person causing the loss was a defence. Afghanistan, Madagascar and Romania noted that such an act was a defence, provided it was equivalent to *force majeure*. Botswana noted that such an act was a defence provided it was not initiated by the act of the defendant.

8. Belgium noted that such an act was not a defence if it did not involve fault on the part of the third person.

(e) *Assumption of risk*¹⁶

9. Afghanistan, Romania and Senegal recognized assumption of risk as a defence if the assumption was expressly contained in a clause of the contract. Madagascar and Sierra Leone noted that assumption of risk was a defence.

(f) *Act of the plaintiff*

10. The German Democratic Republic and Venezuela noted that it was a defence to prove that the breach of contract was occasioned by the act of the plaintiff.

(g) *Absence of fault of the defendant*

11. Austria noted that it was a defence for a producer to prove absence of fault on the part of himself or his agents.

(h) *Impossibility of performance, and change of circumstances*

12. Botswana noted that absolute impossibility of performance was a defence, and Venezuela noted that destruction of the product to be supplied, or its ceasing to be subject to commercial dealing, was a defence. The German Democratic Republic noted that it was a defence to show that the circumstances in which the contracting parties concluded the contract had been fundamentally altered.

(i) *Other defences*

13. Australia noted the existence of the following defences:

(i) As a defence to an alleged breach of an implied condition of merchantability, the seller may allege that the buyer had examined the goods before the contract was entered into, and that such an examination would have revealed the defect to a reasonable buyer;

(ii) As a defence to an alleged breach of an implied condition of fitness for purpose, the seller may prove that the goods were acquired under their patent or trade name, and that the buyer was thereby satisfied that the goods would answer his purpose, and was not relying upon the seller's skill or judgement;

(iii) As a defence to alleged liability under the Manufacturers Warranties Act 1974, the manu-

¹⁶ The case of a sale of goods where the goods contained an apparent defect, the case where a warranty against defects was excluded by an exemption clause, and the case where it was agreed between the buyer and the seller that the buyer was buying at his own risk, may each be regarded as related to the defence of assumption of risk. They are dealt with above in II, A, questions 1 and 2, paras. 12 (b), 8 and 17.

- facturer may prove that the defect was caused by the act of another, or by a cause independent of human control, after the goods left his control;
- (iv) As a defence to alleged liability under the Trade Practices Act 1974, the supplier may prove that the goods were procured for resupply from a principal who carried on business in Australia, and that the supplier did not know and could not with reasonable diligence have ascertained that the goods did not comply with a prescribed standard, or that he relied on a representation from the principal that the goods did comply with such a standard.

Question 8: Are there fixed limits to liability?

Maximum amounts per product, injury or year¹⁷

1. Most States (Australia, Austria, Belgium, Benin, Botswana, Burundi, Canada, Fiji, Cyprus, German Democratic Republic, Ireland, Madagascar, Pakistan, the Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden and the United Kingdom) indicated that there were no such maximum amounts fixed by law.

2. Burundi, Canada (for the province of Quebec), Madagascar, Poland, Portugal and Sweden noted that contractual stipulations might validly fix the maximum amounts recoverable for breach of warranty.

3. Canada (for provinces other than Quebec) noted that a contractual stipulation fixing an amount payable for a breach of warranty would be upheld by the Courts if regarded as a genuine pre-estimate by the parties of the loss which they contemplated would result from the breach. However, such a stipulation would not be upheld if it was regarded as security for due performance.

Periods of prescription or limitation

(a) "Short period"

4. Many States whose sales law contained an implied warranty against hidden defects modelled on the provisions of the French Civil Code noted that the actions available for breach of that warranty¹⁸ were barred unless they were instituted within a short period, the length of the period depending on the nature of the defects and the usages of the place where the sale was concluded (Belgium, Benin, Mauritius, Netherlands (in respect of a sale of specific goods), Senegal). Those States whose sales law contained a similar implied warranty noted that:

- (i) The actions were barred unless instituted within 60 days (Burundi);
- (ii) The actions were barred unless instituted with due diligence (Canada, for the province of Quebec).

(b) 6 months period

5. Chile and the Philippines noted that an action on a contract of sale in respect of hidden defects in the goods sold must be instituted within six months of the delivery of the goods.

¹⁷ Even where no maximum limits per product, injury or year are fixed by law, the general rules delimiting those consequences of a breach of contract for which compensation is recoverable, and the rules for assessing in money terms the compensation recoverable, will specify limits beyond which no compensation is recoverable. The available information as to these limits is contained in II, A, question 6, paras. 19-25.

¹⁸ For an account of this warranty, see II, A, questions 1 and 2, para. 12.

(c) 1 year period

6. Botswana noted that the period of prescription for the *actio quanti minoris* and the *actio redhibitoria*¹⁹ was 1 year.

(d) 2 year period

7. Canada (in respect of the provinces of Alberta, British Columbia and Manitoba) noted that an action for breach of a contract of sale was barred unless it was instituted within 2 years of the date the cause of action arose.

(e) 3 year period

8. Botswana noted that an action on an oral contract was prescribed in 3 years.

9. Portugal noted that, under one view, a contractual action was prescribed within 3 years of the date the injured party came to know of his right, without prejudice to the time-limit for ordinary prescription if that period had already elapsed from the date of the injurious act.

(f) 5 or 6 year period

10. Australia, Barbados, Canada (in respect of the provinces of Nova Scotia, Newfoundland, Ontario, Prince Edward Island and Saskatchewan) and Sierra Leone noted that an action for breach of a contract of sale was barred unless it was instituted within 6 years of the date the cause of action arose. Australia also noted that, if compensation was sought for personal injuries, the period was reduced in some states of the federation as follows: Queensland, South Australia and Victoria, to 3 years and Tasmania, to 2 years 6 months. Barbados also noted that, in the case of actions against public authorities, the action must be commenced before the expiration of 1 year from the date the cause of action arose.

11. The United Kingdom noted that actions in respect of damage to property must be instituted in England within 6 years from the time of the damage, and in Scotland, when the damage was not immediately apparent, within 5 years from the time when the claimant ought reasonably to be aware of the damage.

12. Botswana noted that actions on a written contract were prescribed in 6 years.

13. Denmark noted that the limitation period was five years after the occurrence of the damage. If however the buyer, without fault on his part, was not aware of his rights, or the whereabouts of the seller, the period commenced from the time when the buyer was in a position to assert his rights.

(g) 30 year period

14. Madagascar noted that all actions in respect of civil matters were prescribed in 30 years. The Netherlands noted that the general limitation period in respect of a contract for the sale of generic goods was 30 years, but that the principle that all contracts must be executed in good faith would prevent the buyer from delaying his action against the seller for a very long period.

(h) Other periods

15. Poland noted that the period of prescription of contractual claims was 1 year as between Socialist enterprises and 10 years in other relationships. It also noted that actions in respect of the warranty against physical

¹⁹ For an account of these actions, see II, A, questions 1 and 2, para. 20.

defects²⁰ were barred if the buyer did not inform the seller of the existence of the defect within 1 month of its discovery, or within 1 month after he should have discovered the defect by the exercise of due diligence. Such actions were extinguished 1 year after the date of delivery. Where an express warranty in writing as to quality had been given by the seller, an action for breach of warranty was not barred earlier than 3 months after the lapse of the period of the warranty.

16. Venezuela noted that the general limitation period was 10 years for personal civil actions, but that in a case where the seller had warranted satisfactory performance for a set period of time, the buyer was bound to notify the seller of the defect within 1 month of its discovery, and must institute action within 1 year of the notification.

Question 9: In respect of what matters does the plaintiff have the burden of proof, and in respect of what matters does it rest on the defendant?

General principle

1. Many States noted that, in principle, the plaintiff (i.e. the buyer in an action for the breach of a contract of sale through the supply of defective goods) was bound to prove the elements necessary to establish liability (Afghanistan, Australia, Austria, Barbados, Belgium, Benin, Burundi, Canada, Cyprus, Fiji, Ireland, Madagascar, Mauritius, Pakistan, Poland, Portugal, Romania, Sierra Leone, Sweden, the United Kingdom, Venezuela). However, the defendant (i.e. the seller in the action described above) was bound to prove the elements of any defence exculpating him from liability (Australia, Austria, Barbados, Belgium, Benin, Burundi, Sierra Leone, Venezuela.)

2. States with sales laws containing implied terms as to quality modelled on the Sale of Goods Act 1893 of the United Kingdom noted the following examples of matters to be proved by the plaintiff and defendant respectively in accordance with the principle stated in paragraph 1 above:

To be proved by the plaintiff—the terms of the contract (Australia, Barbados), breach of contract (Australia, Barbados, Canada (for provinces other than Quebec)) and the causal link between the breach of contract and the loss (Australia).

To be proved by the defendant—defences entailing the plaintiff's examination of the goods, or reliance on a patent or trade name (Australia) and want of consideration, mistake or frustration (Canada (for provinces other than Quebec)).

3. Canada (for provinces other than Quebec) noted that when the subject-matter of an issue was particularly within the knowledge of one of the parties, the burden of proof as to that issue was on that party.

4. States with sales laws containing the implied warranty against hidden defects modelled on the provisions of the French Civil Code noted the following examples of matters to be proved by the plaintiff and defendant respectively in accordance with the principle stated in paragraph 1 above:

To be proved by the plaintiff—the contract of sale (Mauritius), hidden defects affecting the use of the thing sold (Belgium, Mauritius), the loss suffered (Burundi, Madagascar), the causal connexion between the loss suffered and the hidden defect (Burundi, Mauritius) and the fact that the seller, if not a professional seller, was in bad faith (Mauritius).

To be proved by the defendant—that the defect did not exist at the time of the sale (Belgium) that notwithstanding all possible precautions, it was impossible for him to know of the defect (Belgium), that the loss was caused by *force majeure* (Belgium, Burundi, Venezuela), that he was not a professional seller and was in good faith (Mauritius), that the defects in the product were patent (Mauritius) and that the loss was due to the act of a third party or the fault of the plaintiff, or that the product sold had been lost (Venezuela).

5. Other States noted:

As matters to be proved by the plaintiff: the breach of contract (Sweden), the nature and extent of the loss (Denmark, Sweden), and the causal connexion between the defect and the loss suffered (Denmark, Romania).

As matters to be proved by the defendant: *force majeure* (Philippines, Romania), absence of fault on his part (Austria) and that the act of the plaintiff or of a third party was the cause of the loss (Romania).

6. Barbados, Canada (for the province of Quebec) and Portugal noted that the normal incidence of the burden of proof may be affected by terms in the contract on the burden of proof. Portugal noted that an agreement inverting the burden of proof was void in the following circumstances:

(a) If it dealt with an indispensable right, or rendered excessively difficult the exercise of his rights to one of the parties, or

(b) Excluded a legal means of proof, or admitted a means of proof different from the legal.

Degree of proof

7. Australia, Barbados, Canada (for provinces other than Quebec) and the United Kingdom noted that, where the burden of proof lay on a party, the degree of proof required was proof on a balance of probabilities. Portugal noted that in a case of doubt the facts must be considered to constitute the right in question.

B. EXTRA-CONTRACTUAL LIABILITY

1. DELICTUAL (TORTIOUS) LIABILITY²¹

Question 1: On what concepts is liability based?

Question 2: What acts or omissions may entail liability?

1. The information given separately in relation to

²¹ The reply of Chile was confined to contractual liability, and forms of extra-contractual liability other than delictual (tortious) liability. The reply of Austria dealt mainly with contractual liability, and the reply of the German Democratic Republic was confined to contractual liability under the Law on International Economic Contracts adopted on 5 February 1976 (see foot-note 3 above). The reply of Turkey only indicated that the legislation of Turkey did not provide a special rule with regard to the civil liability of producers, but that producers incurred certain civil liabilities for defective products through the distributors of their goods.

²⁰ For an account of this warranty, see II, A, questions 1 and 2, para. 21.

these two questions was interrelated, and is therefore analysed together under the two categories of fault liability and strict liability.

Fault liability

2. Many States (Afghanistan, Australia, Belgium, Benin, Burundi, Byelorussian Soviet Socialist Republic, Canada (for the province of Quebec), Denmark, Federal Republic of Germany, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Pakistan, Poland, Portugal, Union of Soviet Socialist Republics) noted that fault was a basis of liability. Some of these States further noted that fault included one or both of the following two bases of liability: intentional action and negligence.

Intentional action

3. Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Nicaragua, Poland and Venezuela noted that acts intended to cause loss entailed liability if loss ensued.

Negligence

4. Most States (Australia, Barbados, Belgium, Benin, Botswana, Burundi, Canada, Cyprus, Denmark, Fiji, Federal Republic of Germany, Hungary, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Ireland, Pakistan, the Philippines, Portugal, Sierra Leone, Sweden, United Kingdom, Venezuela) noted that negligent acts entailed liability. Some States defined negligence as failure to observe the standard of a reasonable man (Australia, Barbados, Botswana, Canada, Cyprus, Fiji, Hungary, Pakistan, Philippines, Portugal, Senegal, United Kingdom). It was also noted that a slight degree of negligence sufficed to entail liability (Burundi, Madagascar).

Requirement of breach of duty in addition to fault

5. Australia, Barbados, Botswana, Canada (for provinces other than Quebec), Cyprus, Fiji, Ireland, Pakistan, Senegal, Sierra Leone and the United Kingdom noted that negligent acts only entailed liability if the negligence involved a breach of a duty to take care owed by the defendant to the plaintiff. Such a duty arose when the defendant could reasonably foresee that his acts or omissions would be likely to cause physical loss to the person or property of the plaintiff. The following were noted as special instances of a negligent breach of duty:

(a) Where the defendant delivered an inherently dangerous product to A, who delivered it to the plaintiff to whom it caused damage (Cyprus, Pakistan);

(b) Where the defendant, knowing the dangerous nature of a product, did not inform the recipient of the danger, and the plaintiff, a third party, was injured as a result (Cyprus);

(c) Where the defendant enterprise did not organize its business in such a way as to exclude injury or damage to others as far as possible, and did not itself, or through its chief representatives, ensure the proper selection and direction of the employees (Federal Republic of Germany).

6. The Netherlands noted that, in order to found liability, it was necessary to prove that a faulty act was also unlawful in that it was in breach of a duty to take care. However, once the breach of a duty to take care

was proved, fault on the part of a producer would often be presumed.

Variations in degree of care required

7. Australia, Burundi, Canada (for provinces other than Quebec), Ireland, Netherlands, Norway and Sweden noted that the degree of care required varied commensurately with the possible risk of injury, and Australia also noted that in relation to inherently dangerous products the standard approached strict liability.²² Sweden noted that a very high degree of care, entailing a liability approaching strict liability, was required from industrial enterprises.

Modifications to the burden of proof of negligence²³

8. Australia, Barbados, Cyprus, Canada (for provinces other than Quebec), Fiji, Ireland, Pakistan, Sierra Leone and the United Kingdom noted that the burden of proof of negligence normally lay on the plaintiff. However, if the circumstances in which the loss or damage was caused raised an inference that the cause was the negligence of the defendant (*"res ipsa loquitur"*), the defendant bore the burden of disproving negligence.

9. The Federal Republic of Germany noted that where an injured party proved that the origin of a defect in a product causing loss or damage could not be precisely ascertained, but that such origin was situated in an area of activity for which the manufacturer was responsible, it was presumed that the defect was attributable to negligent conduct on the part of the manufacturer. The burden lay thereafter on the manufacturer to refute this presumption by showing that he had complied with the organizational duties relating to his business, and that he had carefully selected and directed all the employees in the business. The Federal Republic of Germany also noted that, where a law was designed to have a protective effect (e.g. certain laws on the manufacture or distribution of dangerous products) fault was generally presumed from the violation of the law.

10. Portugal noted that a provision existed in its legal system that whoever caused loss to others in the exercise of a dangerous activity should make good that loss, unless he proved that he had taken all the precautions required in the circumstances.

"Development risks" (liability for defects not discoverable with the scientific knowledge available at the time of circulation of the product)

11. All States which referred to this question (Burundi, Canada, Federal Republic of Germany, Netherlands, Sweden) noted that there was no liability, as there was no fault or negligence on the part of anyone.

Fraud

12. Portugal noted that fraudulent acts entailed liability, while Botswana and Pakistan noted that a person who made a fraudulent representation as to the condition of a product was liable for resulting damage to the person to whom the representation was made. Cyprus noted that a person who fraudulently represented that a dangerous product was safe, and so misled the recipient into causing damage to a third party, was liable to that third party.

²² See also II, B, 1, question 4, para. 2.

²³ Issues relating to the burden of proof are dealt with in II, B, 1, question 9, below. Modifications to the burden of proof of negligence are dealt with at this point as they are relevant to the strictness of liability.

Abuse of rights

13. Venezuela noted that liability was imposed if anyone in the exercise of his rights exceeded the limits placed by good faith.

Acts or omissions entailing liability

14. In relation to the bases of liability noted above, acts or omissions only entailed liability if they were of the quality required under the respective bases of liability e.g. intentional acts, negligent acts, fraudulent acts. The following instances of the possible physical nature of acts entailing liability were noted:

(a) Failure or mistake in the manufacturing process, and faulty design: (Afghanistan, Australia, Belgium, Byelorussian Soviet Socialist Republic, Canada, Federal Republic of Germany, Hungary, Norway, Sierra Leone, Sweden, Union of Soviet Socialist Republics);

(b) Failure to give proper warning or instruction (Afghanistan, Australia, Belgium, Burundi, Byelorussian Soviet Socialist Republic, Canada, Federal Republic of Germany, Hungary, Madagascar, Norway, Sweden, Union of Soviet Socialist Republics);

(c) Misrepresentation of condition concerning safety (Afghanistan, Canada (for the province of Quebec), Hungary);

(d) Distribution of product in a dangerous condition (Afghanistan, Canada for the province of Quebec), Madagascar;

(e) Failure to recall a faulty product (Canada (for provinces other than Quebec), Federal Republic of Germany).

*Strict liability**Liability of a person having care of a thing*

15. Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Romania, Senegal and Venezuela noted a form of strict liability which had certain elements common under the law of all these States, but required additional elements under the law of some of these States. The common elements required to be proved by the plaintiff were:

(a) That the defendant had the care of a thing i.e. he had the use, control and direction of the thing; and

(b) Proof of loss caused by the action of that thing.

16. The following additional elements to be proved by the plaintiff were noted:

(a) The thing was defective (Belgium);

(b) That the thing was dangerous (Romania);

(c) That the injury or damage consisted of death, physical injury to the person, or physical damage to property (Madagascar).

17. Assuming the requisite elements were proved, the defendant was liable unless he proved a valid defence. However, proof of the absence of negligence was not a defence, except in Mauritius. The available defences²⁴ were:

(a) *Force majeure* (Benin, Burundi, Belgium, Madagascar, Mauritius, Romania, Senegal, Venezuela);

(b) That the cause of the loss was the fault of the

victim (Benin, Burundi, Madagascar, Mauritius, Romania, Senegal, Venezuela);

(c) That the cause of the loss was the act of a third person (Benin, Madagascar, Mauritius, Romania, Senegal, Venezuela);

(d) That the defendant was unable to prevent the act which caused the loss (Canada (for the province of Quebec));

(e) A contractual clause exempting the defendant from liability (Madagascar).

Act or omission entailing liability

18. The act entailing liability in the above form of strict liability was having the care of the thing causing the damage, provided the other conditions for liability noted above were also satisfied.

Other cases of strict liability

19. The Byelorussian Soviet Socialist Republic and the Union of Soviet Socialist Republics noted that organizations and individuals whose activities entailed a high degree of risk for persons in the vicinity were required to pay compensation for any damage caused by the source of the risk, unless they proved that the damage resulted from "force majeure" or from intent on the part of the injured person. Hungary noted a provision in its law that any person carrying on an activity involving substantial danger should compensate for resulting damage, but added that the provision had so far not been judicially applied to the liability of producers. It was a defence, however, to show that the damage had been caused by an unavoidable cause outside the scope of the activity, or that the loss was imputable to the conduct of the injured person.

20. Norway noted that by a process of judicial law-making which was still continuing absolute liability was imposed where defective products created a high degree of danger or risk, in particular danger of physical injury to human beings and animals.

21. Botswana, Portugal, Denmark and Sierra Leone noted that their laws did not impose strict liability.

Alternative remedies in contract and delict (tort)

22. Barbados, Belgium, Canada (for the province of Quebec), Netherlands, Poland, and Sierra Leone noted that a person in contractual relationship with another could sue that other in delict (tort) if the facts gave rise to delictual (tortious) liability, whether or not he could sue in contract. However, the German Democratic Republic noted that, in cases falling within its scope of application, the law on International Economic Contracts²⁵ excluded extra-contractual claims.

Question 3: What persons may be liable?

1. All States which replied to this question noted that every person was liable whose act or omission entailed liability under an existing basis of liability.²⁶ However, the potential liability of the following categories of persons was specially noted:

Persons in the chain of production or distribution of a product

(a) All persons in the chain of production or distribution

²⁴ The question of possible defences is dealt with in II, B, 1, question 7, below. Since, however, the extent of the available defences is relevant to judging the strictness of liability, the defences to this form of strict liability are noted at this point.

²⁵ For the scope of application of this law, see II, A, questions 1 and 2, foot-note 3.

²⁶ For the various bases of liability recognized by States, see II, B, 1, questions 1 and 2, above.

bution (Belgium, Benin, Burundi, Canada (for provinces other than Quebec), Senegal, Sweden);

(b) The producer or the assembler of a finished product (Australia, Barbados, Botswana, Byelorussian Soviet Socialist Republic, Ireland, Madagascar, Netherlands, Poland, Sierra Leone, Union of Soviet Socialist Republics);

(c) The supplier of component parts (Australia, Barbados, Byelorussian Soviet Socialist Republic, Madagascar, the Union of Soviet Socialist Republics);

(d) The wholesaler and retailer of a product (Australia, Botswana, Ireland, Madagascar, Netherlands, Sierra Leone);

Persons not in the chain of production or distribution of a product

(e) The service contractor (Australia, Byelorussian Soviet Socialist Republic, Poland, Union of Soviet Socialist Republics);

(f) Inspectors and certifiers (Canada (for provinces other than Quebec)).

2. The Byelorussian Soviet Socialist Republic and the Union of Soviet Socialist Republics noted that in many cases the law excluded any recovery of compensation from the retailer.

Vicarious liability

3. Denmark, the Netherlands, Norway, Senegal, Sweden and Venezuela noted that the general principle that an employer was vicariously liable for the delict (tort) of his employee committed in the course of his duties was applicable to products liability.

4. The Federal Republic of Germany noted that, even if an injured person proved fault of an employee in the process of manufacturing or distributing a product, an employer might exculpate himself by proof that the employee in question had been properly selected and directed. It also noted, however, that the impact of this principle had been mitigated as follows:

(a) An enterprise was under a duty to organize its business properly. If improper organization could be proved, the enterprise would be directly liable, irrespective of any fault of its employees.

(b) Where the defect in a product originated from an area of activity for which the enterprise was responsible, the burden was placed on the enterprise to disprove negligence.

Joint wrongful acts

5. Belgium, Madagascar, Nicaragua and Venezuela noted that, where damage had been caused jointly by more than one person, each was liable for the full compensation payable. Portugal noted that in such a case the liability was joint, while the Federal Republic of Germany noted that each person was jointly and severally liable.

*Question 4: Does liability differ depending on the kind of products causing the damage?*²⁷

1. Most States (Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist

Republic, Canada, Cyprus, Denmark, Fiji, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, the Union of Soviet Socialist Republics, United Kingdom, Venezuela) noted that liability in delict (tort) did not differ depending on the kind of products causing the damage.

2. Some States noted that the standard of care required from a producer or supplier would increase in proportion to the dangerous character of the product in question.²⁸ Cyprus and Pakistan noted that a special duty of care was imposed in relation to dangerous chattels in certain circumstances.²⁹

3. The Philippines noted that manufacturers and processors of food-stuffs, drinks, toilet articles and similar goods were liable for death or injuries caused by any noxious substances used.

Question 5: What persons may be entitled to compensation?

1. All States which replied to this question noted that every person who had suffered loss or injury through a delict (tort) was entitled to compensation.³⁰

2. Denmark, the Federal Republic of Germany and the Netherlands noted that, in cases of physical injury, only the injured person was entitled to compensation, and that others who had sustained loss or damage as a consequence of the injury were not so entitled.

3. Where death had been caused, it was noted that the following persons were entitled to compensation:³¹

Persons suffering loss of support

(a) Close relatives (Burundi), all persons (Federal Republic of Germany), and a person who was not an heir of the deceased (Philippines) who had been entitled to receive maintenance from the deceased during the latter's lifetime;

(b) The widow and dependants of the deceased who had suffered loss of maintenance as a result of the death (Botswana);

(c) The spouse, children or parents of the deceased (Netherlands) and all persons (Denmark) actually maintained by the deceased during his lifetime and who had suffered loss of maintenance as a result of the death:

Other cases

(d) An heir, to recover reimbursement for loss of funeral expenses (Federal Republic of Germany) or to recover for the loss of the earning capacity of the deceased (Philippines);

(e) The estate of the deceased (Australia, United Kingdom);

(f) Relatives by affinity and the spouse of the de-

²⁸ See II, B, 1, questions 1 and 2, para. 6, above.

²⁹ *Ibid.*, para. 7.

³⁰ The replies to question 6: "For what types of loss or damage can compensation be recovered?" indicated that recovery was not possible in some States for certain types of loss or damage. This general statement made in reply to question 5 stressed the fact that no particular category of persons was excluded from the right to compensation.

³¹ In relation to question 5 above, the emphasis in the analysis is on the identity of the persons entitled to compensation. On the related question of the amount recoverable, see II, B, 1, question 6, paras. 6-8 below.

²⁷ Many States noted that the manufacture and supply of certain products (e.g. food, drugs, explosives) were regulated by special laws outside the field of delictual (tortious) liability. These instances are noted in II, B, 2, below.

ceased, as regards compensation for grief suffered as a result of the death (Venezuela), and the spouse and children of the deceased as regards compensation for non-pecuniary loss (Portugal).

Question 6: For what types of loss or damage can compensation be recovered?

1. The information given in response to this question is analysed under the following heads:

- (a) Extent of liability for different types of loss;
- (b) Rules delimiting those consequences of a delict (tort) for which compensation is recoverable;
- (c) Rules for assessing in money terms the compensation to be awarded for loss or damage.

(a) *Extent of liability for different types of loss*

Physical injury to the person: pecuniary loss and non-pecuniary loss

Pecuniary loss

2. Afghanistan, Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Cyprus, Denmark, Fiji, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, the Union of Soviet Socialist Republics, the United Kingdom, and Venezuela noted that compensation was recoverable for pecuniary loss caused by physical injury to the person.

Non-pecuniary loss

3. Of these States, the replies of Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Philippines, Poland, Senegal, Sweden and Venezuela noted that, in addition, compensation was also recoverable for non-pecuniary loss classed as "*dommage moral*". However, the replies of the Byelorussian Soviet Socialist Republic, Hungary, and the Union of Soviet Socialist Republics noted that no compensation was recoverable for "*dommage moral*".

4. The replies of Afghanistan, Barbados, Denmark, Fiji, Federal Republic of Germany, Netherlands, Portugal, Romania and the United Kingdom noted that compensation was recoverable for certain forms of non-pecuniary loss. Norway noted that non-pecuniary loss was only recoverable if:

- (a) The person injured had suffered permanent and significant injury in medical terms, or
- (b) The injury had been inflicted wilfully or through gross negligence.

Death caused by a delict (tort): pecuniary loss and non-pecuniary loss

5. Afghanistan, Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Denmark, Fiji, Federal Republic of Germany, Hungary, Madagascar, Mauritius, Netherlands, Poland, Portugal, Union of Soviet Socialist Republics, United Kingdom and Venezuela noted that compensation was recoverable for loss resulting from the death of a person.

Pecuniary loss

6. It was noted that compensation was recoverable for the following items of pecuniary loss:³²

(a) Loss of the maintenance which would have been given to the claimant by the deceased if the latter had lived (Botswana, Burundi, Denmark, Federal Republic of Germany, Netherlands, Philippines, Portugal). The Netherlands added that no compensation was payable for any other item of loss;

(b) Loss of the earning capacity of the deceased (Philippines);

(c) Medical expenses incurred in treatment (Burundi, Portugal);

(d) Funeral expenses (Burundi, Federal Republic of Germany, Portugal).

7. The United Kingdom noted that pecuniary loss was recoverable. Barbados noted that no compensation was recoverable by a husband or master for loss caused to him by the death of his wife or servant respectively.

Non-pecuniary loss

8. Burundi noted that compensation was payable for "*dommage moral*"; Portugal noted that compensation was payable for non-pecuniary loss; the United Kingdom noted that compensation was recoverable for pain and suffering; and the Philippines and Venezuela noted that compensation was payable for mental anguish.

Damage to property other than the product itself

9. Afghanistan, Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Cyprus, Denmark, Fiji, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Nicaragua, Norway, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, Union of Soviet Socialist Republics and Venezuela noted that compensation was recoverable for damage caused to property other than the product itself.

10. Of these States, Burundi, Canada (for provinces other than Quebec), Fiji, Denmark, Hungary, Nicaragua, Philippines, Poland, Portugal and the United Kingdom noted that compensation was recoverable for loss of profits resulting from such damage.

Economic loss unconnected with physical injury or property damage

11. The replies of Afghanistan, Barbados, Belgium, Benin, Canada (for the province of Quebec), Hungary, Madagascar, Mauritius, Poland, Portugal, Senegal and Venezuela indicated that compensation was recoverable for such loss.

12. Canada (for provinces other than Quebec) noted that there was no general rule excluding recovery for economic loss, but that recovery was only granted in limited circumstances. Cyprus and Ireland noted that the position as to recovery was uncertain, but Cyprus also noted that recovery might be possible in certain circumstances.

13. Denmark, Fiji, Sweden and the United Kingdom noted that usually no recovery was possible for such loss.

³² The categories of persons entitled to claim for loss of support are noted in II, B, 1, question 5, para. 3, above.

Australia noted that compensation for the decreased value of the product itself was not recoverable.

*Infringement of non-pecuniary interest; "dommage moral"*³³

14. Afghanistan, Barbados, Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Philippines, Senegal and Venezuela noted that recovery of compensation could be obtained for infringement of a non-pecuniary interest. Of these States, Belgium, Benin, Burundi, Canada (for the province of Quebec), Madagascar, Mauritius, Philippines, Senegal and Venezuela described the possible loss resulting from infringement of a non-pecuniary interest as "*dommage moral*".

15. The Byelorussian Soviet Socialist Republic, Hungary, and the Union of Soviet Socialist Republics noted that no compensation was recoverable for "*dommage moral*". Botswana noted that no compensation was recoverable if the loss was not a "patrimonial loss".

(b) *Rules delimiting those consequences of a delict (tort) for which compensation is recoverable*

Criterion of foreseeability

16. Canada (for the province of Quebec) and the Philippines noted that compensation was recoverable for consequences which were not foreseeable. It was, however, necessary that the consequences should be:

- (i) Direct and immediate consequences of the delict (tort) (Canada (for the province of Quebec));
- (ii) The natural or probable consequences of the act or omission in question (Philippines).

17. Australia, Barbados and Sweden noted that compensation was limited to consequences which were reasonably foreseeable.

Causation

18. Benin, Burundi, Madagascar, Netherlands and Portugal noted that an adequate causal connexion must be proved between the consequences for which compensation was claimed and the delict (tort).

Remoteness

19. Botswana and the United Kingdom noted that the damages must not be too remote.

(c) *Rules for assessing in money terms the compensation to be awarded for loss or damage*

20. Poland, Portugal, Romania and Sierra Leone noted that the object of an award of compensation was to restore the injured party to the position he would have occupied if the delict (tort) had not been committed.

21. The Netherlands, Poland and Portugal noted that a Court had the power to mitigate the amount awarded as compensation by taking into account:

(a) The financial situation of the parties (Netherlands);

(b) The degree of culpability of the defendant, his financial situation, and the other circumstances of the case (Poland, Portugal).

³³ States where compensation is recoverable for "*dommage moral*" resulting from physical injury have been noted in paras. 2-4 above.

*Question 7: What defences are available, and what is their effect?*³⁴

The following defences were noted:

(a) *Absence of conditions necessary for liability*

1. Many States noted that it was a defence to show the absence of conditions necessary for liability to arise. The following examples were given of circumstances under which liability did not arise:

- (i) Absence of a duty of care owed by the defendant to the plaintiff in the circumstances (Australia);
- (ii) Absence of defendant's negligence (Canada (for provinces other than Quebec), Ireland, Mauritius, Sierra Leone) or fault (Hungary);
- (iii) Absence of causal connexion between the fault and the damage (Canada, Mauritius, Portugal);
- (iv) Absence of defect in the product (Norway).

(b) *Fault of the injured party and contributory (comparative) fault*

2. Afghanistan, Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Denmark, Fiji, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Norway, Pakistan, Poland, Portugal, Romania, Senegal, Sweden, Union of Soviet Socialist Republics, and the United Kingdom noted that fault of the injured party was a defence.

3. It was noted that the defendant was exculpated by proof that the extent of the plaintiff's fault was such that the main responsibility for the loss lay with the plaintiff (Australia, Belgium, Burundi, Byelorussian Soviet Socialist Republic, Canada, Germany, Federal Republic of, Hungary, Madagascar, Netherlands, Poland, Romania, Union of Soviet Socialist Republics, United Kingdom).

4. It was also noted that where the fault of both parties contributed to cause the damage, the amount of compensation awarded to the plaintiff was decreased commensurately to the extent that his fault had caused the damage (Australia, Barbados, Belgium, Botswana, Byelorussian Soviet Socialist Republic, Canada (for provinces other than Quebec), Denmark, Germany, Federal Republic of, Hungary, Ireland, Netherlands, Portugal, Sweden, Union of Soviet Socialist Republics, United Kingdom).

(c) *Assumption of risk*

5. Afghanistan, Australia, Barbados, Botswana, Canada (for provinces other than Quebec), Denmark, Hungary, Madagascar, Netherlands, Norway, Romania, Sierra Leone and the United Kingdom noted that assumption of risk was a defence. Hungary noted that the defence was available only where the injury did not threaten or violate any social interest, and Romania noted that the assumption of risk must be contained in a valid contractual clause.

(d) *Force majeure, cas fortuit, act of God, inevitable accident*

6. Afghanistan, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada (for the province of Quebec), Hungary, Madagascar, Mauritius, Netherlands, Norway, Philippines, Poland, Romania, Senegal and the Union of Soviet Socialist Republics

³⁴ The defences to certain cases of strict liability have been noted in II, B, 1, questions 1 and 2, paras. 17 and 19, above.

noted that it was a defence to prove that the damage resulted from *force majeure*.³⁵

7. Canada (for the province of Quebec) and Senegal noted that it was a defence to prove that the damage resulted from *cas fortuit*.

8. Barbados noted that it was a defence to prove that the damage resulted from an act of God.

9. Barbados and Sierra Leone noted that it was a defence to prove that the damage resulted from inevitable accident. Barbados noted that this defence was available "where the party charged with the offence could not possibly prevent it by the exercise of ordinary care, caution and skill".

(e) *Intervening act of a third party*

10. Afghanistan, Australia, Benin, Botswana, Canada, Denmark, Madagascar, Mauritius, Norway, Romania and Senegal noted that it was a defence to prove that an intervening act of a third party caused the loss. Afghanistan, Madagascar, and Romania noted that the act had to be equivalent to *force majeure*.

(f) *Exemption clauses*

11. Belgium, Canada (for the province of Quebec) and Sweden noted that, where an action was brought on the basis of negligence between parties in contractual relationship, the defendant could rely on a clause in the contract exempting him from liability. However, Canada (for the province of Quebec) also noted that such an exemption clause was invalid:

- (i) When the clause was against public order and morality;
- (ii) When the delict (tort) complained of involved *faute lourde* or gross negligence;
- (iii) When one party had induced the other to accept the exemption clause by false representations.

12. Burundi, Madagascar and Mauritius noted that a contractual clause exempting a defendant from liability for fault was invalid. Canada (for the province of Quebec) noted that a clause exempting a defendant from liability for intentional wrongdoing was invalid.

Question 8: Are there fixed limits to liability?

(a) *Maximum amounts per product, injury or year*³⁶

1. Most States (Australia, Barbados, Belgium, Benin, Botswana, Burundi, Byelorussian Soviet Socialist Republic, Canada, Cyprus, Denmark, Fiji, Germany, Federal Republic of, Hungary, Madagascar, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, the Union of Soviet Socialist Republics, United Kingdom, Venezuela) indicated that there were no such maximum limits fixed by law.

2. Denmark noted, however, that in practice ceilings had been established for recovery of compensation for disability, and for loss of support resulting from the loss

of a breadwinner. Compensation for pain and suffering was also awarded on the basis of fixed rates.

3. The Philippines noted that where death was caused by fault or negligence, a minimum sum payable as compensation was fixed by law.

4. Botswana and Canada (for the province of Quebec) noted that limits were fixed by law regarding compensation payable under the Workmen's Compensation Acts.

5. Afghanistan noted that the amounts payable might be fixed by agreement.

(b) *Periods of prescription or limitation*

(a) *One- or two-year period*

6. Canada (for the province of Quebec) noted that a 1 year period applied:

- (i) To actions for the recovery of compensation for personal injuries;
- (ii) To actions brought by relatives of a deceased to recover compensation for loss caused by his death, the period commencing to run from the date of death. In all other cases a two-year period applied.

7. Canada also noted that in the Yukon, the Northwest Territories, Alberta, Saskatchewan, Manitoba and Prince Edward Island, a two-year period applied to actions for the recovery of compensation for personal injuries.

(b) *Three- or four-year period*

8. Botswana, Byelorussian Soviet Socialist Republic, Germany, Federal Republic of, Poland, Portugal, Romania, the United Kingdom and the Union of Soviet Socialist Republics noted the applicability of a three-year period subject to the following qualifications:

- (i) The Federal Republic of Germany and Poland noted that the three-year period commenced to run from the time that the plaintiff obtained knowledge of the damage suffered, and of the person responsible therefor. Irrespective of this rule however, the action was barred after the lapse of 30 years (Federal Republic of Germany) 10 years (Poland) after the act causing the damage was committed;
- (ii) Portugal noted that the three-year period commenced when the injured party obtained knowledge of his right, even though he did not know the person responsible or the extent of his loss. Irrespective of this rule, however, the action was barred by the lapse of the ordinary period of prescription after the act causing the damage;
- (iii) Romania noted that the period of three years was reduced to 18 months when the action was between Socialist organizations;
- (iv) The United Kingdom noted that, in case of personal injuries and death the action to recover compensation must be brought within three years of the date of injury or death as the case may be, or within three years of the plaintiff becoming aware of all the material facts which would enable him to bring an action, whichever was the longer period.

9. The Philippines noted that a four-year period applied to an action for compensation for damage resulting from fault or negligence.

³⁵ For definitions of *force majeure* given by Burundi, Botswana and Romania, see II, A, question 7, para. 2, above.

³⁶ Even where no maximum limits per product, injury or year are fixed by law the general rules delimiting the consequences of a delict (tort) for which compensation is recoverable, and the rules for assessing in money terms the compensation recoverable, will specify limits beyond which no compensation is recoverable. The available information as to these limits is contained in II, B, 1, question 6, paras. 16-19, above.

(c) *Five- or six-year periods*

10. Denmark noted that a period of five years applied to an action for compensation for damage caused by a product. The period commenced to run from the time the damage occurred, unless the person suffering damage was excusably ignorant of his claim or the whereabouts of the person responsible. Irrespective of this rule, however, an action was barred by the lapse of 20 years from the time the damage occurred.

11. Australia, Barbados, Canada (for the province of Ontario) and Sierra Leone noted that a period of six years applied, subject to the following qualifications:

(i) Australia noted that if compensation was sought for personal injuries, the period was reduced in some States of the Federation as follows: Queensland, South Australia and Victoria, to three years, and Tasmania, to two years six months;

(ii) Barbados noted that in the case of actions against public authorities the action must be commenced before the expiration of one year from the date the cause of action arose.

(d) *Ten-year period*

12. Venezuela noted that the general limitation period was 10 years for personal civil actions.

(e) *Twenty-year period*

13. Mauritius noted that a period of 20 years applied to all delictual (tortious) actions.

(f) *Thirty-year period*

14. Belgium, Benin, Burundi, Madagascar and the Netherlands noted that a period of 30 years was applicable to actions to recover compensation for damage caused by products.

Question 9: In respect of what matters does the plaintiff have the burden of proof, and in respect of what matters does it rest on the defendant?

General principle

1. Many States noted that, in principle, the plaintiff (i.e. the person claiming compensation) was required to prove the elements necessary to establish liability under the basis of liability on which he relied (Afghanistan, Australia, Barbados, Belgium, Benin, Burundi, Canada, Fiji, Germany, Federal Republic of, Hungary, Ireland, Madagascar, Mauritius, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Sweden, United Kingdom, Venezuela). The defendant (i.e. the person from whom compensation was claimed) was required to prove the elements of any defence exculpating him from liability (Australia, Barbados, Belgium, Benin, Burundi, Byelorussian Soviet Socialist Republic, Canada, Fiji, Germany, Federal Republic of, Hungary, Madagascar, Mauritius, Philippines, Poland, Portugal, Romania, Senegal, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom, Venezuela).

Fault liability

2. In relation to fault liability, the following examples were given of the principle noted in paragraph 1 above:

To be proved by the plaintiff

(a) A duty of care owed by the defendant to the

plaintiff (Australia, Canada (for provinces other than Quebec), Ireland, Netherlands, Pakistan);

(b) Fault or negligence³⁷ (Australia, Barbados, Belgium, Canada, Cyprus, Germany, Federal Republic of, Ireland, Mauritius, Nicaragua, Pakistan, Philippines, Senegal, Venezuela);

(c) Loss or damage (Australia, Belgium, Byelorussian Soviet Socialist Republic, Denmark, Hungary, Ireland, Mauritius, Nicaragua, Norway, Pakistan, Senegal, Union of Soviet Socialist Republics);

(d) Causal connexion between the fault and the damage (Australia, Belgium, Byelorussian Soviet Socialist Republic, Canada, Denmark, Germany, Federal Republic of, Hungary, Ireland, Pakistan, Senegal, Union of Soviet Socialist Republics, Venezuela);

To be proved by the defendant

Force majeure (Belgium, Philippines) *cas fortuit* (Philippines) and contributory negligence of the plaintiff (Barbados).

Strict liability

3. In relation to the strict liability of a person having the care of a thing,³⁸ the following examples were given of the principle noted in paragraph 1 above:

To be proved by the plaintiff

(a) That the defendant had the care of the thing (Mauritius, Senegal);

(b) That the thing was defective (Belgium);

(c) Loss or damage (Belgium, Burundi, Romania, Senegal);

(d) Causal connexion between the action of the thing and the loss or damage (Belgium, Burundi, Mauritius, Romania, Senegal).

To be proved by the defendant

(a) *Force majeure* (Belgium and Burundi);

(b) That the damage was caused by the exclusive fault of the plaintiff (Burundi);

(c) Inability to prevent the act which caused the damage (Canada (for the province of Quebec)).

Degree of proof

4. Australia, Barbados, Canada (for provinces other than Quebec), Mauritius and the United Kingdom noted that, where the burden of proof lay on a party, the degree of proof required was proof on a balance of probabilities. Portugal noted that in case of doubt the facts must be considered to constitute the right in question. Norway noted that the degree of proof required would vary with the circumstances of each case.

2. OTHER FORMS OF EXTRA-CONTRACTUAL LIABILITY

1. In addition to the delictual (tortious) liability noted in section (i) above, many States noted the existence of other forms of extra-contractual liability. The description given of the latter forms of liability was generally brief, and therefore no detailed analysis is possible.

³⁷ The exceptional situations where negligence is presumed and the defendant bears the burden of disproving negligence are noted in II, B, 1, questions 1 and 2, paras. 8-10, above.

³⁸ For a description of this basis of liability, see II, B, 1, questions 1 and 2, paras. 15-18, above.

The replies disclosed two broad approaches to the imposition of liability. Under the first approach, the law singles out for special regulation the manufacture and supply of certain products which involved a high risk of physical injury. The products frequently noted in this group were food products, drugs and explosives. Under the second approach, consumer protection is the main objective. The law singles out products which might harm consumers, and consumer contracts, and subjects them to special regulation.

Regulation of food products, drugs and explosives

(a) Food products

2. Madagascar, the Netherlands, Nicaragua, the Philippines and Venezuela noted that the manufacture, or sale, of food products was governed by special regulations, a breach of which entailed criminal liability. The Netherlands also noted that breach of the regulations might be relevant in determining whether there had been a breach of duty in the law of delict (tort).

3. Belgium, Benin, Burundi, Fiji and the Federal Republic of Germany noted that regulations governed the manufacture of food products, and Belgium and the Federal Republic of Germany noted that breach of such regulations may be relevant in determining the existence of delictual (tortious) liability. Burundi noted that breach of the regulations entailed strict civil liability to any person injured as a result of such breach.

(b) Drugs

4. Chile, Madagascar, the Netherlands, Nicaragua, the Philippines, Romania and Venezuela noted that the manufacture, or sale, of drugs was governed by special regulations, a breach of which entailed criminal liability. The Netherlands also noted that breach of the regulations might be relevant in determining whether there had been a breach of duty in the law of delict (tort).

5. Belgium, Botswana, Burundi and Fiji noted the existence of regulations governing the manufacture and distribution of drugs, and noted that the following consequences resulted from a breach of such regulations:

- (i) Belgium and Botswana noted that such a breach might be relevant to determining delictual (tortious) liability to the person injured;
- (ii) Burundi noted that the manufacturer or seller might be subject to strict civil liability to the person injured.

6. The Federal Republic of Germany noted the existence of a special law under which a pharmaceutical company placing a drug on the market was liable irrespective of fault or negligence to pay compensation for physical injury or death caused by the use of the drug. Such liability was, however, limited to a specified maximum amount per claimant, with an over-all maximum amount applying to all damage caused by identical products having the same defect. Norway noted that a person injured by using an improperly manufactured drug could under a special law recover compensation from the seller or manufacturer without proving fault or negligence.

7. Hungary noted that, under a special law, where death or bodily injury resulted from the use of a drug, compensation was paid by the State to the person injured or his dependants.

(c) Explosives

8. Burundi, Madagascar and Romania noted that special regulations applied to the manufacture and distribution of explosives. Madagascar and Romania noted that breach of the regulations entailed criminal liability, while Burundi noted that the manufacturer or seller was strictly liable to any person injured as a result of such breach.

Regulation of products, and consumer contracts, in the interests of consumer protection

(a) Specification of standards

9. Australia (with reference to the Trade Practices Act 1974, and the Consumer Affairs Act 1972 of Victoria) noted the existence of laws enabling an executive authority to specify standards as to the composition of products, or to require the supply to consumers of information about products. Any person suffering loss as a result of a failure to comply with such standards or requirements was entitled to recover compensation from the person in default.

(b) Prohibitions on supply

10. Australia (with reference to the New South Wales Consumer Protection Act 1969) also noted that orders may be made prohibiting the supply of specified goods, and that anyone supplying prohibited goods was strictly liable to a person injured as a result of such supply.

(c) Implied obligations

11. Australia (with reference to the Manufacturers Warranties Act 1974 of South Australia) and Canada (with reference to the Consumer Protection Act 1970 of Manitoba) noted that in a retail sale, obligations to supply goods of merchantable quality were implied which could not be excluded. Canada (with reference to the Consumer Protection Act 1971 of Quebec) noted that an obligation was implied in consumer contracts to disclose relevant information, and that other obligations were implied affecting the legal position of the parties.

C. PROPOSALS FOR LAW REFORM

(a) Proposals involving contractual liability

1. Australia noted that the New South Wales Law Reform Commission had issued a detailed working paper on the sale of goods. Canada (for the province of Ontario) noted that legislation was proposed to reform the law as follows:

(1) Certain warranties which could not be excluded would be implied in every consumer sale for a consideration exceeding a specified sum.

(2) Liability for breach of warranty would extend to the manufacturer notwithstanding the absence of privity of contract.

(3) Certain warranties would accompany the goods regardless of resale.

(b) Proposals involving delictual (tortious) liability

2. Hungary noted that there was a consensus on the need to regulate products liability, and that a proposal had been made as to how the law might be regulated in the course of the forthcoming revision of the Code of Civil Procedure, but that the intention of the legislature was yet unknown.

3. The Netherlands noted that a proposal had been made to include in the section on obligations of the Civil Code the following provision:

"A person who manufactures and puts or causes to be put into circulation a product which by reason of a defect unknown to him constitutes a danger to persons or things, is liable, if that danger materializes, as if the defect were known to him, unless he proves that it was due neither to his own fault or that of another who at his orders was engaged on the product, nor to the failure of the appliances used by him."

It was noted that this article had not been included in the Civil Code because of possible action in connexion with the European Convention on Products Liability in regard to Personal Injury and Death, and the proposed directive of the European Economic Community concerning the approximation of the laws of Member States relative to product liability.

4. Portugal noted that a provision in its Civil Code imposed liability on whoever caused loss to others in the exercise of an activity dangerous in its very nature, except where he showed that he had employed all the precautions required in the circumstances. However, in relation to products liability, this provision was currently construed only as imposing liability for losses caused by the activity of manufacturing, and not for losses caused by products after manufacture. A proposal had been made that the provision should be extended to cover losses caused by defective products after their manufacture and sale.

(c) *Proposals which may involve either or both contractual and delictual (tortious) liability*

5. The United Kingdom noted that certain governmental institutions dealing with law reform (the Law Commission and the Scottish Law Commission) had been requested by the Government to consider whether the existing law governing compensation for personal

injury, damage to property or any other loss caused by defective products was adequate, and to recommend what improvements, if any, were needed in the law.

(d) *Proposals not involving either contractual or delictual (tortious) liability*

6. Mauritius noted that judicial opinion had suggested the creation of a national fund to compensate victims of accidents who could not recover compensation under the law of civil liability.

7. Sweden noted that legislation was being considered to provide compensation for personal injury caused by drugs. It was intended that the compensation would be paid under a scheme of collective insurance.

8. The United Kingdom noted that an inquiry was being conducted by a special Commission into, *inter alia*, the whole basis on which personal injury should be compensated. The Commission had been requested to consider to what extent, in what circumstances and by what means compensation should be payable in respect of death or personal injury suffered by any person through the manufacture, supply or use of goods or services.

9. Denmark noted that the national goal on a long-term basis was that all victims of accidents should be compensated at a reasonable level by the social security system. More immediate proposals involving the relationship between the social security system and claims under civil law were that:

(a) Payments made under the social security system should reduce the amounts which could be claimed in delict (tort);

(b) The social security system should not be involved in claims against the wrongdoer; and

(c) Any compensation paid by private sources should not result in a reduction of social security payments.