come tax is now a part of state tax practice. By the new statute, the standard three-year statute of limitations does not apply when a taxpayer omits an amount properly includible in his gross income that is in excess of twenty-five percent of the amount of gross income stated in the return.[160] In such cases, a six-year statute of limitations applies.[161]

In what could prove to be a very significant enactment, inasmuch as the gross income tax regulations are often altered, the 1977 General Assembly placed an effective restriction on the applicability of gross income tax regulations. Beginning on May 26, 1977, all changes in the interpretations of the gross income tax law by the Department of Revenue that could increase a taxpayer's liability under the gross income tax law must be stated in rules or regulations duly promulgated in the manner by which other state administrative agencies must proceed.[162] Furthermore, changes in departmental interpretation of the gross income tax law that could result in an increase of a taxpayer's gross income liability may in no event take effect prior to the date on which such change is duly promulgated in a rule or regulation.[163]

XVII. Torts

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As has been the case for the past few years, the most dramatic developments in the law of torts have taken place in the products liability area. Those developments are thoroughly discussed in a recent symposium in the *Indiana Law Review*[1] and in another article in this Survey. The purpose of this review is to discuss the "traditional" tort cases decided during the survey period that are of interest to the practitioner and the scholar, either because of their

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[160]IND. CODE § 6-3-6-2(a) (Supp. 1977) (amending *id.* § 6-3-6-2 (1976)).

[161]*Id.*

[162]*Id.* § 6-2-1-34(d). Rules and regulations are "duly promulgated" when the procedure outlined in *id.* §§ 4-22-2-1 to -11 (1976) is followed.

[163]*Id.* § 6-2-1-34(d) (Supp. 1977).

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[1]*See generally Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 753 (1977).

treatment of an area of the law or because of their treatment of particular facts. This is not meant to be an exhaustive review of all torts cases decided during the survey period, but rather a collection of the cases the authors believed were most significant.

A. Intentional Torts

In *Mitchell v. Drake*,[2] the Third District Court of Appeals held that a police officer was not liable for false imprisonment of the plaintiff, who was acquitted of disorderly conduct charges when the trial court held that Indiana's disorderly conduct statute[3] was unconstitutional.[4] Following *Saloom v. Holder*,[5] the court stated that the constitutionality of legislative pronouncements is presumed, and therefore, police officers acting in good faith in reliance on such pronouncements are protected from liability for arrests made, even if the statutes are subsequently found to be invalid.[6]

Two defamation cases decided during the survey period are helpful in determining where Indiana stands on issues of privilege and malice. The plaintiff and defendant in *Weenig v. Wood*[7] were business associates in Markway Press, Inc., a corporation that printed brochures for distribution to hospitals. The plaintiff was a shareholder, director, and employee of the corporation, while the defendant was the president and a director. The plaintiff, Wood, designed the brochures and sold them through his own business, variously known as Guideways or Mark Wood Associates. It was Wood's practice to deposit checks made payable to his business in checking accounts throughout the country and to allocate forty percent of the proceeds to his own business and sixty percent to Markway Press. Weenig, the defendant, had agreed to manage and invest in Markway Press in exchange for a controlling interest in the company; in turn, Wood was to continue to operate his businesses and to market the brochures printed by Markway. Shortly after becoming president of the company, Weenig accused Wood of embezzling funds from the company. The first accusation occurred at a board of directors' meeting of the company and was repeated on at least eight other occasions to groups other than the board of

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[2]360 N.E.2d 195 (Ind. Ct. App. 1977).

[3]IND. CODE § 35-27-2-1 (1976) (repealed 1977, Pub. L. No. 148, § 24, 1976 Ind. Acts 718).

[4]The court of appeals commented in a footnote that the same statute was found to be constitutional in Hess v. State, 260 Ind. 427, 297 N.E.2d 413 (1973), shortly after the dismissal of charges against Mitchell. 360 N.E.2d at 196 n.1.

[5]158 Ind. App. 622, 304 N.E.2d 217 (1973).

[6]360 N.E.2d at 197.

[7]349 N.E.2d 235 (Ind. Ct. App. 1976).

directors.[8] As a result of the accusations, Wood left the company.

Wood sued Weenig for defamation, and a jury awarded him $150,000 actual damages and $50,000 punitive damages. The trial judge reduced the recovery to $25,000 actual damages and $5,000 punitive damages.[9] Both parties appealed. The court of appeals was presented with issues of privilege, malice, and damages, as well as various procedural questions that will not be discussed here. The court first found that the accusation that Wood had embezzled funds was defamatory per se in two ways: it "imputed to Wood the commission of a crime," and it "impugned Plaintiff in his trade or business."[10]

The court then addressed the issue of whether Weenig was protected by a qualified privilege for communications in the common interest. As the court noted, it is the rule in Indiana that:

> [A] communication made in good faith on any subject matter in which the party making the communication has an interest or in reference to which he has a duty, either public or private, either legal, moral, or social, if made to a person having a corresponding interest or duty, is privileged.[11]

The accusations made by Weenig during the board of directors' meeting were held to be within the privilege, but other statements made to people not involved in the business were not privileged. The court then found that Weenig abused and therefore lost the privilege on the privileged occasions[12] by actions that constituted malice by publication of the defamation. Weenig's obvious personal ill will toward the plaintiff coupled with his "vehemence" of language were evidence of actual malice.[13] Reasoning that the existence of actual malice overcomes the qualified privilege, the court of appeals found that all the occasions on which Weenig made the accusations were actionable.[14]

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[8] *Id.* at 238.

[9] *Id.*

[10] *Id.* at 246. When defamation per se is found, absent proof that defendant knew of the falsity of the communication or acted in reckless disregard for its truth or falsity, the common law rule of presumed damages is inapplicable. When the defendant's negligence is at issue, recovery is limited to compensation for actual injury. RESTATEMENT (SECOND) OF TORTS § 621 (1977).

[11] 349 N.E.2d at 248 (quoting 18 IND. L. ENCYCLOPEDIA *Libel and Slander* § 52 (1959), *cited in* Indianapolis Horse Patrol, Inc., v. Ward, 247 Ind. 519, 524, 217 N.E.2d 626, 628-29 (1966)).

[12] 349 N.E.2d at 248.

[13] *Id.* at 250.

[14] *Id.* at 249.

The court found that in addition to the showing of personal ill will, there was another basis for finding actual malice on Weenig's part. If Weenig had made any effort to verify his accusations before making them, he would have discovered, based on Wood's total disclosure of financial affairs, that Wood had never withdrawn more than his allocated portion of the checking accounts. Therefore, Wood was only taking money that was rightfully his. The court stated: "Such recklessness hardly comports with the requirement of 'good faith' included in Weenig's own statement of the conditional privilege which he claims protects him."[15]

The court of appeals held that the original verdict of the jury was supported by ample evidence, as to both actual and punitive damages. The court remanded the case to the trial court with orders to reinstate the original jury verdict.[16]

The second defamation case, *Patten v. Smith*,[17] gave guidance as to the appropriate jury instructions to be given in cases where malice or reckless disregard of falsehood are at issue. The case involved a defamation suit by a mausoleum builder against the defendant, who mailed a brochure containing warnings and advice as to mausoleum purchase and construction to local residents during the construction of the structure. The trial court gave instructions stating that a qualified privilege was applicable to defendant's comments if the subject matter was of public interest, and that "the plaintiff Richard Smith cannot recover actual or punitive damages unless he proves by evidence of convincing clarity that there was actual malice by the defendant Maurice Patten."[18] The court relied on the definition of actual malice in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,[19] which requires "the private individual who brings a libel action involving an event of general or public interest to prove that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard of whether it was false."[20] The court rejected, however, defendant's tendered instruction, which defined the term "reckless disregard" as follows:

> I instruct you that to establish that the defendant, Maurice Patten, or the defendants published the pamphlets with reckless disregard, the plaintiff, Richard Smith, must show

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[15]*Id.* at 251.

[16]*Id.* at 257-58.

[17]360 N.E.2d 233 (Ind. Ct. App. 1977).

[18]*Id.* at 237.

[19]321 N.E.2d 580 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976).

[20]360 N.E.2d at 237 (quoting Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc., 321 N.E.2d at 586).

> by clear and convincing evidence that the defendant, Maurice Patten, in fact entertained serious doubts as to the truth of his publication. If you find from the evidence that Maurice Patten had reason to believe the truth of the matters contained in such pamphlet the fact that he did not verify the truth of the statements contained therein does not constitute reckless disregard.[21]

The Third District Court of Appeals reiterated its holding in *Aafco* and expressly approved the defendant's instruction, stating that in cases in which reckless disregard is an issue, the term must be defined for the jury. In addition, the court found it was erroneous for the trial court to give an instruction defining malice with an exact quote from *Black's Law Dictionary*, because "malice is a term of art in cases involving qualified privilege."[22] Holding that the *Aafco* definition is the proper one for such cases, the court found that the omission of the reckless disregard instruction and the inclusion of the incorrect malice definition were reversible errors and grounds for a new trial.[23]

B. Negligence

1. Statutory Negligence.—Several cases during the survey period involved various kinds of statutory negligence. In *Smith v. Cook*,[24] the First District Court of Appeals held that the Indiana Manual on Uniform Traffic Devices for Streets and Highways,[25] which was adopted by statute in Indiana to guide the "signing, marking, and erection of all traffic control devices on all streets and highways,"[26] did not in itself impose an absolute duty on those bound to follow it. The Manual, rather, was held to be "but a guide."[27] Therefore, failure to follow its provisions could not be negligence per se. In the case at hand, the plaintiff failed to sustain the burden of proof as to defendant's negligence, and the granting of judgment on the evidence was held to be proper.[28]

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[21] *Id.* at 237.

[22] *Id.* at 238.

[23] *Id.*

[24] 361 N.E.2d 197 (Ind. Ct. App. 1977).

[25] Indiana State Highway Commission, Indiana Manual on Uniform Traffic Devices for Streets and Highways (1975) (unpublished pamphlet available at Commission offices, 100 N. Senate Ave., Indianapolis, Indiana 46204).

[26] IND. CODE § 9-4-2-1 (1976). The statute provides: "The Indiana Manual on Uniform Traffic Control Devices for Streets and Highways shall be adhered to by all governmental agencies within the state responsible for the signing, marking, and erection of all traffic control devices on all streets and highways within the state."

[27] 361 N.E.2d at 201. The court noted that the Manual made the use of many devices discretionary and was even called a guide in the Introduction. *Id.*

[28] *Id.* at 202.

In *Stevens v. Norfolk & Western Railway*,[29] the First District Court of Appeals held that a jury may find a railroad crossing is extra hazardous, even if the Indiana Public Service Commission has not so designated the crossing.[30] Indiana Code section 8-6-7-1[31] provides that the Public Service Commission may declare railroad crossings to be dangerous or extra hazardous and thereby require installation of crossing safety devices. The Commission had not designated the crossing in *Stevens* as an extra-hazardous one, and in granting partial summary judgment, the trial court found that "as a matter of law the defendant was not required to install any automatic train-activated warning signal or crossing safety device other than those prescribed by statute."[32] Tracing what it called the "departure from strict adherence to the so-called 'minority view,'"[33] the court of appeals found that it is the law in Indiana that:

> [O]nce it is determined under all the circumstances that a grade crossing is extra hazardous, [the railroad] can then be found negligent in its failure to adequately protect the public from danger by providing warnings and taking safety precautions in addition to those required by statute, and despite the absence of a Public Service Commission determination that the crossing is extra hazardous.[34]

The court then remanded the case to the trial court because the defendant railroad had not sustained its burden of proof on the partial summary judgment motion.

2. Privileges and Immunities.—In *Salem Bank & Trust Co. v. Whitcomb*,[35] the plaintiff-bank sought to recover from the Indiana Secretary of State, the Director of the Uniform Commercial Code Division, and their sureties for failing to include a copy of a financing statement in the results of a U.C.C. filing search[36] pertaining to a

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[29]357 N.E.2d 1 (Ind. Ct. App. 1976). The First District Court of Appeals reiterated its holding in Wells v. Baltimore & Ohio R.R., 363 N.E.2d 1001 (Ind. Ct. App. 1977).

[30]357 N.E.2d at 4-5.

[31]IND. CODE § 8-6-7-1 (1976).

[32]357 N.E.2d at 2 (quoting the trial court).

[33]*Id.* at 3.

[34]*Id.* at 4. The defendant-railroad had relied on two cases to support its contention that it is not proper for a jury to decide whether a railroad crossing has become extra hazardous. Tyler v. Chicago & E. Ill. Ry., 241 Ind. 463, 173 N.E.2d 314 (1961); Terre Haute, Indpls. & E. Traction Co. v. Phillips, 191 Ind. 374, 132 N.E. 740 (1921). The court of appeals agreed that those cases supported defendant's proposition, but noted that Indiana had departed from that rule in Central Ind. Ry. v. Anderson Banking Co., 252 Ind. 270, 247 N.E.2d 208 (1969), and had since then followed the majority rule: a jury might determine a crossing to be extra hazardous.

[35]362 N.E.2d 1180 (Ind. Ct. App. 1977).

[36]The Indiana Secretary of State's office is required to certify such information by IND. CODE § 26-1-9-407(2) (1976), which provides:

party to whom the bank was considering loaning money. The prior secured party, whose identity was omitted from the information given the bank by the Secretary of State's office, repossessed the collateral of the debtor and the bank was left with no recourse on its $18,000 loan balance. The Secretary of State asserted that bad faith or malice must be shown in the performance of ministerial duties before a public officer may be found liable for negligence. The trial court agreed and granted judgment in favor of the defendants. The Indiana Court of Appeals disagreed and held that the law in Indiana rests upon "the traditional distinction between ministerial and discretionary acts as they relate to the immunity accorded executive officers."[37] Although a public officer may not be held liable for errors made in the performance of discretionary acts, he may be held accountable for negligence in the performance of merely ministerial acts.[38] The court of appeals remanded the case to the trial court for exploration of factual controversies not examined in the prior proceeding.

One additional immunity case that could prove to be a landmark decision if it is upheld by the United States Supreme Court is *Sparkman v. McFarlin*.[39] The seventeen-year-old plaintiff brought an action under federal civil rights statutes[40] against her mother, her mother's attorney, and an Indiana circuit court judge, based on the judge's granting of the mother's request two years earlier to have the minor plaintiff sterilized. The judge granted the mother's petition, which alleged that the plaintiff was "somewhat retarded" but was not behind children of her age group, that she had been dating and staying overnight with older men, and that the mother "could not maintain a continuous observation over [plaintiff] to 'prevent unfortunate circumstances.' "[41] The judge granted the petition without a hearing and with no notice to the plaintiff; no guardian ad litem was appointed. Furthermore, the petition and order were never even filed in the court's records. The plaintiff was sterilized by tubal

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Upon request of any person, the filing officer shall issue his certificate showing whether there is on file on the date and hour stated therein, any presently effective financing statement naming a particular debtor and any statement of assignment thereof and if there is, giving the date and hour of filing of each such statement and the names and addresses of each secured party therein.

[37]362 N.E.2d at 1182.

[38]*Id.* at 1182-83. The court cited Wallace v. Feehan, 206 Ind. 522, 537-38, 190 N.E. 438, 445 (1934) (quoting F. HARPER, A TREATISE ON THE LAW OF TORTS § 298, at 669-70 (1933)), for an explanation of the distinction between ministerial and discretionary acts.

[39]552 F.2d 172 (7th Cir.), *cert. granted sub nom.* Stump v. Sparkman, 98 S. Ct. 51 (1977) (No. 76-1750).

[40]42 U.S.C. §§ 1983, 1985(3) (1970).

[41]552 F.2d at 173.

ligation at a county hospital, but she was told the surgery was to remove her appendix. She did not learn of the sterilization until after she married, when one of the doctors who performed the surgery told her about it.

She and her husband brought suit in federal district court, alleging her constitutional rights had been violated; she also asserted pendent state claims of assault and battery and medical malpractice, and her husband claimed damages for loss of potential fatherhood.[42] The federal district court found that the judge was "clothed with absolute judicial immunity" for his actions, and since the judge's actions constituted the only state action present, the federal claims could not stand.[43] The court dismissed the federal claims on that basis; the state claims were dismissed for lack of subject matter jurisdiction. The Seventh Circuit Court of Appeals reversed the district court, holding that judicial immunity was not meant to extend so far.

The court first discussed the rationale of the doctrine of judicial immunity:

> The doctrine of judicial immunity was adopted by the Supreme Court in *Bradley v. Fisher* and was held applicable to actions brought under 42 U.S.C. § 1983 in *Pierson v. Ray.* Its purpose is to permit judges to exercise their judicial function independently, without fear of civil liability. It is available even where malicious or corrupt action on the part of a judge is alleged.[44]

Although the immunity is of wide scope, the court stated that it applies only when the judge has subject matter jurisdiction—that is, "the power of the court to hear and decide a cause of action before it."[45] The Seventh Circuit held that the judge in this case acted completely without a statutory or common law basis on which to rely. The court examined Indiana law at the time the petition for sterilization was granted, and found that there was no authority for ordering such a procedure either in Indiana statutes or in the common law. Having so determined, the court then stated that the only other possible justification was that the remedy was a "valid exercise of the power of courts to fashion new common law."[46] The court

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[42] *Id.* at 173-74.

[43] *Id.* at 174.

[44] *Id.* (citing Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871)) (citations omitted). The Seventh Circuit later followed *Pierson* in defining judicial immunity: "Judges are immune from liabilities under suits arising from acts performed within the scope of their judicial duties." Holton v. Boman, 493 F.2d 1176, 1178 (7th Cir. 1974) (citing Pierson v. Ray, 386 U.S. at 554).

[45] 552 F.2d at 174.

[46] *Id.* at 175-76.

determined that there was no such valid exercise in this case, and to advocate judicial actions of the sort would be to sanction "tyranny from the bench."[47]

Finally, the court noted that even if the judge had been within the scope of his powers in fashioning a new remedy, he was not entitled to protection because he had failed "to comply with elementary principles of procedural due process."[48] The court went on to state, "This kind of purported justice does not fall within the categories of cases at law or in equity."[49]

Having concluded the doctrine of judicial immunity did not protect the judge's actions, the Seventh Circuit remanded the case to the district court. The United States Supreme Court granted certiorari on October 3, 1977.[50] Hopefully, the Court will not reverse the Seventh Circuit's sound reasoning and thereby place its stamp of approval on such irresponsible conduct by a judicial officer.

3. Duty.—The plaintiff in *Petroski v. Northern Indiana Public Service Co.*,[51] a fourteen-year-old boy, climbed a tree that was frequently played in by children in his neighborhood. He was injured when he touched a live, uninsulated electric wire running above a similar wire that carried no electric charge. The evidence showed that the Northern Indiana Public Service Co. (NIPSCO) knew or should have known that children frequently played in the tree. The trial court granted judgment on the evidence in favor of NIPSCO. The Third District Court of Appeals reversed, holding that NIPSCO owed a common law duty to the plaintiff and that the issue of whether there had been a breach of that duty should have been presented to the jury.

The court first stated the general rule that "[i]n Indiana, companies engaged in the generation and distribution of electricity have a duty to exercise reasonable care to keep distribution and transmission lines safely insulated in places where the general public may come into contact with them."[52] It then concluded that, given the evidence that children had played in the tree for several years, and regardless whether the plaintiff was characterized as a trespasser or a licensee, NIPSCO owed him "a duty to exercise reasonable care

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[47]*Id.* at 176.

[48]*Id.* In contrast, a federal district court recently found that, under the circumstances, a summary procedure ordering a child removed from his parents' custody and appointing a guardian to give permission for a possibly lifesaving blood transfusion was within the judge's jurisdiction; the court thereby distinguished *Sparkman.* Staelens v. Yake, 432 F. Supp. 834, 837 (N.D. Ill. 1977).

[49]552 F.2d at 176.

[50]98 S. Ct. 51 (1977) (No. 76-1750).

[51]354 N.E.2d 736 (Ind. Ct. App. 1976).

[52]*Id.* at 741.

to protect him from coming into contact with its high voltage wires."[53]

C. Defenses

1. Seat Belt Defense.—There is still a theoretical possibility that a defendant in Indiana could partially or totally escape liability in an automobile accident based on the plaintiff's failure to wear a seat belt. However, as the number of cases increases in which courts of appeal refuse to apply such a defense, the likelihood of its success decreases.

Both the First District Court of Appeals, in *Gibson v. Henninger*,[54] and the Second District Court of Appeals, in *Rhinebarger v. Mummert*,[55] considered seat belt cases during the survey period. Both courts held that giving an instruction allowing the jury to find that the plaintiff had been contributorily negligent in failing to use available seat belts was contrary to law.[56]

In 1971, the Seventh Circuit Court of Appeals, making an attempt to predict Indiana's position regarding the seat belt defense, held that giving such an instruction was not in error.[57] Both the *Gibson* and *Rhinebarger* courts refused to follow the federal interpretation of Indiana law[58] and, instead, followed *Kavanagh v. Butorac*,[59] an earlier Indiana case. Although *Kavanagh* did leave the door open for the application of the defense in some later case,[60] the defendant did not succeed there.

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[53]*Id.* at 742. The court also considered the standard of care applicable to the plaintiff and concluded that he had not acted any differently from any normal fourteen-year-old.

[54]350 N.E.2d 631 (Ind. Ct. App. 1976).

[55]362 N.E.2d 184 (Ind. Ct. App. 1977).

[56]In *Gibson*, the issue was whether the trial court erred in not giving the defendant's instruction. The court held it did not. 350 N.E.2d at 634. On the other hand, in *Rhinebarger*, the trial court gave the instruction and the court of appeals held it to be reversible error. 362 N.E.2d at 185.

[57]Mays v. Dealers Transit, Inc., 441 F.2d 1344 (7th Cir. 1971).

[58]Gibson v. Henninger, 350 N.E.2d at 632; Rhinebarger v. Mummert, 362 N.E.2d at 186 & n.1 (Buchanan, P.J., concurring).

[59]140 Ind. App. 139, 221 N.E.2d 824 (1966).

[60]The *Kavanagh* court said: "We recognize [the] possibility of the doctrine [of avoidable consequences] applying in some future date . . . ." *Id.* at 149, 221 N.E.2d at 830.

The defense is based on the theory that the plaintiff could have avoided some or all of his injuries by wearing a seat belt. However, the failure to wear the seat belt could almost never be the cause in fact of the accident itself. See the discussion of the seat belt defense in Twerski, *The Use and Abuse of Comparative Negligence in Products Liability, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 797 820-23 (1977).

In arguing the doctrine of avoidable consequences, the defendant must take care to avoid seeming to argue comparative negligence, the basis upon which the court re-

According to these cases, in order for a defendant to be entitled to a seat belt instruction, he must present evidence "showing that some part of the injury would not have occurred except for the fact that plaintiff failed to avoid the consequences of the tort by not fastening his seat belt,"[61] or "which connected [the] injuries to her failure to be 'buckled up.' "[62] In *Gibson*, the defendant failed to produce any such evidence. In *Rhinebarger*, the court of appeals did not give weight to the testimony of an apparently non-expert witness who gave his opinion as to the relationship between the failure to wear seat belts and the injuries. In rejecting this testimony, however, the *Rhinebarger* court indicated at least two kinds of witnesses whose testimony would be credited. Presumably a person "qualified as a safety expert" or one with "extensive experience as a police officer" would be competent to testify as to the relationship between not wearing seat belts and the injury.[63] Therefore, any defendant proposing to interject a seat belt defense should provide such expert testimony.

2. Contributory Negligence.—Frankfort v. Owens,[64] a case as interesting for the exchange between defense counsel and a witness for the plaintiff as for its discussion of the law, held that the plaintiff, who was injured while walking across a multi-laned street in Indianapolis, was contributorily negligent in doing so. The plaintiff was held to have violated section 9-4-1-87(a) of the Indiana Code,[65] which requires vehicles to yield the right-of-way to pedestrians. The violated provision states that "no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield."[66] The plaintiff had been standing in a protected area behind a parked telephone company truck that was effecting repairs, and he stepped from behind it into the path of a car driven by one of the defendants. The plaintiff argued that that area should not be considered a "place of safety" under the statute, and since he had not left a curb, he had not violated the statute. The Indiana Court of Appeals disagreed, because the truck was surrounded by traffic control

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jected the seat belt defense in Birdsong v. ITT Continental Baking Co., 160 Ind. App. 411, 413, 312 N.E.2d 104, 106 (1974).

The application of the avoidable consequences doctrine to seat belt cases is criticized by Judge Buchanan in his concurring opinion in *Rhinebarger*. 362 N.E.2d at 186-87. He strongly advocates leaving the question to the legislature.

[61]Kavanagh v. Butorac, 140 Ind. App. at 149, 221 N.E.2d at 830.

[62]Gibson v. Henninger, 350 N.E.2d at 634.

[63]Rhinebarger v. Mummert, 362 N.E.2d at 186.

[64]358 N.E.2d 184 (Ind. Ct. App. 1976).

[65]IND. CODE § 9-4-1-87(a) (1976).

[66]*Id.*

cones and a uniformed man was directing traffic. It held, therefore, that there was some evidence from which the jury could infer that the plaintiff was contributorily negligent, and that the trial court was correct in not withdrawing that issue from the jury.[67]

D. Loan Receipt Agreements

The loan receipt agreement has continued to be a subject of judicial scrutiny.[68] Most recently, the First District Court of Appeals, in two separate decisions, passed upon the procedural effect of such agreements at trial. The desirability of such agreements from a policy standpoint is an issue that has previously been settled in favor of encouraging such agreements.[69]

The first of the two latest cases, *Burkett v. Crulo Trucking Co.*,[70] involved an action against a truck owner, McMurry, and the company to which he had leased his truck, Crulo. Prior to the commencement of the trial, the plaintiff entered into a loan receipt agreement with the representatives of McMurry, who died prior to trial, pursuant to which they agreed to loan the plaintiff $82,000, repayable only if the plaintiff recovered more than $50,000 from the company that had leased the truck.

Crulo, the lessee company, moved for a separate trial, alleging prejudice to it through the truck owner's successors' participation at trial after entering into such an agreement. After an analysis of the history of loan receipt agreements and their approval in Indiana courts, the court noted that while they have been approved in principle, the "innumerable variations" in which they appear requires the court to determine the "specific effect" of each agreement in each case.[71]

McMurry's successors were given full rights of participation at trial as defendants. Crulo objected to their participation, alleging they had presented a sham defense whose only purpose was to assist the plaintiff in recovering a high verdict against Crulo.

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[67]358 N.E.2d at 190. Another case during the survey period discussed contributory negligence. In McKeown v. Calusa, 359 N.E.2d 550 (Ind. Ct. App. 1977), the court noted that a defendant's willful and wanton misconduct can overcome the defense of contributory negligence, but no such misconduct was found on the defendant's part in that case.

[68]*See, e.g.*, American Transp. Co. v. Central Ind. Ry., 255 Ind. 319, 264 N.E.2d 64 (1970); Geyer v. City of Logansport, 346 N.E.2d 634 (Ind. Ct. App. 1976); Scott v. Krueger, 151 Ind. App. 479, 280 N.E.2d 336 (1972); Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969); Klukas v. Yount, 121 Ind. App. 160, 98 N.E.2d 227 (1951).

[69]*See* the authorities cited at note 68 *supra*.

[70]355 N.E.2d 253 (Ind. Ct. App. 1976).

[71]*Id.* at 258.

The court of appeals agreed and held that Crulo was entitled to a separate trial. The agreement, which was quoted in full, was rife with conclusory language as to each defendant's negligence and admitted McMurry's liability. In so doing, it foreclosed, in the court's opinion, any justiciable issues between the plaintiff and McMurry. "McMurry, in fact if not in form, had ceased to be a defendant . . . ."[72] His participation in trial, therefore, served no useful purpose but to confuse the real issues and to "dilute the procedural rights"[73] of Crulo. "After the loan was made, McMurry had no greater right to participate in the trial to protect his 'loan' than would a stranger to the action who had loaned Burkett money for the duration of the trial."[74]

The court noted that a previous Indiana decision[75] had affirmed the denial of a separate trial motion under similar circumstances, but the court distinguished the earlier case because the participating "lender" had denied negligence in the agreement and had not totally limited its exposure to the amount loaned, in the event judgment was rendered against it alone. In dictum, the *Burkett* court anticipated that future resourceful drafters of such agreements would no doubt be able to circumvent its decision to the detriment of non-paying defendants. Colorfully, it concluded that it was applying a "Band-Aid to an abcess."[76] Nonetheless, the court expressed its purpose: "firing a shot across the bow"[77] of those who would seek to misuse such agreements in the future to deprive non-paying defendants of a fair trial.

Despite its ballistics display, the First District Court of Appeals was again confronted with the question of the procedural effect to be given loan receipt agreements in *City of Bloomington v. Holt.*[78] In this case, the plaintiff's decedent was killed when she lost control of her car on a patch of ice on a state highway. The ice was created by leakage from a broken water pipe that passed under the highway and serviced the Voyles residence. The Voyles were made defendants, along with the City of Bloomington, the State of Indiana, and the State Highway Commission. After the commencement of trial, the Voyles entered into a loan receipt agreement with the plaintiff. They participated fully in the trial proceedings; however, the state alleged that they "appeared to behave like plaintiffs rather than defendants."[79] The plaintiff was awarded $100,000; the state and the Highway Commission appealed.

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[72] *Id.* at 259.
[73] *Id.*
[74] *Id.*
[75] Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378 (1969).
[76] 355 N.E.2d at 259.
[77] *Id.* at 261.
[78] 361 N.E.2d 1211 (Ind. Ct. App. 1977).
[79] *Id.* at 1215.

The court of appeals once again approved loan receipt agreements as valid in Indiana, citing its own earlier decision in *Burkett* for the proposition that a defendant who can show that he has been prejudiced by the agreement has alternatives to relieve the prejudice, such as a motion for separate trial. In *Holt*, however, the state was not aware of the agreement until "several days into the trial"[80] and could not have made a pre-trial motion for separation. The state therefore argued that it had been prejudiced by late notice of the agreement. However, the court refused to hold that such agreements must be entered into prior to trial and devoted the remainder of its opinion to a consideration of the alternatives open to non-paying defendants. In so doing, the court found no prejudice in the Voyles' nonparticipation in voir dire or their use of two peremptory challenges. Somewhat abruptly, the court concluded there could be no prejudice to other parties through the exercise of peremptory challenges.[81] No consideration was given to the practical effect of a sham defendant's use of a portion of a finite number of peremptory challenges divided among all the defendants.

The court rejected the contention that the state was prejudiced because the Voyles' "defense" was designed to assist the plaintiffs and defeat the state, reasoning that antagonism between codefendants is inevitable as each attempts to shift the blame to the other. In addition, it found no significance in the fact that the Voyles gave the final closing argument, noting that such questions of sequence are within the discretion of the trial court. Thus, no prejudice to the state was found to have resulted from the active participation of the Voyles at trial.[82] That the court reached this conclusion without examining the language of the agreement is somewhat surprising in light of its effort in *Burkett* to distinguish cases allowing participation on the basis of the language in the agreement. Nowhere in the *Holt* opinion is the precise language of the agreement reported. A jury instruction indicated that the Voyles denied liability—a factor that the *Burkett* court said was favorable to participation. The instruction did not disclose, however, whether the Voyles could have suffered a levy of execution for any judgment in excess of the loan if judgment were rendered against them alone, which was the second distinguishing factor noted in *Burkett* in favor of participation at trial.[83] The failure of the court to rely on these factors in *Holt* arguably diminishes the importance placed upon them in *Burkett*.

The state also alleged error in the trial court's refusal to permit the state to examine the plaintiff as to the nature of the agreement.

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[80] *Id.*

[81] *Id.* at 1215-16.

[82] *Id.* at 1217.

[83] 355 N.E.2d at 259.

While the trial court refused to allow such inquiry, it did instruct the jury that such an agreement existed, even though the Voyles denied liability.[84] The jury was further told that the Voyles would recover their loan only if the plaintiff received a judgment against the other defendants. The jury was instructed to consider the agreement in determining any defendant's liability or the amount of damages, but only as it affected the interests of the parties.

The court of appeals found no compounding of error in this instruction, but the court failed to decide whether the original exclusion of the testimony was in error, saying that any error was rendered harmless by the instruction, since the instruction allowed the state the benefit it would have received from the excluded testimony.[85] This conclusion is questionable, given the general wording of the instruction and its failure to detail the amounts or the possibility of further liability of the Voyles. No doubt the state was seeking more specific information when it sought to elicit testimony concerning the agreement from the plaintiff. The court's holding is consistent, however, with the trial court's instruction that the only purpose for disclosing the agreement to the jury is to show its effect on the interests of the parties. The interests of the plaintiff and the non-lending defendants underwent no apparent change by reason of the agreement. The plaintiff still had every interest in recovering from the non-lending defendants, who, in turn, had every interest in avoiding a finding of liability, including their natural antagonism toward each other. Therefore, the agreement had no hidden effect

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[84]The text of the instruction, as quoted by the court of appeals was:

> You are instructed that there exists in this case a loan receipt agreement by and between the plaintiff, Eris Holt and defendants Harold E. Voyles and Gretna K. Voyles.
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> That in the agreement the Defendants Harold E. Voyles and Gretna K. Voyles continue to deny liability but enter into said agreement because of the uncertainty of the result of this case.
>
> That plaintiff entered into the agreement to receive some money at this time without jeopardizing his claim against the City of Bloomington, State of Indiana or the Indiana State Highway Commission.
>
> That said agreement provides for a loan by defendants Harold E. Voyles and Gretna K. Voyles to plaintiff of a sum of money repayable to Defendants Voyles only in the event that plaintiff receives a judgment from the City of Bloomington and/or the State of Indiana and/or the Indiana State Highway Commission.
>
> You are not to consider the loan agreement in determining the liability of the City of Bloomington, Harold E. Voyles, Gretna K. Voyles, the State of Indiana, or the Indiana State Highway Commission. Nor should you consider the agreement in determining the amount of damages, if any. *You're only to consider the agreement as it effects [sic] the interests of the parties.*

361 N.E.2d at 1217 (emphasis added by the court).

[85]*Id.*

on the plaintiff's testimony. If, however, the state had sought to elicit the excluded testimony from one of the Voyles, a much stronger argument could be made that a vague and general instruction, such as the one given, did not allow the same benefit the testimony would have.

The state challenged the instruction as incomplete and misleading for failure to disclose the amount of the loan. The court of appeals found no reason for disclosing the amount to the jury and dismissed the issue as having been waived by the state for failure to submit an instruction that included the amount.[86] The state was thus caught in the position of maintaining that an instruction was insufficient to correct the error of excluded testimony and the need to submit an instruction of its own.

The variations between the *Burkett* and *Holt* decisions are in keeping with the court's prophecy in *Burkett* that the infinite combinations of conceivable events and possible agreements frustrate the development of firm rules governing loan receipt agreements. Hopefully, however, the attempt to move toward some useful rules will continue as it has in other states,[87] with the ultimate goal of a fair trial for the non-lending defendants serving as the underlying analytical tool. Presently in Indiana, the question of whether the amount of the loan or, indeed, the agreement in its entirety must or should be excluded from evidence remains unanswered, as does the issue of participation as a witness of the "lender" if dismissed from the action.[88] The "abcess" needs further treatment.

E. Damages

Of some interest in the damages area is the case of *Charlie Stuart Oldsmobile, Inc. v. Smith*,[89] in which the plaintiff sought damages for mental anguish in connection with the failure of the defendant car dealer properly to repair plaintiff's automobile. After his purchase of the auto from the defendant in February of 1970, the plaintiff returned it for repairs on no fewer than nine occasions,

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[86]*Id.*

[87]*E.g.*, Sequoia Mfg. Co. v. Halec Constr. Co., 570 P.2d 782 (Ariz. 1977); Reese v. Chicago, Burlington & Quincy R.R., 55 Ill. 2d 356, 303 N.E.2d 382 (1973); Bedford School Dist. v. Caron Constr. Co., 367 A.2d 1051 (N.H. 1976). See the excellent discussion of this subject in Davis, *Comparative Negligence, Comparative Contribution, and Equal Protection in the Trial and Settlement of Multiple Defendant Product Cases, Symposium: 1977 Products Liability Institute*, 10 IND. L. REV. 831 (1977).

[88]*See* Marshall, Direct and Cross-Examinations of Witnesses and Parties at Trial, *reprinted in* Voir Dire to Verdict, Thirteenth Annual Institute, Indiana Trial Lawyers Association 50-53 (1977) (course manual available from the Indiana Trial Lawyers Association, 6201 Carrollton Ave., Indianapolis, Ind. 46220).

[89]357 N.E.2d 247 (Ind. Ct. App. 1976), *partially vacated on rehearing*, 362 N.E.2d 947 (Ind. Ct. App. 1977).

after many of which the auto had more defects than when it had been taken to defendant's shop.[90] After being unsuccessful in having his car repaired, the plaintiff filed suit for breach of warranty and tortious conduct in the repair of the auto, seeking actual damages, damages for mental anguish, and punitive damages. The punitive damages prayer was deleted from the complaint prior to trial. Plaintiff received a bench verdict for $5,000.

After reviewing the evidence, the Indiana Court of Appeals concluded that the evidence supported an award of only $4,000 in damages to the car, and therefore the trial judge must have awarded $1,000 for mental anguish.[91] Characterizing mental suffering as "parasitic to the host cause of action," the court of appeals reviewed the authorities and policy reasons, and concluded that Indiana's "rule of ancient vintage"—that damages for mental anguish are not recoverable without accompanying physical injury—remains valid today.[92] The court noted there can be exceptional circumstances in which such damages may be recovered in connection with injuries to personal property "if the act occasioning the injury was inspired by fraud, malice, or like motives, involving intentional conduct."[93] Finding that "[t]he wrongful acts of Charlie Stuart were neither intentional nor malicious,"[94] but merely negligent, the court of appeals concluded that mental anguish was not a proper element of damages in the present case.[95]

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[90]357 N.E.2d at 248-49.

[91]*Id.* On rehearing, the court of appeals vacated its previous holding to the extent that it found the $5,000 verdict to be severable. Rather, since the evidence of damage to plaintiff's car was conflicting, the amount attributable to mental distress was not ascertainable with certainty. Therefore, the case was remanded for a new trial on the issue of damages. The remainder of the court's opinion, which disallowed damages for mental distress under the facts of this case, still stands. 362 N.E.2d at 948-49.

[92]357 N.E.2d at 253-55.

[93]*Id.* at 254.

[94]*Id.* at 255.

[95]Two other damages cases worthy of mention are St. Joseph Bank & Trust Co. v. Wackenhut Corp., 352 N.E.2d 842 (Ind. Ct. App. 1976), and Jos. Schlitz Brewing Co. v. Central Beverage Co., 359 N.E.2d 566 (Ind. Ct. App. 1977). In *St. Joseph*, the owner of a leased building that burned sought damages for lost rental from the defendant company, whose employee had been guarding the building. The court equated lost rental with lost profits and concluded such damages were not foreseeable and would encourage speculation. *Schlitz* continued the trend of the past few years of overlapping tort and contract theories, and awarded punitive damages in a commercial contract case based on conduct of the defendant that was "tortious in nature." 359 N.E.2d at 580. *See, e.g.*, Hibschman Pontiac, Inc. v. Batchelor, 362 N.E.2d 845 (Ind. 1977); Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173 (Ind. 1976); Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976). In *Schlitz*, the court of appeals did not note that it was applying cases that allowed punitive damages in the consumer context to a commercial relationship without changing the standards required to award punitive damages. Oral arguments on petition to transfer were heard by the Indiana Supreme Court on February 14, 1978.