Chicago-Kent Law Review

Volume 57 | Issue 1 Article 12

January 1981

Uninsured Motorist Coverage and Interspousal Immunity

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UNINSURED MOTORIST COVERAGE AND INTERSPOUSAL IMMUNITY

Allstate Insurance Co. v. Elkins
77 Ill. 2d 384, 396 N.E.2d 528 (1979)

In *Allstate Insurance Co. v. Elkins*,[1] the Supreme Court of Illinois faced the novel problem of defining the nature of the interplay between uninsured motorist insurance[2] and interspousal tort immunity. The issue before the court was whether an insured woman, who is unable to recover damages from her tortfeasor husband because of interspousal immunity, is nonetheless "legally entitled to recover" from him in terms of an uninsured motorist policy. The *Elkins* court held that a wife is legally entitled to recover under such circumstances,[3] explaining that a husband's ability to invoke the defense of interspousal immunity is relevant only to his wife's right to enforce payment and does not affect her right to recover.[4] The court considered interspousal immunity to be a personal defense which cannot be raised to benefit the insurance company.[5]

This case comment will first examine the nature and history of uninsured motorist coverage and discuss the various judicial interpretations of the standard statutory and insurance policy phrase "legally entitled to recover." It will then trace the history of common law interspousal immunity in Illinois and examine the effect of the Married Women's Act[6] on the nature of that immunity. This comment will establish that Illinois precedent does not support the *Elkins* court's finding that a woman has a viable cause of action in tort against her spouse in Illinois rendering her "legally entitled to recover" from him. The resulting weakness of the *Elkins* rationale will then be discussed. Fi-

1. 77 Ill. 2d 384, 396 N.E.2d 528 (1979).

2. Uninsured motorist insurance is also commonly referred to as "Innocent Victim Coverage," "Family Protection-Automobile Coverage," and "Family Protection Against Uninsured Motorists." Plummer, *Handling Claims Under Uninsured Motorist Coverage*, 1957 INS. L.J. 494.

3. 77 Ill. 2d at 390-91, 396 N.E.2d at 531.

4. *Id.* at 390, 396 N.E.2d at 531.

5. *Id.* at 389-90, 396 N.E.2d at 530-31.

6. ILL. REV. STAT. ch. 68, § 1 (1973) [current version at ILL. REV. STAT. ch. 40, § 1001 (1977)] provides, in pertinent part:

> A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture.

nally, this comment will assess the desirability of the result achieved in *Elkins* and question the continued utility of interspousal tort immunity.

UNINSURED MOTORIST COVERAGE

Historical Background

Uninsured motorist coverage is automobile insurance which compensates the claimant for injuries sustained through the fault of an uninsured motorist who is financially unable to respond in damages.[7] The need for this type of insurance became increasingly apparent after World War II when the number of automobiles in the United States rapidly increased, resulting in a parallel increase in automobile accidents.[8] While there had always been individuals who were "financially irresponsible" in that they neither purchased automobile insurance nor had sufficient funds to respond in damages for their negligence, the threat posed by such persons became more acute as the number of automobile accidents grew.[9] It was in response to this problem that, in 1956, the National Bureau of Casualty Underwriters announced the development and availability of uninsured motorist insurance.[10] The coverage was promulgated both to forestall the passage by the states of compulsory liability insurance laws and to satisfy the public demand for protection against financially irresponsible motorists.[11] A majority of the states, including Illinois,[12] have now adopted statutes requiring insurance companies to offer such coverage.[13]

The effect of uninsured motorist insurance is to place the insured in substantially the same position he would have occupied had the tortfeasor carried liability insurance.[14] Although recovery by the

7. Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 138, 248 N.E.2d 299, 303 (4th Dist. 1969); Van Hoozer v. Farmers Ins. Exch., 219 Kan. 595, 600, 549 P.2d 1354, 1359 (1976); Booth v. Fireman's Fund Ins. Co., 253 La. 521, 527, 218 So. 2d 580, 583 (1968).

8. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 3 (1969) [hereinafter referred to as WIDISS].

9. *Id.*

10. *Id.* at 14. For detailed accounts of the activities leading up to the National Bureau of Casualty Underwriters' 1956 endorsement, *see* Comment, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CALIF. L. REV. 516-17; WIDISS, *supra* note 8, at 3-17.

11. WIDISS, *supra* note 8, at 14-15.

12. ILL. REV. STAT. ch. 73, § 755a (1967).

13. For a survey of the states, *see* Graham, *Recent Interpretations of the Uninsured Motorist Endorsement*, 4 FORUM 160 (April, 1969) at 160 n.1; 20 FED'N INS. COUNSEL Q. 56, 85 n.2 (Winter 1969-70); *Uninsured Motorist Protection*, a monograph published by The Defense Research Institute, Inc., Milwaukee, Wisconsin app. A (November, 1968).

14. *See* Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law); Bocek v. Inter-Ins. Exch. of the Chicago Motor Club, 369 N.E.2d 1093 (Ind. App. 1977); VII PERSONAL INJURY COMMENTATOR 128, 141-42 (1969). In Illinois, the insured is placed

claimant from the insurance company is based upon the contract embodied in the policy,[15] the insurer's liability is contingent upon the claimant's ability to establish that a negligent act was committed by the uninsured motorist and that injury resulted.[16]

In Illinois,[17] as in other jurisdictions,[18] statutes provide that uninsured motorist coverage is for the protection of persons who are "legally entitled to recover" damages from the uninsured motorist. The interpretation of that phrase has engendered much confusion.[19] When, as in *Elkins*, the insured is unable to recover damages directly from the tortfeasor because of a statutory or common law defense or immunity, the controversy lies in whether the insured is nonetheless "legally entitled to recover" within the meaning of his uninsured motorist policy.[20]

Conflicting Interpretations of the Phrase "Legally Entitled To Recover"

A few jurisdictions have construed the phrase "legally entitled to recover" to require that the claimant obtain a judgment against the uninsured motorist before he is entitled to the benefits of his coverage.[21]

in substantially the same position he would have occupied had the tortfeasor obtained the minimum statutory coverage required by the Safety Responsibility Law, ILL. REV. STAT. ch. 95½, § 7-200 to 7-215 (1965). Ullman v. Wolverine Ins. Co., 105 Ill. App. 2d 408, 244 N.E.2d 827 (3d Dist. 1969); Kirkland, *Recent Developments in Illinois Casualty Insurance Law*, 23 DE PAUL L. REV. 18, 33 (1973).

15. *See* McMahon v. Coronet Ins. Co., 6 Ill. App. 3d 704, 286 N.E.2d 631 (1st Dist. 1972); DeLuca v. Motor Vehicle Accident Indem. Corp., 17 N.Y.2d 76, 268 N.Y.S.2d 289, 215 N.E.2d 482 (1966); Sahloff v. Western Cas. & Sur. Co., 45 Wis. 2d 60, 171 N.W.2d 914 (1969); Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. L. REV. 497, 505-09 n.44 (1967).

16. Wilhelm v. Universal Underwriters Ins. Co., 60 Ill. App. 3d 894, 377 N.E.2d 62 (1st Dist. 1978); Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974); Sahloff v. Western Cas. & Sur. Co., 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

17. ILL. REV. STAT. ch. 73, § 755a (1967).

18. *See, e.g.*, IND. CODE ANN. § 27-7-5-1 (1971) (Burns); KAN. STAT. ANN. § 40-284 (1968); LA. REV. STAT. § 22:1406(D) (1978); 36 OKLA. STAT. ANN. § 3636 (1971); WIS. STAT. § 204.30(5)(a) (1975).

19. *See* WIDISS, *supra* note 8, at §§ 2.17-2.28.

20. Questions have arisen regarding whether the following persons are "legally entitled to recover" under an uninsured motorist policy: a plaintiff who is barred by parent-child immunity from suing her minor daughter in tort (Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law)); a plaintiff who is barred by the state's workmen's compensation act from suing his fellow employee for injuries resulting from the employee's negligence (Hopkins v. Auto-Owners Ins. Co., 41 Mich. App. 635, 200 N.W.2d 784 (1972)); a plaintiff who is unable to sue a hit-and-run driver in tort because she does not know his identity (Basore v. Allstate Ins. Co., 374 S.W.2d 626 (Mo. App. 1963)); a plaintiff who is barred from bringing a tort claim against the uninsured motorist by the statute of limitations (Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974)); and an administrator of an insured's estate making a claim under the deceased's uninsured motorist policy after expiration of the statutory period for bringing wrongful death actions (Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969)).

21. *See, e.g.*, O'Brien v. Government Employees Ins. Co., 372 F.2d 335 (3d Cir. 1967) (applying Virginia law); State Farm Mut. Auto. Ins. Co. v. Girtman, 113 Ga. App. 54, 147 S.E.2d 364 (1966).

A more widely-accepted interpretation is that the insured must have an enforceable claim against the uninsured tortfeasor.[22] In other words, the claimant must be under no legal disability from recovering damages from the uninsured motorist in that particular jurisdiction. A third construction, adhered to by the Supreme Court of Illinois in *Elkins*,[23] is gaining wide acceptance.[24] This view is that the phrase "legally entitled to recover" means that the claimant can establish the elements of a valid cause of action against the tortfeasor regardless of whether the claimant would be able to recover damages in a direct action against him.[25] The phrase is interpreted as simply denoting the existence of fault on the part of the uninsured motorist.[26] This interpretation presupposes that a defense or immunity available to the tortfeasor is personal to him and may not be invoked to benefit the insurance company.[27]

In determining whether a tortfeasor's immunity may be raised by a third party, courts have carefully scrutinized the nature of the immunity which exists in their particular jurisdictions.[28] They have decided whether the immunity merely bars enforcement of a remedy by the injured party or whether it prevents a cause of action from accruing in the first place.[29] It is only in the latter case that a third party may invoke the immunity as a defense in an action by the injured party.[30] When the immunity prevents a cause of action from arising, an insured

22. *See, e.g.*, Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law); Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969); Hopkins v. Auto-Owners Ins. Co., 41 Mich. App. 635, 200 N.W.2d 784 (1972); Noland v. Farmers Ins. Exch., 413 S.W.2d 530 (Mo. App. 1967); Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

23. 77 Ill. 2d at 390, 396 N.E.2d at 531.

24. *See, e.g.*, Hettel v. Rye, 251 Ark. 868, 475 S.W.2d 536 (1972); Van Hoozer v. Farmers Ins. Exch., 219 Kan. 595, 549 P.2d 1354 (1976); Booth v. Fireman's Fund Ins. Co., 253 La. 521, 218 So. 2d 580 (1968); Guillot v. Travelers Indem. Co., 338 So. 2d 334 (La. App. 1976); Gremillion v. State Farm Mut. Auto. Ins. Co., 302 So. 2d 712 (La. App. 1974); DeLuca v. Motor Vehicle Accident Indem. Corp., 17 N.Y.2d 76, 268 N.Y.S.2d 289, 215 N.E.2d 482 (1966); Sahloff v. Western Cas. & Sur. Co., 45 Wis. 2d 60, 171 N.W.2d 914 (1969); Annot., 73 A.L.R.3d 632, 651-53 (1976) and cases cited therein.

25. 77 Ill. 2d at 390, 396 N.E.2d at 531.

26. *Id.* at 388, 390, 396 N.E.2d at 530, 531.

27. *See id.* at 390, 396 N.E.2d at 531. In the related area of liability insurance, one commentator has noted that if a policy carries no immunity endorsement under which the insured and insurer agree that the insured's immunity is preserved for the benefit of the insurer, the majority of jurisdictions still find that the immunity is available to the insurer. R. KEETON, INSURANCE LAW 236-37 (1971) [hereinafter referred to as KEETON].

28. *See, e.g.*, Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law); Guillot v. Travelers Indem. Co., 338 So. 2d 334 (La. App. 1976).

29. *See, e.g.*, Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law); Bodenhagen v. Farmers Mut. Ins. Co., 5 Wis. 2d 306, 95 N.W.2d 822 (1959).

30. *See id.*

victim is not considered "legally entitled to recover" in terms of his uninsured motorist coverage.[31] A review of the history of interspousal immunity is essential to an understanding of the nature of that immunity in Illinois and of its effect on an insured's legal entitlement to recover under his uninsured motorist endorsement.

HISTORICAL BACKGROUND OF INTERSPOUSAL IMMUNITY

Interspousal Immunity at Common Law

It is often said that at common law husband and wife were considered one and the husband was the one.[32] A married woman was hampered by many legal disabilities which rendered her inferior to her husband under the law. She could not own separate property nor could she institute a lawsuit without joining her husband as a party.[33] Any right of action she may have had was enforceable only by him.[34] Furthermore, two obstacles precluded a married woman from suing her husband. The first was a procedural difficulty: the husband, in enforcing the right of his wife as plaintiff, would be suing himself as defendant.[35] The second obstacle was that any recovery obtained by the wife would immediately become her husband's property, thus making her suit an exercise in futility.[36]

Chief Judge Cardozo, speaking for the Court of Appeals of New York in *Schubert v. August Schubert Wagon Co.*,[37] espoused the view that a husband's common law immunity from suit by his wife barred only her remedy, not her cause of action. In *Schubert*, the plaintiff sued her husband's employer in tort, seeking damages for injuries she sustained as a result of her spouse's negligence. Because the accident had occurred during the course of her husband's employment, the plaintiff based her claim on the doctrine of *respondeat superior*.[38] After

31. Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law).

32. *See, e.g.*, Trammel v. United States, 445 U.S. 40 (1980); Welch v. Davis, 410 Ill. 130, 133, 101 N.E.2d 547, 548 (1951); Note, *Interspousal Tort Suits in Illinois*, 48 NW. L. REV. 75, 76-78 (1953). While this statement frequently is quoted, Professor Prosser has noted that it is not entirely accurate in that the criminal law regarded husband and wife as separate entities. W. PROSSER, LAW OF TORTS 859 (4th ed. 1971) [hereinafter referred to as PROSSER].

33. PROSSER, *supra* note 32, at 859-60.

34. Welch v. Davis, 410 Ill. 130, 133, 101 N.E.2d 547, 548 (1951).

35. Brandt v. Keller, 413 Ill. 503, 505, 109 N.E.2d 729, 730 (1952); Welch v. Davis, 410 Ill. 130, 133, 101 N.E.2d 547, 548-49 (1951); Note, *Interspousal Tort Suits in Illinois*, 48 NW. L. REV. 75, 82-83 (1953).

36. *Id.*

37. 249 N.Y. 258, 164 N.E. 42 (1928).

38. *Respondeat superior* is a Latin phrase meaning "let the master answer." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979). The doctrine of *respondeat superior* is that a master will be

acknowledging that the plaintiff could not sue her husband in tort at common law, the court affirmed the lower court judgment in her favor. It stated that a trespass upon the wife "does not cease to be an unlawful act, though the law exempts the husband from liability for the damage."[39] The court found that others could not hide behind the husband's immunity.[40] This view has been adopted by many jurisdictions[41] and has been adhered to in some Illinois decisions.[42]

But in *Heckendorn v. First National Bank of Ottawa*,[43] the Supreme Court of Illinois voiced the opposing view: not only was the wife's remedy barred at common law, but, in addition, no cause of action on her part could exist.[44] This view is not peculiar to Illinois, but has been accepted in many other jurisdictions.[45] The Supreme Court of Massachusetts has gone so far as to state that the fact that no cause of

vicariously liable for the negligent acts of his servant which were committed during the course of his employment. H. HENN, AGENCY, PARTNERSHIP AND OTHER UNINCORPORATED BUSINESS ENTERPRISES 132-33 (1972). The master is vicariously liable even if he did not authorize his servant to act negligently or even to perform the particular act. *Id.*

39. 249 N.Y. at 256-57, 164 N.E. at 43.

40. *Id.*

41. *See, e.g.*, Davis v. Harrod, 407 F.2d 1280 (D.C. Cir. 1969) (Husband is liable for his wife's negligence while she was driving a car owned by him. A District of Columbia statute made the driver of a car the agent of the owner in the event of an accident.); Edmunds v. Edmunds, 353 F. Supp. 287 (D.D.C. 1972) (Wife is allowed to recover from owner of a car husband was driving when he negligently injured her.); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933) (Court acknowledged that a wife may recover from her husband's employer for the husband's negligence. However, the wife was denied recovery because she did not establish that her husband was engaged in his employer's business when the accident occurred.).

42. *See, e.g.*, Herget Nat'l Bank v. Berardi, 64 Ill. 2d 467, 356 N.E.2d 529 (1976); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951) (Administrator of deceased wife's estate may bring statutory wrongful death action on behalf of minor children against estate of deceased husband.); Tallios v. Tallios, 345 Ill. App. 387, 103 N.E.2d 507 (1st Dist. 1952) (Wife can recover from her husband's employer for injuries sustained through her husband's negligence arising in the course of his employment.).

43. 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

44. *Id.* at 194, 166 N.E.2d at 573.

45. *See, e.g.*, Saunders v. Hill, 57 Del. 519, 202 A.2d 807 (1964); Magee v. Allstate Ins. Co., 276 So. 2d 752 (La. App. 1972) (applying Mississippi law); Ensminger v. Ensminger, 222 Miss. 799, 77 So. 2d 308 (1955); Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); Wooley v. Parker, 222 Tenn. 104, 432 S.W.2d 882 (1968). *But see*, Tallios v. Tallios, 345 Ill. App. 387, 393, 103 N.E.2d 507, 510 (1st Dist. 1952) wherein the court stated: "The weight of authority is to the effect that the marital immunity of the spouse does not mean that there is no right of action, but merely denies the remedy against the spouse and does not destroy the right of action against the master."

It is interesting to note that one year prior to the *Heckendorn* decision, the Supreme Court of Wisconsin had stated unequivocally that a wife had no cause of action in Illinois at common law. Bodenhagen v. Farmers Mut. Ins. Co., 5 Wis. 2d 306, 310b, 95 N.W.2d 822, 823 (1959). In *Bodenhagen*, the plaintiff sued the defendant insurance company seeking damages for injuries she sustained in an automobile accident caused by her husband's negligence. The defendant had issued a policy to the plaintiff's husband insuring him against liability arising from the negligent operation of his automobile. The plaintiff and her husband were Wisconsin residents, but the accident had occurred in Illinois. The Supreme Court of Wisconsin applied Illinois law. The court initially found for the plaintiff, holding that she could recover from the defendant despite her inability to

action could arise between spouses at common law is too well settled to require citation of authority.[46]

The nature of interspousal immunity at common law is today a topic of merely historical interest in Illinois, for the immunity is now codified in section 1001 of the Married Women's Act.[47] Nearly twenty years prior to *Elkins*, in the *Heckendorn*[48] decision, the Supreme Court of Illinois interpreted that provision to mean that no cause of action can arise in tort between spouses. The following section will review the history of Illinois' Married Women's Act and set forth a chronology of judicial interpretations of the legislation, including that imparted in *Heckendorn*.

Illinois' Married Women's Acts

In 1861, Illinois adopted the first in a series of Married Women's Acts.[49] That statute provided that a married woman could own, acquire and convey property in her own right as though she were unmarried.[50] In 1869, a statute was enacted allowing a married woman "to receive, use and possess her own earnings and to sue for the same in her own name, free from interference from her husband or his creditors."[51] Five years later, the rights of a married woman were again enlarged. The 1874 law provided that a married woman could sue "in all cases" without joining her husband.[52] As late as 1952, the provisions of Illinois' Married Women's Act remained substantially the same as those promulgated by the legislature in 1874.[53]

Prior to the 1952 decision of the Supreme Court of Illinois in

recover damages in a suit against her husband under Illinois law. 5 Wis. 2d at 310a, 92 N.W.2d at 762.

On rehearing, the *Bodenhagen* court stated that the law of the domicile, Wisconsin, should be applied to determine the existence and nature of interspousal immunity. But the court stated:

> We withdraw that portion of the original opinion wherein we interpreted Illinois law to hold that . . . [interspousal] immunity barred only the remedy and not the cause of action. There is no question but that such immunity at common law was substantive in nature.

5 Wis. 2d at 310b, 95 N.W.2d at 823, *citing, inter alia*, Callow v. Thomas, 322 Mass. 550, 551, 78 N.E.2d 637 (1948).

46. Callow v. Thomas, 322 Mass. 550, 551, 78 N.E.2d 637, 638 (1948).

47. ILL. REV. STAT. ch. 40, § 1001 (1977) (formerly ILL. REV. STAT. ch. 68, § 1 (1973)). *See* note 6 *supra* for the text of that statute.

48. 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

49. 1861 ILL. LAWS 143. *See* Brandt v. Keller, 413 Ill. 503, 506, 109 N.E.2d 729, 730 (1952).

50. *Id.*

51. 1869 ILL. LAWS 255, § 1. *See* 413 Ill. at 506, 109 N.E.2d at 730-31.

52. 1874 ILL. LAWS 576, §§ 1-21. *See* 413 Ill. at 507, 109 N.E.2d at 731 (1952).

53. ILL. REV. STAT. ch. 68, § 1 (1951) provided in pertinent part:

> [A] married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such action may be enforced by or against her as if she were a single woman.

Brandt v. Keller,[54] no case had directly addressed the question of whether the Married Women's Act of 1874 had changed the common law rule that a wife could not sue her husband in tort.[55] In *Brandt*, the court found that the Act gave a married woman that right which she had not enjoyed at common law. The plaintiff in *Brandt* sued her former husband for damages resulting from personal injuries she sustained during their marriage while riding in an automobile driven by him. In deciding to allow the plaintiff's action against her former spouse, the *Brandt* court examined the legislature's intent in enacting the Married Women's Act of 1874. The court found the Act reflected a legislative purpose to establish the separate identity of a married woman in all litigation.[56] The statutory phrase "in all cases"[57] was literally construed to mean "[in] all actions against all persons, including her husband . . . ."[58]

But soon after the *Brandt* decision, in 1953, the Illinois legislature amended the Act, adding the proviso that "neither husband nor wife may sue the other for a tort to the person committed during coverture."[59] This amendment clearly reflects the legislature's dissatisfaction with the *Brandt* court's interpretation of the Married Women's Act. But beyond the purpose of invalidating that construction, it is difficult

54. 413 Ill. 503, 109 N.E.2d 729 (1952).

55. Although Illinois courts had not directly addressed the issue, three cases had dealt with it indirectly. In Main v. Main, 46 Ill. App. 106 (3d Dist. 1892), the court denied a married woman's right to sue her husband in tort for acts committed before their divorce without reference to the prevailing Married Women's Act. Later, in Meece v. Holland Furnace Co., 269 Ill. App. 164 (3d Dist. 1933), the court denied the right of a minor child to sue his father in tort, noting that the situation was similar to that of one spouse suing the other. In 1951, the Supreme Court of Illinois, in Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951), allowed the administrator of the estate of a deceased woman to bring a wrongful death action against the executor of her husband's will. The suit was initiated on behalf of a surviving minor child. The court based its decision to allow recovery on two factors: first, the true parties in interest were the child and the husband's executor; and, second, the Wrongful Death Act, ILL. REV. STAT. ch. 70, §§ 1, 2 (1949), created a statutory right of action independent of any common law disabilities.

For discussions of the effect of the married women's acts on interspousal immunity, *see generally* PROSSER, *supra* note 32, at 861-64; Note, *Torts Between Husband and Wife*, 30 CHI.-KENT L. REV. 343 (1952).

56. 413 Ill. at 513, 109 N.E.2d at 734.

57. *See* note 6 *supra* for the pertinent text.

58. 413 Ill. at 513, 109 N.E.2d at 734.

59. ILL. REV. STAT. ch. 68, § 1 (1953). In common legal usage, "coverture" means "the condition or state of a married woman." BLACK'S LAW DICTIONARY 330 (5th ed. 1979). The term is sometimes used to describe the legal disability which arose from the status of coverture at common law. *Id.* For example, in Osborn v. Horine, 19 Ill. 123 (1857), the court stated:

> The very term *coverture* implies that . . . [the wife] is, during its continuance, under the protection of her husband, and the common law will not allow her to do anything which may prejudice her rights or interests, without his advice, consent and approval. In this respect, she is incapable of acting alone.

Id. at 125 (emphasis in original).

to determine the precise nature of the legislature's intent.[60] The 1953 modification could have been designed either to abolish a wife's right to sue her husband in tort which the Married Women's Act of 1874 had created or to restate the common law rule of interspousal tort immunity which had never ceased to be the law.

In *Heckendorn v. First National Bank*,[61] a 1960 case, the Supreme Court of Illinois adopted the view that in promulgating the Married Women's Act of 1874, the legislature had given a woman the right to sue her husband in tort which she had not had at common law.[62] The court stated that by amending the Act in 1953, the legislature withdrew that right which it had previously created.[63]

The issue in *Heckendorn* was whether a widow has the right to sue her deceased husband's estate for a tort committed by him during coverture. The widow plaintiff contended that the Married Women's Act as amended has no application after a marriage has been terminated by death. The Supreme Court of Illinois disagreed. Finding that the legislature had created a statutory disability during the lifetime of husband and wife, the *Heckendorn* court stated that the legislature had intended to prevent a cause of action from coming into being.[64] "If a cause of action could not exist in favor of the wife and against the tortfeasor husband, it could not survive his death."[65]

Six years after *Heckendorn*, the Supreme Court of Illinois affirmed the decision in a factually similar case, *Wartell v. Formusa*.[66] As in

60. No legislative history is available relating to the 1953 amendment to the Married Women's Act.

61. 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

62. *Id.* at 194, 166 N.E.2d at 573.

63. *Id.* at 195, 166 N.E.2d at 574.

64. *Id.* at 193, 166 N.E.2d at 573.

65. *Id. But see* Calvert v. Morgan, 41 Ill. App. 2d 23, 190 N.E.2d 1 (2d Dist. 1963), where the court would not construe the 1953 amendment of the Married Women's Act to bar wrongful death actions brought by the administrator of the estate of a deceased wife on behalf of her dependent children against the estate of her deceased husband. In *Calvert*, the husband had shot and killed his wife before committing suicide.

The United States District Court for the Northern District of Illinois faced a problem similar to that in *Calvert* in Rogers v. Jackson, 416 F. Supp. 1125 (N.D. Ill. 1976). In *Rogers*, the administrator of the deceased wife's estate brought a wrongful death action on behalf of the surviving children against the husband. The administrator contended that because of the husband's wrongful acts in driving an automobile in which his wife was a passenger, the wife suffered injuries which caused her death. The district court allowed the wrongful death action, finding that interspousal immunity did not apply to the case because the true parties in interest were the children and the husband. *Id.* at 1126. The court noted that domestic tranquility would not be fostered by disallowing the action, because there was no domestic tranquility to preserve following the wife's death. *Id.* To add support to its view that interspousal immunity had no applicability to the case, the court indicated that the defendant had been the deceased's husband "until the moment of her death." *Id.* at 1128.

66. 34 Ill. 2d 57, 213 N.E.2d 544 (1966).

Heckendorn, the court in *Wartell* denied a woman's action against the estate of her deceased husband for injuries she sustained through her husband's negligence during their marriage.

In 1967, the Illinois Appellate Court for the Second District decided *Packenham v. Miltimore*.[67] There the court allowed a wife to sue her husband for a premarital tort, distinguishing the facts of the case from those in *Heckendorn* and *Wartell* in which the torts had been committed during marriage. The *Packenham* court acknowledged that the earlier cases had interpreted the Married Women's Act to prevent a woman's cause of action against her husband from coming into being.[68]

Finally, in a 1976 case, *Herget National Bank v. Berardi*,[69] the Supreme Court of Illinois again referred to the *Heckendorn* and *Wartell* rulings. In dictum, the *Herget* court stated that those cases had presented the question of whether a woman has the right to bring an action against her deceased husband's estate for a tort committed during their marriage.[70] "This court held . . . that the action was barred by the amendment enacted after the decision in *Brandt*."[71]

It was against this backdrop that the Supreme Court of Illinois decided *Allstate Insurance Co. v. Elkins*.[72] As will be shown, the court ignored *Heckendorn* and the cases following its interpretation of the nature of interspousal immunity in Illinois, choosing instead to redefine that immunity.

ALLSTATE INSURANCE CO. V. ELKINS

Statement of the Case

Helen Elkins and her minor daughter were injured in an automobile accident.[73] The car in which they were riding was driven by Mr. Elkins, whose negligence caused the accident.[74]

67. 89 Ill. App. 2d 452, 232 N.E.2d 42 (2d Dist. 1967).
68. *Id.* at 455, 232 N.E.2d at 44.
69. 64 Ill. 2d 467, 356 N.E.2d 529 (1976). In *Herget*, Darolde Petri piloted a plane that crashed, killing him and his wife. The plaintiff, Herget National Bank, as administrator of the wife's estate, brought an action under the Wrongful Death Act (ILL. REV. STAT. ch. 70, §§ 1, 2 (1973)) for the benefit of decedent's minor children. The executor of Mr. Petri's estate was named as the defendant. The Supreme Court of Illinois allowed the action, notwithstanding that Mrs. Petri could not have maintained an action against her husband or his estate had she survived. The court found that since the plaintiff was asserting independent rights of the surviving children and not rights of the deceased wife, the Married Women's Act did not bar the action.
70. *Id.* at 472, 356 N.E.2d at 532.
71. *Id.*
72. 77 Ill. 2d 384, 396 N.E.2d 528 (1979).
73. *Id.* at 386, 396 N.E.2d at 529.
74. Allstate Ins. Co. v. Elkins, 63 Ill. App. 3d 62, 63, 381 N.E.2d 1, 2 (1st Dist. 1978).

Mrs. Elkins was "insured" under her husband's[75] automobile liability insurance policy which had been issued to him by Allstate Insurance Company.[76] An exclusionary clause in the policy rendered Mr. Elkins "uninsured" with respect to Mrs. Elkins.[77]

The insurance policy also contained an uninsured motorist section which provided:

> Allstate will pay all sums which the insured . . . shall be *legally entitled to recover* as damages from the owner or operator of an uninsured automobile . . . caused by accident and arising out of the use . . . of such uninsured automobile.[78]

Mrs. Elkins and her daughter filed claims under the uninsured motorist portion of the policy. Allstate refused to pay and the claims were submitted to arbitration.[79]

Prior to a decision by the arbitrator, Allstate brought a declaratory judgment action in the Circuit Court of Cook County, Illinois,[80] seeking a ruling that interspousal immunity prevented Mrs. Elkins from recovering.[81] Before the trial court rendered a judgment, the arbitrator awarded the daughter $1,300 and found that Mrs. Elkins' injuries amounted to $18,500.[82] Relying on the Illinois Married Women's Act,[83] the arbitrator determined, however, that Mr. Elkins was immune from suit by his wife and that she was therefore not "legally entitled to recover" damages from him.[84]

The Circuit, Appellate and Supreme Court Decisions

The circuit court agreed that Mrs. Elkins was not legally entitled to recover for her injuries[85] and granted Allstate's motion for summary judgment in the declaratory judgment action.[86]

75. Mr. Elkins was the named insured. 77 Ill. 2d at 386, 396 N.E.2d at 529.

76. Hereinafter referred to as "Allstate."

77. The liability portion of the policy excluded "bodily injury to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person resides in the same household as such insured." 77 Ill. 2d at 387, 396 N.E.2d at 530.

78. 77 Ill. 2d at 386-87, 396 N.E.2d at 529-30 (emphasis added).

79. *Id.* at 387, 396 N.E.2d at 530. The policy provided that all claims involving the uninsured motorist provision were to be submitted to arbitration. 63 Ill. App. 3d at 63, 381 N.E.2d at 2.

80. 77 Ill. 2d at 387, 396 N.E.2d at 530.

81. 63 Ill. App. 3d at 63, 381 N.E.2d at 2.

82. 77 Ill. 2d at 387, 396 N.E.2d at 530.

83. ILL. REV. STAT. ch. 60, § 1 (1973).

84. 77 Ill. 2d at 387, 396 N.E.2d at 530.

85. *Id.* The circuit court also found that Mrs. Elkins' failure to file a timely proceeding to vacate the arbitrator's ruling made his decision binding on her. The procedure for vacating an arbitrator's award is governed by section 112 of the Uniform Arbitration Act, ILL. REV. STAT. ch. 10, § 112 (1977).

86. 77 Ill. 2d at 386, 396 N.E.2d at 529.

On appeal, Mrs. Elkins argued that the trial court had erred in ruling that interspousal immunity precluded her from recovering under her husband's policy.[87] The appellate court reversed and remanded, holding that the arbitrator had exceeded his authority in determining that interspousal immunity precluded Mrs. Elkins from recovering.[88] The court further held that a third party, in this case the insurance company, cannot raise the defense of interspousal immunity and that the capacity of spouses to sue one another in tort has no bearing in a claim against the insurance company on the insurance contract.[89] The appellate court construed the phrase "legally entitled to recover" to mean that the claimant must establish that the uninsured motorist was at fault and that damages resulted.[90]

The Supreme Court of Illinois affirmed the appellate court judgment, ruling for Mrs. Elkins.[91] It concurred in the appellate court's interpretation of "legally entitled to recover"[92] and found that Allstate could not invoke the defense of interspousal immunity to avoid Mrs. Elkins' claim.[93]

Reasoning of the Majority

The *Elkins* court[94] grounded its reasoning on the premise that a woman has a cause of action in tort against her husband in Illinois despite her lack of remedy.[95] In establishing this principle, the court examined Illinois law and found that prior to the 1953 amendment of the Married Women's Act[96] one spouse could sue the other in tort during coverture.[97] It cited *Brandt v. Keller*[98] for that proposition and interpreted the amendment to confer immunity on the tortfeasor spouse,

87. 63 Ill. App. 3d at 63, 381 N.E.2d at 2. Mrs. Elkins also argued that the trial court had erred in holding that she was bound by the arbitrator's award for failing to challenge it within ninety days. *Id.* *See* note 85 *supra*.

88. 63 Ill. App. 3d at 65, 381 N.E.2d at 3. The court stated that the arbitrator's award had to be vacated. *Id.*

89. 63 Ill. App. 3d at 65-66, 381 N.E.2d at 4.

90. *Id.* at 66, 381 N.E.2d at 4.

91. 77 Ill. 2d at 391, 396 N.E.2d at 532. The court excused Mrs. Elkins' failure to file a timely application to vacate the arbitrator's award. *Id.* Because the declaratory judgment action involved the same issue the arbitrator had resolved, the court stated that Mrs. Elkins' filing of any further action would have been a useless act. *Id.*

92. 77 Ill. 2d at 390, 396 N.E.2d at 531.

93. *Id.* at 390-91, 396 N.E.2d at 531-32.

94. Chief Justice Goldenhersh authored the majority opinion.

95. 77 Ill. 2d at 390, 396 N.E.2d at 531.

96. ILL. REV. STAT. ch. 68, § 1 (1951). *See* note 6 *supra*.

97. 77 Ill. 2d at 390, 396 N.E.2d at 531.

98. 413 Ill. 503, 109 N.E.2d 729 (1952).

but not to destroy the victim spouse's cause of action.[99] The court drew an analogy between interspousal immunity and a statute of limitations, which can be waived by the defendant and which does not affect the existence of a cause of action on the part of the plaintiff.[100]

Thus, the court cited a New York[101] and a Wisconsin[102] decision in which an insured, who was barred from suing the uninsured tortfeasor by the tort statute of limitations, was allowed to recover under his uninsured motorist policy. The New York and Wisconsin courts ruled that the defense of the statute of limitations was not available to the insurance company, for the statute merely barred a remedy—not the cause of action.

The *Elkins* court distinguished these cases from those in which failure to bring an uninsured motorist claim within the statutory period of limitations for wrongful death actions rendered the administrator of the deceased insured's estate not "legally entitled to recover" in terms of the policy.[103] The *Elkins* court pointed out that in the latter cases the period for instituting wrongful death actions was a statutory element of the cause of action itself—not merely a statute of limitations.[104]

Finding that the question of whether a tortfeasor's immunity can be invoked by the insurance company in a claim under an uninsured motorist endorsement was one of first impression in Illinois,[105] the *Elkins* court turned to cases from other jurisdictions which had examined the issue. It looked first to a Louisiana case, *Guillot v. Travelers Indemnity Co.*,[106] which is factually similar to *Elkins*. The *Guillot* court allowed the wife's recovery under an uninsured motorist endorsement. It ruled that interspousal immunity did not bar the wife's recovery in that, in Louisiana, the defense was personal to her tortfeasor husband and was not available to the insurance company.[107]

The *Elkins* court distinguished *Markham v. State Farm Mutual Automobile Insurance Co.*,[108] a case in which the United States Court of

99. 77 Ill. 2d at 390, 396 N.E.2d at 531.
100. *Id.*
101. DeLuca v. Motor Vehicle Accident Indem. Corp., 17 N.Y.2d 76, 268 N.Y.S.2d 289, 215 N.E.2d 482 (1966).
102. Sahloff v. Western Cas. & Sur. Co., 45 Wis. 2d 60, 171 N.W.2d 914 (1969).
103. 77 Ill. 2d at 389, 396 N.E.2d at 531, *citing* Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969); Bocek v. Inter-Insurance Exch. of the Chicago Motor Club, 369 N.E.2d 1093 (Ind. App. 1977).
104. 77 Ill. 2d at 389, 396 N.E.2d at 531.
105. *Id.* at 388, 396 N.E.2d at 530.
106. 338 So. 2d 334 (La. App. 1976).
107. *Id.* at 336.
108. 464 F.2d 703 (10th Cir. 1972) (applying Oklahoma law).

Appeals for the Tenth Circuit applied Oklahoma law. In contrast to *Guillot*, the *Markham* court found that parent-child immunity rendered the injured parent not "legally entitled to recover" under her uninsured motorist policy. The plaintiff in *Markham* had been injured in an automobile driven by her daughter. The Tenth Circuit found that since a parent has no cause of action in tort against her child in Oklahoma, she can not be legally entitled to recover for injuries sustained through the child's negligence in a claim against the insurance company.[109] The *Elkins* court considered *Markham* distinguishable because of the court's premise that, in Illinois, a woman has a cause of action against her tortfeasor husband although she cannot enforce a judgment against him.

The court found *Noland v. Farmers Insurance Exchange*,[110] a case presenting a factual situation similar to that in *Elkins*, to be inapposite because of the wording of the uninsured motorist policy. In *Noland*, the policy provided that the insurer would pay all sums "which the owner . . . of an uninsured motor vehicle would be *legally responsible to pay as damages* to the insured."[111] The *Noland* court denied the wife's claim because of her uninsured motorist husband's immunity from suit by her.

In *Elkins*, however, the Illinois Supreme Court construed the phrase "legally entitled to recover" in the uninsured motorist policy as merely denoting fault on the part of the uninsured motorist.[112] Having decided that a wife has a viable cause of action in tort against her husband in Illinois notwithstanding her lack of remedy, the court reasoned that the husband's immunity from suit does not inure to the benefit of the insurance company nor affect the wife's legal right to recover.[113]

Finally, the court noted that the intent of the parties must be given foremost consideration and that any ambiguity contained in an insurance policy should be construed in favor of the insured.[114] Relying on those rules of construction, the court concluded that the parties could not have intended that Allstate would deny Mrs. Elkins' claim on the happenstance that the uninsured tortfeasor turned out to be her spouse.[115]

109. *Id.* at 705, 708.
110. 413 S.W.2d 530 (Mo. App. 1967).
111. *Id.* at 532, quoting from defendant's brief (emphasis added by the court).
112. 77 Ill. 2d at 390, 396 N.E.2d at 531.
113. *Id.*
114. *Id.* at 390-91, 396 N.E.2d at 531.
115. *Id.* at 391, 396 N.E.2d at 531.

Reasoning of the Dissent

Justice Ryan, joined by Justice Underwood, dissented from the majority opinion.[116] He found the majority's assertion that a woman has a cause of action against her husband despite her lack of remedy untenable in light of *Heckendorn*[117] and subsequent Illinois cases[118] which have interpreted the 1953 amendment to the Married Women's Act as preventing a cause of action from accruing.[119] The dissent relied on the principle of *stare decisis*, concluding that the majority had usurped legislative authority by bestowing a new meaning on the Married Women's Act.[120]

Analysis of the Opinion

The *Elkins* majority found the issue of whether a husband's immunity from a tort action by his wife may be raised as a defense by a third party to be one of first impression in Illinois.[121] Accordingly, the court looked to authority from other jurisdictions[122] to substantiate its finding that a husband's immunity is solely a personal defense.[123] Seemingly as an afterthought, the majority examined Illinois statutory and case law relating to the nature of interspousal immunity in its own jurisdiction.

The majority found that prior to the 1953 amendment of Illinois' Married Women's Act, one spouse could sue the other in tort.[124] In

116. *Id.* at 391-95, 396 N.E.2d at 532-34.

117. Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

118. 77 Ill. 2d at 390-95, 396 N.E.2d at 532-34. Herget Nat'l Bank v. Berardi, 64 Ill. 2d 467, 356 N.E.2d 529 (1976); Wartell v. Formusa, 34 Ill. 2d 57, 213 N.E.2d 544 (1966); Packenham v. Miltimore, 89 Ill. App. 2d 452, 232 N.E.2d 42 (2d Dist. 1967). *See* text accompanyinng notes 61-71 *supra*.

119. The dissent explained that:

> [T]he statute has not been construed as creating an immunity from suit that can be raised as a defense or waived by one spouse when sued by the other, as the majority opinion holds. Under the previous construction, the cause of action does not exist in favor of the injured spouse against the tortfeasor. Under our previous construction, the fact that the uninsured motorist provision of an insurance policy permits payment of the sum the insured "shall be legally entitled to recover" would not, in our case, permit the injured wife to recover under the policy, because she has no cause of action against her husband and therefore is not legally entitled to recover from him.

77 Ill. 2d at 392-93, 396 N.E.2d at 532.

120. *Id.* at 395, 396 N.E.2d at 533-34.

121. *Id.* at 388, 396 N.E.2d at 530.

122. *Id.* at 389, 396 N.E.2d at 530-31, *citing* Guillot v. Travelers Indem. Co., 338 So. 2d 334 (La. App. 1976); DeLuca v. Motor Vehicle Accident Indem. Corp., 17 N.Y.2d 76, 268 N.Y.S.2d 289, 215 N.E.2d 482 (1966); and Sahloff v. Western Cas. & Sur. Co., 45 Wis. 2d 60, 171 N.W.2d 914 (1969).

123. 77 Ill. 2d at 389-90, 396 N.E.2d at 530-31.

124. *Id.* at 390, 396 N.E.2d at 531.

citing *Brandt v. Keller*,[125] the *Elkins* court presumably accepted *Brandt*'s view that the Married Women's Act of 1874 had created a cause of action in tort between spouses. The court stated that the effect of the amendment of the Act in 1953, the year after *Brandt* was decided, was not to destroy a wife's cause of action against her husband, but rather to confer immunity on him.[126] But as pointed out in the dissenting opinion,[127] there are subsequent Illinois cases to the contrary. In *Heckendorn v. First National Bank*,[128] the Supreme Court of Illinois stated unequivocally that by enacting the 1953 amendment to the Married Women's Act, the legislature had intended to prevent a cause of action from coming into being.[129] Several Illinois cases have since followed that view.[130]

Without reference to any of these Illinois cases, the *Elkins* court set forth a new interpretation of the effect of the 1953 amendment. In so doing, the majority, as the dissent correctly noted, acted in disregard of the principle of *stare decisis*. Under that doctrine, a court is bound to follow judicial precedent unless it can be shown that a serious detriment will arise prejudicial to the public welfare.[131]

The dissenting opinion indicated that the Married Women's Act has been amended at various times since the *Heckendorn* court assessed the effect of the interspousal immunity provision and the language interpreted in *Heckendorn* has not been altered.[132] It is well settled that when the legislature amends an act without changing language which has been construed by the courts, that is strong evidence that the legislature approves the construction.[133] The rationale is that the legislature

125. 413 Ill. 503, 109 N.E.2d 729 (1952).

126. 77 Ill. 2d at 390, 396 N.E.2d at 531.

127. *Id.* at 391-95, 396 N.E.2d at 532-33. *See* text accompanying notes 116-20 *supra*.

128. 19 Ill. 2d 190, 166 N.E.2d 571 (1960).

129. *Id.* at 193, 166 N.E.2d at 573.

130. *See* text accompanying notes 61-71 *supra*.

131. Flood v. Kuhn, 407 U.S. 258 (1972); Maki v. Frelk, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). *But see* Schenk v. Schenk, 100 Ill. App. 2d 199, 201, 241 N.E.2d 12, 13 (4th Dist. 1968), stating that " '*stare decisis*' has not been an insuperable barrier to a reconsideration of decisions or principles where adequate cause is shown and impelling changing conditions exist." *See also* Note, *Maintaining Liberty The Judicial Way*, 32 CHI.-KENT L. REV. 230, 233-34 (1954).

The rationale underlying the principle of *stare decisis* is that the citizenry is entitled to rely on decisions of the courts with confidence that they will not be changed from term to term. Chicago Title & Trust Co. v. Shellaberger, 399 Ill. 320, 343, 77 N.E.2d 675, 687 (1948). The people must know that the courts do not intend to usurp legislative powers. *Id.*

132. 77 Ill. 2d at 395, 396 N.E.2d at 533.

133. Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), *rehearing denied*, 434 U.S. 881 (1977); Edelman v. Jordan, 415 U.S. 651 (1974); Union Elec. Co. v. Illinois Commerce Comm'n, 77 Ill. 2d 364, 396 N.E.2d 510 (1979) and cases cited therein; Susemiehl v. Red River Lumber Co., 376 Ill. 138, 33 N.E.2d 211 (1941); Bowers v. Green, 2 Ill. 42 (1832); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.09 (4th ed. 1973).

is presumed to know the interpretation which has been adopted by the courts and, by reenactment, gives the new act the same effect as its predecessor.[134] This strongly suggests that the Illinois legislature has adopted or at least acquiesced in the view that no cause of action in tort can arise between spouses.

The *Elkins* court may have declined to mention *Heckendorn* and the cases affirming its rule[135] because it believed that these cases misconstrued the 1953 legislature's intent. Or, the court may have found that to accept the established interpretation would necessitate a harsh result in the case at hand. Whatever the court's motive, the effect of this omission was to weaken the persuasive impact of the *Elkins* opinion, which is grounded on the assumption that a tort cause of action can arise between spouses in Illinois.

Thus, the court's attempt to distinguish *Markham v. State Farm Mutual Automobile Insurance Co.*[136] fails. In *Markham*, the Tenth Circuit found that the Oklahoma courts had repeatedly held that there is no cause of action based on negligence between a parent and his child in Oklahoma. The court denied the plaintiff's uninsured motorist claim for damages resulting from injuries she sustained through her child's negligence. It reasoned that the plaintiff could not be "legally entitled to recover" in terms of her uninsured motorist policy because no tort cause of action could arise between her and her child. Contrary to the *Elkins* court's view of *Markham*, parent-child immunity in Oklahoma and interspousal immunity in Illinois are analogous rather than distinct. Just as the Oklahoma courts had held that there is no tort cause of action between parent and child,[137] Illinois courts have held that no cause of action can arise between husband and wife.[138] In both instances, the cause of action itself is barred, making the immunity not merely a personal defense but one which can be invoked by the insurance company. It follows, then, that the plaintiff is not "legally entitled to recover" in either case.

Similarly, the *Elkins* court's attempt to distinguish decisions in which the plaintiff's uninsured motorist claim was barred by a failure to seek arbitration within the period of limitations for wrongful death

134. Hupp v. Gray, 73 Ill. 2d 78, 382 N.E.2d 1211 (1978); City of Champaign v. City of Champaign Township, 16 Ill. 2d 58, 156 N.E.2d 543 (1959).

135. *See* text accompanying notes 61-71 *supra*.

136. 464 F.2d 703 (10th Cir. 1976) (applying Oklahoma law). *See* text accompanying notes 108-09 *supra*.

137. 464 F.2d at 705.

138. *See* text accompanying notes 61-71 *supra*.

actions[139] was unconvincing. The basis for those holdings was that bringing suit within the time period required by the applicable wrongful death statute was a condition attached to the administrator's right to sue. The statutes in question[140] expressly provided that wrongful death actions must be commenced within the stated time period. Once the time period expired, no cause of action existed.[141] The result, then, is similar to, rather than distinguishable from, the interspousal tort situation in Illinois.

In contrast are cases in which the defense of the insured's noncompliance with the tort statute of limitations has been held to be no defense in an action by the insured against the insurance company.[142] Unlike compliance with the statutory period of limitations for wrongful death actions, compliance with a general statute of limitations is not an element of the cause of action.[143] Rather, it is a defense which can be interposed or waived at the defendant's discretion.[144] If suit is filed after the statute of limitations has run, the cause of action exists notwithstanding the fact that the remedy is barred.

The *Elkins* court considered *Noland v. Farmers Insurance Exchange*,[145] a case directly on point, to be unpersuasive. Like *Elkins*, *Noland* involved a woman who brought an uninsured motorist claim against the insurance company for damages resulting from injuries she sustained while riding in an automobile driven by her husband. The *Noland* court held that interspousal immunity precluded the woman

139. 77 Ill. 2d at 389, 396 N.E.2d at 531, *citing* Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969); and Bocek v. Inter-Insurance Exch. of the Chicago Motor Club, 369 N.E.2d 1093 (Ind. App. 1977). *See* text accompanying notes 103-04 *supra*.

140. In Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969), the statute in question was ILL. REV. STAT. ch. 70, §§ 1, 2 (1967). In Bocek v. Inter-Insurance Exch. of the Chicago Motor Club, 369 N.E.2d 1093 (Ind. App. 1977), the applicable statute was IC 1971, 34-1-2-2 (Burns Code Ed.).

141. In Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 248 N.E.2d 299 (4th Dist. 1969), the court explained the effect of the period of limitations contained in Illinois' Wrongful Death Statute, ILL. REV. STAT. ch. 70, §§ 1, 2 (1967), on the viability of a cause of action for wrongful death:

> The Illinois courts consistently have held that the right of action for wrongful death is wholly statutory and that the provision in the statute creating the right that requires the action to be brought within the specified time is a condition attached to the right to sue and is not merely a statute of limitations . . . . This is unlike a general statute of limitations which may serve as a defense to an action which a defendant may interpose or waive as he sees fit, but it is a condition of the statute of any right to liability whatsoever.

109 Ill. App. 2d at 139, 248 N.E.2d at 303 (citations omitted).

142. *See* text accompanying notes 101-02 *supra*.

143. Country Mut. Ins. Co. v. National Bank, 109 Ill. App. 2d 133, 139, 248 N.E.2d 299, 303 (4th Dist. 1969).

144. *Id.* *See* note 141 *supra*.

145. 413 S.W.2d 530 (Mo. App. 1967). *See* text accompanying notes 110-11 *supra*.

from recovering from the insurance company. The *Elkins* court distinguished *Noland* by finding that the wording of the insurance policy in *Noland* was so dissimilar to that in *Elkins* as to make *Noland* inapposite. Whether the phrases "legally responsible to pay as damages" (in *Noland*) and "legally entitled to recover as damages" (in *Elkins*) reflect a substantive difference or merely a difference in point of view is debatable. Since Illinois cases have ruled that a wife is not legally entitled to recover tort damages from her husband,[146] relieving him of legal responsibility to pay them, the semantic difference lacks import. With that distinction dismantled, *Noland* cannot be reconciled with the *Elkins* result.

The *Elkins* court looked to the intent of the parties in interpreting the meaning of the insurance policy.[147] It was unwilling to find that the parties could have intended that the exclusionary clause should invoke the uninsured motorist provisions and simultaneously deny recovery to the injured spouse.[148] But viewed from another perspective, it is equally untenable that Allstate could have intended to refuse to indemnify Mr. Elkins under the liability provisions of the policy for injuries to his wife and yet compensate her directly for those injuries. Thus, the better view is that Allstate's intention was to provide compensation under the uninsured motorist endorsement only when the tortfeasor was not a family member.[149] The agreement of the insurance company was to pay when a liability was recognized by law.[150] Because of the husband's immunity, no such liability could be imposed.[151]

The court noted that ambiguities in an insurance policy should be construed in favor of the insured.[152] But when read in light of the Illi-

146. *See* text accompanying notes 61-71 *supra*.

147. 77 Ill. 2d at 390-91, 396 N.E.2d at 531, *citing* Kaufmann v. Economy Fire & Cas. Co., 76 Ill. 2d 11, 389 N.E.2d 1150 (1979). *Accord*, Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 162 (1965). *But see* Home Ins. Co. v. Monaco, 405 F. Supp. 321, 324 (E.D. Pa. 1975), indicating that the court may attempt to discern the parties' expectations only where a term in an insurance policy is ambiguous.

148. 77 Ill. 2d at 391, 396 N.E.2d at 531.

149. A spokesman for a major casualty insurer explained to this author that uninsured motorist insurance was not intended to defeat the function of the family exclusion in automobile liability insurance policies. He indicated that the exclusion is based on the belief that family members should not be allowed to sue each other for injuries and thereby take advantage of the insurance company. The spokesman stated that alternative types of insurance are available to family members, such as medical payments, hospitalization, health, life and disability coverage, which can be purchased to protect a family member against losses caused by another family member's negligent driving.

150. *See* KEETON, *supra* note 27, at 237.

151. *Id.*

152. 77 Ill. 2d at 391, 396 N.E.2d at 531, *citing* Kaufmann v. Economy Fire & Cas. Co., 76 Ill. 2d 11, 389 N.E.2d 1150 (1979). *Accord*, Squire v. Economy Fire & Cas. Co., 69 Ill. 2d 167, 370 N.E.2d 1044 (1977); United Security Ins. Co. v. Mason, 59 Ill. App. 3d 982, 376 N.E.2d 653 (1st

nois cases finding that a wife has no cause of action in tort against her husband,[153] the phrase "legally entitled to recover" should present no interpretative difficulty. A court may not raise a doubt or ambiguity in an insurance contract where none exists.[154] If Mrs. Elkins had no cause of action, it should be clear that she was not "legally entitled to recover."

Purpose of the Uninsured Motorist Act

The *Elkins* court focused narrowly on the language of the insurance contract. In so doing, it failed to look beyond the insurance policy itself and consider the Uninsured Motorist Act[155] which mandates uninsured motorist coverage. Moreover, the court made no mention of Illinois cases which have discussed the intent of the legislature in enacting this statute.

In *Barnes v. Powell*,[156] the Supreme Court of Illinois set forth an expansive interpretation of the Uninsured Motorist Act. The court examined the purpose of the Act and found that the legislature had intended that uninsured motorist insurance would protect an insured generally against injuries caused by motorists who are uninsured.[157] Finding a legislative mandate to protect the innocent victim, the *Barnes* court determined that uninsured motorist coverage becomes effective when no liability insurance is applicable to the victim at the time of an

Dist. 1978); Booth v. Fireman's Fund Ins. Co., 253 La. 521, 218 So. 2d 580 (1968). *See also* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. L. REV. 497, 510 (1967).

153. *See* text accompanying notes 61-71 *supra*.

154. Home Ins. Co. v. Monaco, 405 F. Supp. 321, 324 (E.D. Pa. 1975), *citing* Brunner v. McCullough, 216 F. Supp. 496 (E.D. Pa. 1963); and Burdsall v. Mutual of Omaha Ins. Co., 207 Pa. Super. 228, 217 A.2d 789 (1966).

155. ILL. REV. STAT. ch. 73, § 755a (1969).

156. 49 Ill. 2d 449, 275 N.E.2d 377 (1971). In *Barnes*, the plaintiff, Mrs. Barnes, was injured while riding as a passenger in a car driven by defendant Powell. Mrs. Barnes and her husband were co-owners of the automobile, which was insured by LaSalle National Insurance Company. A provision in the policy, which had been issued to Mr. Barnes, excluded Mrs. Barnes from liability coverage.

Mrs. Barnes claimed that the defendant, who was uninsured, had caused the accident. She sought recovery under the uninsured motorist provision of her husband's policy. LaSalle filed an intervening complaint for a declaratory judgment that the uninsured motorist portion of Mr. Barnes' policy did not cover the accident because the vehicle in question was insured at the time of the collision.

Because the court found the purpose of the Uninsured Motorist Act was to protect an insured generally against injuries caused by uninsured motorists, *id.* at 454, 275 N.E.2d at 379, the fact that an uninsured motorist was the driver of the automobile in which the plaintiff was riding was not decisive. *Id.* The court found that because the plaintiff was excluded from the liability portion of her husband's insurance policy, the automobile was not an insured automobile and the driver was not an insured driver "notwithstanding that as to all others the automobile and the driver may have been insured." 49 Ill. 2d at 454, 275 N.E.2d at 380.

157. *Id.*, 275 N.E.2d at 379.

accident.[158] Numerous subsequent Illinois cases have accepted this view.[159]

Although *Barnes* appears to support the result achieved in *Elkins*, it is by no means certain that the legislature intended to allow a woman to recover under an uninsured motorist endorsement for injuries caused by her husband. The fact that the Married Women's Act prevents a woman from suing her husband directly for his torts militates against such a legislative purpose. Nonetheless, the *Elkins* court could have profited by noting the expansive views set forth in *Barnes* and subsequent cases. To have done so would have obviated a strained analysis of the phrase "legally entitled to recover." The *Elkins* court could have asserted that, despite the literal meaning of the policy, to deny Mrs. Elkins' claim would be to disregard the purpose of the Uninsured Motorist Act as interpreted by Illinois courts.[160] The *Elkins* court would not then have been constrained to ignore Illinois precedent nor to turn to foreign jurisdictions for its sole support.

Public Policy Considerations

Although the *Elkins* decision is in conflict with Illinois precedent, arguments other than those based on *Barnes* can be raised in support of the holding. One is that a wrong was committed and that the innocent victim should not be denied a remedy.[161] This argument was advanced

158. *Id.* at 454, 275 N.E.2d at 380. The court incidentally noted that plaintiff had an option to reject the uninsured motorist coverage but had decided to pay an extra premium for the additional protection.

159. *See, e.g.*, Squire v. Economy Fire & Cas. Co., 69 Ill. 2d 167, 370 N.E.2d 1044 (1977); Madison Co. Mut. Auto. Ins. Co. v. Goodpasture, 49 Ill. 2d 555, 276 N.E.2d 289 (1971); Zurich v. Country Mut. Ins. Co., 65 Ill. App. 3d 608, 382 N.E.2d 131 (2d Dist. 1978); Roby v. Illinois Founders Ins. Co., 57 Ill. App. 3d 89, 372 N.E.2d 1097 (1st Dist. 1978); Doxtater v. State Farm Mut. Auto. Ins. Co., 8 Ill. App. 3d 547, 290 N.E.2d 284 (1st Dist. 1972).

It should be noted, however, that the majority view in *Barnes* has not been universally accepted. In his dissent in *Barnes*, Chief Justice Underwood found the legislative intent manifest in the plain language of the Act, which speaks of protection against injury from an "uninsured motor vehicle." He criticized the majority for having converted this phrase to mean an "uninsured motorist" in order to accomplish a more desirable result. Justice Underwood found that in promulgating the Uninsured Motorist Act, the legislature had been concerned with multi-car accidents and that the legislative purpose was to protect against damage resulting from other automobiles which were not insured. 49 Ill. 2d at 456, 275 N.E.2d at 380. Several Illinois cases have been in accord with Justice Underwood's more restrictive interpretation of the purpose of the Uninsured Motorist Act. *See, e.g.*, Stryker v. State Farm Mut. Auto. Ins., 74 Ill. 2d 507, 386 N.E.2d 36 (1978); Tuthill v. State Farm Ins. Co., 19 Ill. App. 3d 491, 311 N.E.2d 770 (5th Dist. 1974).

160. *See* Burgo v. Illinois Farmers Ins. Co., 8 Ill. App. 3d 259, 290 N.E.2d 371 (1st Dist. 1972), where the court found a provision in an uninsured motorist policy shortening the applicable statute of limitations void for placing a limitation on the meaning and purpose of the Uninsured Motorist Act.

161. For discussion of this issue, *see* Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 194-95,

by the plaintiff in *Steffa v. Stanley*[162] who was injured while riding as a passenger on her husband's motorcycle which collided with another vehicle. In contending that she should be able to sue her husband in tort, the plaintiff pointed out that the Illinois constitution provides that "[e]very person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely and promptly."[163] The Illinois Appellate Court for the Second District stated in *Steffa*, however, that the Illinois constitution does not mandate a specific form of remedy but merely expresses a philosophy in favor of providing redress for wrongs.[164] It noted that a court's power to fashion remedies is limited and that the policy expression in the constitution does not authorize a court to create a cause of action unknown to common law and expressly prohibited by the Married Women's Act.[165]

Another argument which could be posed in support of the *Elkins* holding is that an insured, who generally has no expertise in interpreting the interaction among insurance policy provisions, may reasonably expect to be protected in a situation like that presented in *Elkins* and that his expectations should be fulfilled.[166] But the rebuttal to that position is that a court has the duty to enforce the terms agreed upon by the contracting parties. It "cannot make for [them] . . . better agreements than they themselves have been satisfied to conclude."[167]

The *Elkins* court failed to apply objectively the doctrine of interspousal immunity as it exists in Illinois to the facts before it. This may imply judicial discontent with the doctrine itself.[168] Although interspousal immunity is logically consistent with the early theory that husband and wife constituted a single legal entity,[169] that view is no longer viable in our society.[170] "Nowhere in the common-law world [today] is

166 N.E.2d 571, 573-74 (1960); Steffa v. Stanley, 39 Ill. App. 3d 915, 917-18, 350 N.E.2d 886, 888-89 (2d Dist. 1976).

162. 39 Ill. App. 3d 915, 350 N.E.2d 886 (2d Dist. 1976).

163. ILL. CONST. art. 1, § 12.

164. 39 Ill. App. 3d at 918, 350 N.E.2d at 888.

165. *Id.*, 350 N.E.2d at 889-90, *citing* Heckendorn v. First Nat'l Bank, 19 Ill. 2d 190, 194, 166 N.E.2d 571, 573 (1960).

166. *See* Burgo v. Illinois Farmers Ins. Co., 8 Ill. App. 3d 259, 290 N.E.2d 371 (1st Dist. 1972).

167. *Id.* at 264, 290 N.E.2d at 375 (Burman, J., dissenting).

168. *See* KEETON, *supra* note 27, at 237 in which it is suggested that courts refusing to allow the insurance company to invoke an immunity available to the wrongdoer may be "chipping away another segment of immunity . . . ."

169. *See* text accompanying notes 32-36 *supra*.

170. Trammel v. United States, 445 U.S. 40 (1980). *Trammel* evidences erosion of the traditional judicial attitude toward the marital status. The United States Supreme Court considered

a woman . . . demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being."[171] The modern justifications for interspousal tort immunity warrant close scrutiny to determine whether they compensate for withholding a cause of action from an injured spouse.[172]

A frequently cited argument in favor of interspousal immunity is that it preserves domestic tranquility.[173] But if one spouse is willing to bring the other into court to account for some wrong, the implication is that the domestic situation is already less than harmonious.[174] Although subjecting a spouse to the rigors of a judicial proceeding may increase the level of discord, it is the tort itself, not the tort suit, which likely initiated the spousal conflict. Furthermore, in a case like *Elkins*, where the parties are spouse and insurance company rather than husband and wife, denying the spouse's claim will likely cause more domestic unrest than will allowing it.

Interspousal immunity has been further justified by the theory that the criminal and divorce laws offer adequate remedies to an injured spouse.[175] This assertion is erroneous in that neither a criminal nor a divorce action can be validly based on mere negligence.[176] But even assuming *arguendo* that the criminal and divorce laws sufficed, either of these routes would certainly be more disruptive to family harmony than a suit in tort.

The one truly persuasive argument in favor of interspousal immunity is that permitting suits between husband and wife will promote

whether an accused may invoke the privilege against adverse spousal testimony to exclude his wife's voluntary testimony. By allowing the defendant's wife to testify voluntarily against him, without his consent, the Court modified the rule laid down in Hawkins v. United States, 358 U.S. 74 (1958), which had barred the testimony of one spouse against the other in a criminal proceeding unless both spouses consented.

171. Trammel v. United States, 445 U.S. 40, 52 (1980).

172. For discussions of the modern justifications for interspousal immunity, *see* Note, *Torts Between Husband and Wife*, 30 CHI.-KENT L. REV. 343, 345 (1952); Note, *Tort Liability Within the Family Area—A Suggested Approach*, 51 NW. L. REV. 610, 613 (1956).

173. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Pirc v. Kortebein, 186 F. Supp. 621 (E.D. Wis. 1960); Welch v. Davis, 410 Ill. 130, 101 N.E.2d 547 (1951); Callow v. Thomas, 332 Mass. 550, 78 N.E.2d 637 (1948); Bandfield v. Bandfield, 117 Mich. 80, 75 N.W. 287 (1898); Nickerson v. Nickerson, 65 Tex. 281 (1886). *But see* Mertz v. Mertz, 271 N.Y. 466, 476, 3 N.E.2d 597, 601 (1936) (Crouch, J., dissenting) ("To urge that [interspousal tort immunity] . . . survives because it is an aid to conjugal peace disregards reality. Conjugal peace would be as seriously jarred by an action for breach of contract, or on a promissory note, or for an injury to property, . . . all of which the law permits, as by one for personal injury.")

174. Note, *Tort Liability Within the Family Area—A Suggested Approach*, 51 NW. L. REV. 610, 613 (1956).

175. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Dishon v. Dishon, 187 Ky. 497, 219 S.W. 794 (1920). *See also* PROSSER, *supra* note 32, at 862-63.

176. PROSSER, *supra* note 32, at 863 n.45.

collusive lawsuits to collect insurance monies.[177] Undoubtedly, if such suits are allowed, the insurance companies—and, through them, the public—will bear the burden of paying for some fraudulent claims contrived by conniving spouses. But the possibility of fraud exists even in tort suits between unrelated parties. However, denying a cause of action to all spouses so that some dishonest spouses cannot use the judicial process unfairly is not a proper solution either.[178]

The question of the continued utility of interspousal immunity is difficult indeed and one which should not be resolved precipitately.[179] Because the courts have been hesitant to abolish the doctrine,[180] the question is ripe for legislative reexamination. But until the Illinois legislature sees fit to change the law, Illinois courts must implement the doctrine and deal objectively with all of its ramifications, including its effect on entitlement to insurance benefits.

CONCLUSION

The current trend in many jurisdictions is to construe liberally the phrase "legally entitled to recover" in uninsured motorist policies and statutes. Although a defense or immunity available to the uninsured tortfeasor may bar the claimant from suing the tortfeasor directly, many courts have nonetheless allowed the insured to recover from his insurance company.

The decision of the Supreme Court of Illinois in *Allstate Insurance Co. v. Elkins* is in keeping with this trend. While arguments can be raised in support of the result achieved in *Elkins*, the rationale em-

177. Among the cases considering this argument are Thompson v. Thompson, 218 U.S. 611 (1910); Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1953); Newton v. Weber, 119 Misc. 240, 196 N.Y.S. 113 (1922).

178. *Accord*, Note, *Tort Liability Within the Family Area—A Suggested Approach*, 51 NW. L. REV. 610, 614-15 (1956).

179. In Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979), the Supreme Court of Florida refused to abolish interspousal tort immunity. In a concurring opinion, one of the justices suggested that the application of interspousal immunity should be relaxed to allow suits between spouses when the tortfeasor is covered by insurance for his negligent acts. The concurring justice indicated, however, that the legislature, and not the court, should adopt this limited form of immunity. *Id.* at 355 (McDonald, J., concurring).

180. *See, e.g.*, Alfree v. Alfree, 410 A.2d 161, 162 (Del. 1979), wherein the court stated:

> We are aware of the modern, widespread criticism of the rationale of the [interspousal immunity] doctrine . . . . But, nonetheless, we think that, in addition to its time-honored recognition in this State, it retains sufficient merit to warrant continued adherence . . . . (citations omitted)

The court additionally stated that it believed the problem is one more appropriate for legislative solution than for judicial determination. *Id.* at 163. *See also* Raisen v. Raisen, 379 So. 2d 352 (1979). *But see* Shook v. Crabb, 281 N.W.2d 616 (1979); MacDonald v. MacDonald, 412 A.2d 71 (1980); Brown v. Brown, 409 N.E.2d 717 (1980); Imig v. March, 203 Neb. 537, 279 N.W.2d 382 (1979) (all abolishing interspousal tort immunity).

ployed to attain that end is flawed. The *Elkins* court treated the case as one wholly of first impression in Illinois, ignoring *Heckendorn v. First National Bank of Ottawa* and subsequent decisions which had found that the 1953 amendment to the Married Women's Act prevented a tort cause of action from arising between spouses. By basing its opinion on the premise that such a cause of action can arise in Illinois, the *Elkins* court showed a disquieting willingness to reach its desired result notwithstanding precedent and the risk of confusing the legal nature of interspousal immunity in the state.

The *Elkins* decision is disturbing in that it weakens the validity of the assumption, necessary in a common law society, that a citizen can rely on case law with confidence that the courts will not lightly change the law from term to term. It would have been appropriate, at the very least, for the *Elkins* court to have acknowledged that it was invalidating the construction of the 1953 amendment set forth in earlier decisions and accepted by the Illinois legislature. For the court to have effectively overruled the earlier cases without even recognizing their existence served only to create uncertainty and to cast doubt on the validity of the conclusion reached in *Elkins*.

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