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Torts -- Civil Liability for the Sale of Intoxicating Liquors to Minors

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FLORIDA NOTES*

TORTS—CIVIL LIABILITY FOR THE SALE OF INTOXICATING LIQUORS TO MINORS

Facts: The plaintiff's sixteen year old son and two teenage companions drove to the defendant's drive-in liquor store and while remaining in the automobile, purchased a substantial quantity of alcoholic beverages. The defendant's employee made no effort to determine whether or not the sale was being made in violation of a Florida statute which makes it a crime to sell alcoholic beverages to a minor.[1] Shortly after the sale, while under the influence of the liquor purchased, the plaintiff's son lost control of the car and struck a tree. He was dead within six hours as a result of the injuries sustained. The district court of appeal affirmed an order dismissing the complaint as being legally insufficient to state a cause of action.[2] *Held*, reversed with directions to reinstate the cause: the statute prohibiting the sale of alcoholic beverages to a minor[3] was enacted to preclude the harm that can come to one of immaturity from imbibing liquor. The fact that the statute was violated, coupled with the fact that the minor was in the automobile at the time of the sale, made the accident reasonably foreseeable, and since he was under the influence of liquor when the accident occurred, the sale might be found to have been the proximate cause. *Davis v. Shiappacossee*, 155 So.2d 365 (Fla. 1963).

Annotator's Comments: In reaching its decision the court was initially concerned with the fact that there is no Dramshop Act[4] in

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* This section is a new feature in the *University of Miami Law Review*. The annotator has attempted to make *Florida Notes* a significant and informative presentation by reviewing and analyzing current Florida cases worthy of note but which could not be given more extensive treatment because of time and space limitations.

1. FLA. STAT. § 562.11(1) (1961), provides in part:

> It is unlawful for any person, firm . . . and employee thereof, to sell . . . alcoholic beverages . . . to persons under twenty-one years of age . . . . Anyone convicted of violation of the provisions hereof shall be punished by imprisonment in the county jail for not more than six months or by fine of not more than five hundred dollars.

2. The court held that

> the automobile accident and the death of the driver [the plaintiff's son] were not reasonably expected or probable results of the sale of beverages . . . [and] generally in the absence of statute there is no cause of action against a provender of liquor in favor of one injured by reason of intoxication of the person so provided. Davis v. Shiappacossee, 145 So.2d 758, 760 (Fla. 2d Dist. 1962), *rev'd*, 155 So.2d 365 (Fla. 1963).

Cf. Cone v. Inter County Tel. & Tel. Co., 40 So.2d 148 (Fla. 1949).

3. FLA. STAT. § 562.11 (1961).

4. Dramshop Acts, or Civil Damage Acts as they are sometimes called, have been enacted in a number of jurisdictions

> providing a right of action against persons or establishments for damages suffered as a result of the serving of intoxicating beverages to another person whose inebriation or drinking causes damage to the person to whom the right of action is given. These actions are entirely statutory, and were unknown to the common law. Annot., 52 A.L.R.2d 890 (1957).

Florida. In the absence of such an act, the courts in other jurisdictions have been reluctant to consider the sale of alcoholic beverages as the proximate cause of a subsequent injury.[5] However, the holding in a prior Florida case, *Tamiami Gun Shop v. Klein*,[6] quickly dispelled any apprehension in that respect. In that case the court allowed recovery by a minor from a dealer in firearms for personal injuries sustained from a rifle sold to the minor, in violation of a statute making the sale a crime.[7] Since *Tamiami* also involved a violation of a statute which imposes a criminal penalty, the court apparently felt that it had a sufficient precedent to enable it to extend civil liability in the instant case as a result of a violation of the alcoholic beverage statute.[8] However, in *Tamiami*, the court went further than merely permitting recovery as a result of a violation of the statute which prohibits the sale of firearms to minors, since it construed the statute as an "unusual and exceptional . . . [one, in which] the courts usually find a legislative intent to remove the defense of contributory negligence."[9] The court went on to analogize the statute which prohibits the sale of firearms to minors to the child labor acts which provide that the employer "is liable for injury to the child even though he has acted in *good faith* and has employed the infant in ignorance of his age."[10] It should be noted that the statute considered in the *Davis* case, which prohibits the sale of alcoholic beverages, is not the type of statute mentioned above, since it is not a violation of the alcoholic beverages statute if the seller exercises due care to determine whether the vendee is a minor.[11] Therefore, the *Davis* and *Tamiami* cases are distinguishable on the grounds that there are two different types of statutes involved. An opinion as to whether this distinction will be a significant factor to the court in its consideration of future controversies, or for that matter, as to how the court will decide future controversies dealing with the statute that prohibits the sale of alcoholic beverages to minors,[12] would be mere speculation. However, it is not

See also 30 AM. JUR. *Intoxicating Liquors* § 525 (1958). For a discussion of the Illinois Dramshop Act see, Appleman, *Civil Liability Under the Illinois Dramshop Act*, 34 ILL. L. REV. 30 (1939).

5. See Annot., 75 A.L.R.2d 833 (1961).

6. 116 So.2d 421 (Fla. 1959); 20 LA. L. REV. 796 (1960).

7. FLA. STAT. § 790.18 (1961) provides in part: "It is unlawful for any dealer in arms to sell to minors any rifle . . . and every person violating this section shall be guilty of a misdemeanor . . . ."

8. *Supra* note 1.

9. Tamiami Gun Shop v. Klein, 116 So.2d 421, 423 (Fla. 1959). This type of statute has been formulated into a principle in the *Restatement of Torts* as follows:

> If the defendant's negligence consists in the violation of a statute enacted to protect a class of persons from their inability to exercise self-protective care, a member of such class is not barred by his contributory negligence from recovery for bodily harm caused by the violation of such statute. RESTATEMENT, TORTS § 483 (1934).

10. Tamiami Gun Shop v. Klein, 116 So.2d 421, 423 (Fla. 1959). (Emphasis added.) For strict liability with respect to a child labor act in Florida, see Tampa Shipbuilding & Eng'r. v. Adams, 132 Fla. 419, 181 So. 403 (1938).

11. Cohen v. Schott, 48 So.2d 154 (Fla. 1950); Trader Jon, Inc. v. State Beverage Dept., 119 So.2d 735 (Fla. 1st Dist. 1960).

12. FLA. STAT. § 562.11 (1961).

speculative to note that civil liability has been extended in Florida to an area in which relief was previously unavailable. Furthermore, in the author's opinion, the following are questions which the court will probably be called upon to resolve as a result of the *Davis* extention:

(1) Will the court extend civil liability as against one who exercised due care in determining whether the vendee was a minor, and therefore, had not violated the statute?[13]
(2) Will the court allow contributory negligence as a defense in a civil action if the statute has been violated?
(3) Will the court allow recovery by a third person who has been injured by a minor, as a result of the minor's negligent operation of a motor vehicle while under the influence of alcoholic beverages obtained in violation of the statute?[14]

CRIMINAL LAW—EFFECT OF WAIVER BY STATE OF OPENING ARGUMENT

Facts: The appellant was tried and convicted of the crime of robbery. During the trial, after all the evidence was presented, the state waived its right to an opening argument before the jury, to which the appellant objected. Thereafter, the closing arguments were made—the appellant's argument followed by the presentation by the state. The appellant did not object to the state's making a closing argument, nor did he demand the right to reply to it. *Held*, reversed and a new trial ordered: it is reversible error if the trial court permits the state to waive opening argument when the appellant objects thereto, and later makes a closing argument, even though the appellant neither objects to the state's being allowed to make a closing argument nor demands the right to reply. *Pettibone v. State*, No. E-100, 1st Dist., Fla., Sept. 10, 1963.

Annotator's Comments: The court adopted the rule set forth in *Andrews v. State*,[1] and resolved an apparent inconsistency in the holding of *Andrews*, and a prior Supreme Court of Florida decision, which held that, "it is *not* reversible error . . . to permit the state to waive the opening argument where it is not made to appear that there was any

13. In other words, will the standard of conduct in determining civil liability be a different standard from that used in determining whether the statute was violated?

14. In the instant case, the plaintiff, a "third person," is the minor decedent's father who apparently sued under the Wrongful Death Act, FLA. STAT. § 768.01 (1961), which allows recovery if the defendant "would have been liable in damages if death had not ensued . . . ." As to recovery by third persons other than those who recover by virtue of a statutory cause of action, see Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959), where the court interpreted the statute prohibiting sales of alcoholic beverages to minors as "intended for the protection of members of the general public as well" and allowed the third person to recover. See also 20 LA. L. REV. 800 (1960); Annot., 130 A.L.R. 352 (1941).

1. 99 Fla. 1350, 129 So. 771 (1930).

closing argument, on behalf of the state, *prejudicial to defendant*, or argument to which . . . defendant was not permitted to reply."[2]

The holding in the instant case seems to protect the basic purpose of the defendant's argument, which is to give him an opportunity to reply before the jury to the "case [relied on by the state], that is, the particular evidence and the laws upon which . . . [the state relies]."[3] Also, the language of the court in the instant case seems to indicate, first, that the stated rule will be applicable when the state makes an opening argument in which it fails to mention some of the stronger points in its favor, and then does so in its closing argument, and secondly, that it will not be reversible error when the state waives its opening argument, and then makes a closing argument, if the court indicates to the defendant that he may reply to the state's closing argument. The rationale appears to be that the defendant will not be prejudiced if he is given this opportunity.[4] Two obvious questions still remain with respect to the rule developed in the instant case:

(1) Will the court apply the rule to cases other than felonies, without requiring an additional showing that the state's closing argument was *in fact* prejudicial to the defendant?
(2) Will the court apply the rule to protect a defendant who does not object at the time the state requests, and is granted, a waiver of its opening argument?

2. Tindall v. State, 99 Fla. 1132, 1136, 128 So. 494, 498 (1930). (Emphasis added.) *Accord*, Seaboard Air Line Ry. v. Rentz, 60 Fla. 449, 54 So. 20 (1910); Harmon v. State, 48 Fla. 44, 37 So. 520 (1904). However, the court in the instant case was not satisfied that there was an inconsistency between Tindall v. State, *supra*, and Andrews v. State, *supra* note 1. It reasoned that the record in the *Tindall* case did not indicate that the state made *any* closing argument, prejudicial or otherwise. Therefore, any statement in *Tindall*, as to whether the closing argument by the state would be prejudicial to the defendant was obiter dictum. Based on the above reasoning, the court hedged by saying: *"If we cannot reconcile* the two opinions, it is our duty to follow that in the Andrews case for two reasons. (1) On the point at issue here, the opinion in the Tindall case is obiter dictum and (2) the opinion in the Andrews case is latest in point of time and therefore controlling." Pettibone v. State, No. E-100, 1st Dist., Fla., Sept. 10, 1963. (Emphasis added.)

3. Pettibone v. State, *supra* note 2, at 6. See also Tindall v. State, 99 Fla. 1132, 1136, 128 So. 494, 498 (1930); Seaboard Air Line Ry. v. Rentz, 60 Fla. 449, 54 So. 20 (1910).

4. This rationale is reasonable in that by giving the defendant the opportunity to reply to the state's closing argument, the defendant is, in effect, making an opening and closing argument. As a result, he will be in the same position as a defendant who qualifies under a Florida statute, the purpose of which is to aid the defendant, and which provides in part that "in all criminal prosecutions . . . a defendant offering no testimony in his own behalf, except his own, shall be entitled to the concluding argument before the jury." FLA. STAT. § 918.09 (1961).

DAMAGES—DATE OF VALUATION OF CORPORATE STOCK IN A CONVERSION ACTION

Facts: On May 30, 1959, six months after the appellant closed her account with the appellee-stockbroker, she received from the appellee a certificate representing 100 shares of Larel Electronics, Inc. This stock had been purchased on May 7, 1959, by the appellee for a different customer having the same name as the appellant, and inadvertently had been sent to her. She *assumed* that the certificate had been sent to her in further settlement of her account, and on August 3, 1959, she sold it through a Miami brokerage house for 2,318.58 dollars. On or about June 7, 1960, the appellee discovered his error, and requested by letter that the appellant return the stock certificate. When no reply was received, the appellee purchased 100 shares of Larel Electronics, Inc. for his customer at a cost of 5,800 dollars. The appellee filed this action for conversion on February 12, 1963. The trial court granted a summary judgment in favor of the appellee for 5,800 dollars together with interest from May 30, 1959 to the date of this judgment. *Held*, reversed: in a case involving the conversion of corporate stock, damages are to be measured by the value of the corporate stock within a reasonable time after conversion.[1] The trial court's award of 5,800 dollars, based on the cost of stock to the appellee more than one year thereafter was erroneous. *Klein v. Newburger, Loeb & Co.*, 151 So.2d 879 (Fla. 2d Dist. 1963).

Annotator's Comments: In the author's opinion, the court's reasoning is subject to at least two criticisms, notwithstanding the apparently equitable result. First, the court disclaimed what it labeled the New York rule, which was stated to be one which provides that "in cases involving the conversion of corporate stock, damages are to be assessed upon the basis of the highest market price attained within a reasonable time after the owner has had notice of the conversion."[2]

This is a misstatement of the New York rule[3] with respect to con-

1. Scott v. National City Bank, 107 Fla. 818, 146 So. 573 (1933) was cited as authority for the Florida rule.

The rule stated in the text accompanying this footnote, that "damages are to be measured *within a reasonable time after conversion*," is the rule stated by the *Klein* court prior to rehearing. (Emphasis added.) On petition for rehearing as to *costs*, the court apparently did not follow its own stated rule with respect to the measure of damages in holding that "the . . . judgment of this court . . . is modified to read as follows: . . . [judgment should be entered] in favor of the appellee based on the value of the stock *at the time of its conversion* by the appellant, to wit: August 3, 1959 . . . ." Klein v. Newburger, Loeb & Co., 151 So.2d 879, 881 (Fla. 2d Dist. 1963). (Emphasis added.) It is submitted that the rule as indicated prior to rehearing is the rule in this case, and that the court did not intend to modify it in the petition for rehearing. This conclusion is based on the fact that the petition for rehearing was merely a rehearing as to *costs* and not as to the measure of *damages*, and that the court in its opinion prior to rehearing held the Florida rule to be the rule enunciated in Scott v. National City Bank, *supra*.

2. Klein v. Newburger, Loeb & Co., 151 So.2d 879, 880 (Fla. 3d Dist. 1963).

3. The New York rule was misstated to the extent that it would be applicable to cases

version of property with a fluctuating value, *e.g.*, corporate stock. Properly stated, the rule provides that damages are to be ascertained from the value at the time of the conversion, or a reasonable time after discovery of the wrongful act, *whichever is higher.*[4]

Secondly, the court held the rule to be applicable to "case[s] involving the conversion of corporate stock . . . ."[5]

This language used by the court may be criticized as an ambiguous delimitation of the scope of the enunciated rule. This ambiguity extends to both the kinds of property and types of legal relationships to which the rule will be applied. The following questions remain unanswered, and in this writer's opinion, as a result of the ambiguous language used by the court, the answers cannot be predicted with a reasonable degree of confidence:

(1) Will the rule apply to fluctuating property other than capital stock?
(2) Will the rule apply to capital stock that is not fluctuating property, *e.g.*, capital stock of a closely held corporation?
(3) Will the rule apply if the converter is a broker or a thief?[6]

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where the market price or value of the corporate stock was lower on the date of *notice* of the conversion than it was on the date of conversion itself. See *In re* Salmon Weed & Co., 53 F.2d 335, 341 (2d Cir. 1931) for a clear statement of the New York rule.

4. *In re* Salmon Weed & Co., 53 F.2d 335 (2d Cir. 1931). *Accord*: McIntyre v. Whitney, 139 App. Div. 557, 124 N.Y. Supp. 234, *aff'd mem.*, 201 N.Y. 526, 94 N.E. 1096 (1911); German v. Snedeker, 257 App. Div. 596, 13 N.Y.S.2d 237, 24 N.E.2d 492 (1939).

5. Klein v. Newburger, Loeb & Co., 151 So.2d 879 (Fla. 3d Dist. 1963).

6. For example, consider the situation where by applying the "Florida rule," the conversion would result in a windfall to the broker or thief. See generally, Annot., 161 A.L.R. 316 (1946).