Premises Liability in Florida in Light of Walt Disney World Co. v. Goode: Confusing Legal Remedies with Good Samaritan Impulses

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On August 11, 1977, Joel Goode, age four, visited Disney World for the first time with his mother.

**KEYWORDS:** Walt Disney World, invitees, waterways
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I. Introduction

On August 11, 1977, Joel Goode, age four, visited Disney World for the first time with his mother, Mrs. Marietta Goode, and his aunt and cousins. All had agreed to meet at approximately 11:30 p.m. at an

1. 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986).

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ice cream parlor to watch the “Electric Light Parade.” The children climbed over a short rail fence onto a grassy area to play. After a short time, the other children returned from play, but Joel did not. No one had seen Joel leave the fenced area, and an extensive search began. Joel’s body was found approximately three hours later in the “moat” which surrounds Cinderella’s Castle. A medical examiner determined that he had died by drowning.

Mrs. Goode brought a wrongfulness death action against Disney based on the theory of premises liability, alleging that Joel’s death was proximately caused by an unreasonably dangerous condition on the premises. The original complaint alleged that the artificial waterway was unreasonably dangerous because it was four to five feet deep, had sloping sides, and was inadequately fenced. The Ninth Judicial Circuit Court of Orange County, Florida, granted summary judgment in favor of Disney. The Florida Fifth District Court of Appeals reversed, determining that genuine issues of material fact remained as to Disney’s alleged negligence.

The case first went to trial in July of 1984, but the jury could not reach a verdict. A retrial in 1985 determined that Mrs. Goode and Disney were each 50% at fault. The court entered judgment in favor of Joel’s father for $1,000,000 and Mrs. Goode for $500,000. Disney appealed, but the fifth district court of appeal affirmed.

Even though Joel Goode entered onto an area that was off limits to patrons, the court held that the issue of whether the park was liable turned on ordinary rules of negligence as applied to a business invitee. Although there was undisputed testimony that no child had ever been injured in the waterway since the park had opened, the court did not disturb the finding of the jury on the issue of proximate causation. Disney argued strenuously that the requisite foreseeability factor was missing. The court was not persuaded, and concluded that the evidence presented supported the jury’s decision. Even though there is ample Florida law which holds that the owner of premises on which a waterway is located is not liable unless the waterway constitutes a trap, the majority opinion rejected this argument as inapplicable. According to the majority, this rule of law would only have applied if Joel had become a trespasser when he climbed the fence. In their determination, he remained a business invitee. The dissent contended that Joel did become a trespasser, or at least his status did not remain that of a business invitee.

In its discussion of this case, this article will examine premises liability in Florida in general, with some particular attention given to amusement parks. There will be an analysis of liability when there is an artificial waterway on the premises. The article will also focus on the so-called “category approach” to premises liability and the duty owed to business invitees. There will be a discussion of the attractive nuisance doctrine. Some attention will be given to the issue of negligence of a parent as an intervening cause when a child is injured, and to the issue of proximate causation. Even though the court examined the question of whether the jury award was excessive, this analysis will not delve into that issue. It is a broad and complex topic unto itself, and beyond the realm of this discussion.

It will be suggested that while the facts are tragic, the decision of the court extends liability beyond the decided weight of authority in Florida. The majority did not focus on whether the waterway was unnaturally dangerous, or whether it was constructed so as to constitute a trap. The jury, as trier of fact, determined that Disney had
ice cream parlor to watch the "Electric Light Parade." The children climbed over a short rail fence onto a grassy area to play. After a short time, the other children returned from play, but Joel did not. No one had seen Joel leave the fenced area, and an extensive search began. Joel's body was found approximately three hours later in the "moat" which surrounds Cinderella's Castle. A medical examiner determined that he had died by drowning.

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3. Id. at 2. The grassy area is bordered by a short fence on all sides. Beyond the fence is a walkway, another fence, some shrubbery, another fence, another grassy area, and then the "moat," which surrounds Cinderella's Castle. The moat itself is not fenced. Brief of Appellee at 2. Walt Disney World Co. v. Goode, 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986) (No. 85-680) [hereinafter Brief of Appellee].

4. Walt Disney World, 501 So. 2d at 623.

5. Initial Brief of Appellant at 1.

6. Walt Disney World, 501 So. 2d at 622.


8. Initial Brief of Appellant at 1.

9. Walt Disney World, 501 So. 2d at 622.

10. Id. at 623.

11. Initial Brief of Appellant at 27.
breached its duty of reasonable care under the circumstances even though the danger that did exist was obvious and patent. The court also determined that the jury was not to be given instructions on foreseeability, despite the fact that Florida precedent dictates that foreseeability is a necessary element to establish liability.

In Florida, the inclination to create waterways on our properties is quite popular. It will also be suggested in this article, therefore, that this case, which seems to extend the liability of premises owners beyond Florida precedent, may encourage litigation against property owners which would not otherwise have been initiated.

II. Premises Liability in Florida Prior to Walt Disney World: Places of Amusement, Business Invitees, and Artificial Waterways

A. Places of Amusement

Florida courts have long adhered to the rule that the owner of a place of public amusement owes a duty to its patrons to maintain the premises in a reasonably safe condition. The owner will be liable for damages if failure to maintain the premises in a reasonably safe condition is the proximate cause of the injury, provided that the premises involved are those customarily used by patrons. Extending liability somewhat further, the court in Brightwell v. Beem stated that the owner had the duty to keep his property reasonably safe not only for the use for which it was reasonably intended, but for use made by patrons of which the owner was aware. Following the same reasoning, another court held that the owner of a stadium was liable for injuries sustained when a patron used the stadium seats as stairs.

20. Id. at 625.
22. Walt Disney World, 501 So. 2d at 629.
23. See Rainbow Enterprises, Inc. v. Thompson, 81 So. 2d 208 (Fla. 1955); Mosqueda v. Paramount Enterprises, Inc., 111 So. 2d 63 (Fla. 3d Dist. Ct. App.), cert. denied, 115 So. 2d 415 (Fla. 1959).
24. See Rainbow, 81 So. 2d at 210; see also, Kuebler v. Volusia Jai-Alai Inc., 126 So. 2d 163 (Fla. 1st Dist. Ct. App. 1960), cert. denied, 131 So. 2d 201 (Fla. 1961).
25. 90 So. 2d 320 (Fla. 1956).
26. Id. at 323.
27. See also Kuebler v. Palm Beach Speedway, Inc., 100 So. 2d 804 (Fla. 1958).
28. See, e.g., Rainbow, 81 So. 2d at 210.
29. Id.
30. 211 So. 2d 37 (Fla. 2d Dist. Ct. App. 1968).
31. Id. at 38.
32. Id.
33. See, e.g., Ramadan v. Crowell, 192 So. 2d 525 (Fla. 2d Dist. Ct. App. 1966); Rainbow, 81 So. 2d at 210; Mosqueda, 111 So. 2d at 65.
34. 192 So. 2d 525 (Fla. 2d Dist. Ct. App. 1966).
35. Id. at 527.
36. See, e.g., Brightwell, 90 So. 2d at 322.
37. Id. at 321.
38. Id. at 323.
39. 159 Fl. 741, 32 So. 2d 738 (1947) (en banc).
40. Id. at 742, 32 So. 2d at 739.
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Generally, the reasonable person standard is applied when a place of amusement is involved. The owner’s duty is that which an ordinary prudent person would exercise in the same circumstances. For example, the court in Reynolds v. Deep South Sports, Inc. held that the promoters of a wrestling match owed a duty to exercise reasonable care for the safety of their patrons. The court said that the applicable standard was the degree of care that a prudent person would exercise in the same situation, with the same amount of risk involved.

Reynolds maintained, however, that promoters or owners are not the insurers of the safety of their patrons. This is also a well established rule in Florida. In Ramadan v. Crowell, the court denied liability when a young patron was injured when she attempted to climb over a concrete block partition because she mistakenly believed that the exit door was blocked.

Regarding places of amusement, the Florida courts have also required that the injury must occur while the patron uses the premises in an ordinary, customary, or reasonable manner. In the Brightwell case, a young patron injured herself when she attempted to dive from a wooden dock which was not intended for that purpose. The court noted that since this was not a reasonable use of the premises, the plaintiff would need to prove there was a duty to warn before liability could be established.

Foreseeability is yet another factor on which Florida courts have focused, as it relates to places of amusement. Florida Coastal Theatres, Inc. v. Belflower held that liability may be determined if it can be proven that the same or similar injuries had occurred in the past.

In that case, a movie theatre patron fell in an area where the lighting

28. See, e.g., Rainbow, 81 So. 2d at 210.
29. Id.
30. 211 So. 2d 37 (Fla. 2d Dist. Ct. App. 1968).
31. Id. at 38.
32. Id.
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35. Id. at 527.
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37. Id. at 321.
38. Id. at 323.
39. 159 Fla. 741, 32 So. 2d 738 (1947) (en banc).
40. Id. at 742, 32 So. 2d at 739.
was very dim and the steps were in a state of disrepair. The court held that if the plaintiff could demonstrate that others had fallen on the same stairs, then she could prove that the owner knew of the dangerous condition. This knowledge created a duty on the part of the owner to warn future patrons. If the owner failed in that duty, liability could be established.44

Generally, the courts have noted that the proprietor of a place of public amusement fulfills his duty of reasonable care by making the premises as safe as can be expected under the circumstances.45 Usually, the question of whether the proprietor fulfilled his duty is for the jury.46

B. Business Invitees

There has been some controversy as to whether the standard of care required of amusement park owners is higher than for other places of business.47 In light of the decision in Walt Disney World v. Goode,48 and because of this uncertainty, some general discussion of the duty owed to business invitees is appropriate. According to the Florida Supreme Court, in McNulty v. Hurley,49 a business invitee is a person who enters upon the premises of another with the intent that the owner of the premises or both the owner and the invitee should derive pecuniary benefit.50 Also, in Smith v. Montgomery Ward & Co.,51 the court said that in order to attain the status of an invitee, it must be shown that the premises were intended for the use to which the injured patron has put them.52

The duties owed to the business invitee were set out in Hylazewski

41. Id.
42. See Mosqueda, 111 So. 2d 63; Payne v. City of Clearwater, 155 Fla. 9, 19 So. 2d 406 (Fla. 1944).
43. See Mosqueda, 111 So. 2d at 65.
44. For example, in Sergemeister v. Recreation Corp. of America, Inc., 314 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 1975), cert. denied, 328 So. 2d 844 (Fla. 1976), the court held that owners of places of public amusement are only held to a standard of reasonable care. In Mosqueda, 111 So. 2d at 65, however, the court determined that such owners owe a higher standard of care than do owners of other places of business.
45. 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986).
46. 97 So. 2d 185 (Fla. 1957).
47. See also, City of Boca Raton v. Mattef, 91 So. 2d 644 (Fla. 1956), Pinson v. Barlow, 209 So. 2d 722 (Fla. 2d Dist. Ct. App. 1968).
49. Id. at 197.
50. 432 So. 2d 1371 (Fla. 5th Dist. Ct. App. 1983).
51. Id. at 1372.
52. Dramstadt v. City of West Palm Beach, 81 So. 2d 484 (Fla. 1955).
53. 47 So. 2d 889 (Fla. 1950).
54. 61 So. 2d 477 (Fla. 1952).
55. Hall, 47 So. 2d at 891-92; Earley, 61 So. 2d at 478.
56. IRE Florida Income Partners, Ltd. v. Scott, 381 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1979), cert. denied, 388 So. 2d 1118 (Fla. 1980).
57. Id. at 1117.
58. Burdine’s, Inc. v. McConnell, 146 Fla. 512, 1 So. 2d 462 (1941).
59. 110 So. 2d 718 (Fla. 3d Dist. Ct. App.), cert. denied, 114 So. 2d 3 (Fla. 1959).
60. Id. at 722.
61. 146 Fla. 512, 1 So. 2d 462 (1941).
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Generally, the courts have noted that the proprietor of a place of public amusement fulfills his duty of reasonable care by making the premises as safe as can be expected under the circumstances.⁴² Usually, the question of whether the proprietor fulfilled his duty is for the jury.⁴³

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The duties owed to the business invitee were set out in Hylazewski v. Wet 'n Wild, Inc.⁴⁹ A premises owner owed a duty to the invitee to use ordinary care in keeping the premises in a reasonably safe condition, and to give timely notice when there is a latent or concealed danger which is known to the owner, but which is not known to the invitee.⁵⁰ Owners, however, are not required to place warning signs on property where the public is not expected to go.⁵¹ The Florida Supreme Court noted in two separate cases, Hall v. Holland,⁵² and Early v. Morrison Cafeteria Co. of Orlando,⁵³ that the law does not require a proprietor to maintain the premises so that an accident could not possibly happen to a business invitee. The owner has the right to assume that the invitee will perceive what will be obvious to him by the use of his own senses. Therefore, the owner is under no duty to alter the premises so as to eliminate obvious or known dangers.⁵⁴

If a person invited onto premises goes to a place not covered by that invitation, the owner's duty to that person as an invitee terminates.⁵⁵ At least one court, however, has noted that the duty to keep the premises safe for invitees extends to areas where the presence of the patron should be reasonably anticipated.⁵⁶

A property owner may be held to a higher standard of care when the business invitee is a child.⁵⁷ This principle applied in McCain v. Bankers Life and Casualty Co.⁵⁸ when a child walked into a glass door and injured himself. The court referred to prior case law, and concluded that children have always been dealt with in a special manner by the courts. They do not comprehend danger in the way that adults do, and therefore a higher standard of care is required when a proprietor knows that young invitees will enter upon the premises.⁵⁹ In Burdine's, Inc. v. McConnell,⁶⁰ a small child injured his finger in an escala-

⁴¹ Id.
⁴² See Mosqueda, 111 So. 2d 63; Payne v. City of Clearwater, 155 Fla. 9, 19 So. 2d 406 (Fla. 1944).
⁴³ See Mosqueda, 111 So. 2d at 65.
⁴⁴ For example, in Segermeister v. Recreation Corp. of America, Inc., 314 So. 2d 626, 627 (Fla. 4th Dist. Ct. App. 1975), cert. denied, 328 So. 2d 844 (Fla. 1976), the court held that owners of places of public amusement are only held to a standard of reasonable care. In Mosqueda, 111 So. 2d at 65, however, the court determined that such owners owe a higher standard of care than do owners of other places of business.
⁴⁵ 501 So. 2d 622 (Fla. 5th Dist. Ct. App. 1986).
⁴⁶ 97 So. 2d 185 (Fla. 1957).
⁴⁷ See also, City of Boca Raton v. Mathef, 91 So. 2d 644 (Fla. 1956); Pimmon v. Barlow, 209 So. 2d 722 (Fla. 2d Dist. Ct. App. 1968).
⁴⁹ Id. at 197.
⁵⁰ 432 So. 2d 1371 (Fla. 5th Dist. Ct. App. 1983).
⁵¹ Id. at 1372.
⁵² Dramstad v. City of West Palm Beach, 81 So. 2d 484 (Fla. 1955).
⁵³ 47 So. 2d 889 (Fla. 1950).
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⁵⁹ 110 So. 2d 718 (Fla. 3d Dist. Ct. App.), cert. denied, 114 So. 2d 23 (Fla. 1959).
⁶⁰ Id. at 722.
⁶¹ 146 Fla. 512, 1 So. 2d 462 (1941).
tor. Because the proprietor knew that small children played on the escalator unsupervised, and because he made no attempt to restrict the children, the appellate court upheld the finding that the proprietor was negligent. 62

C. Artificial Waterways

There has been an abundance of Florida case law over the years involving the drowning deaths of minors in artificial waterways. 63 The rule set forth in *Allen v. William P. McDonald Corp.* 64 stated that the owner of an artificial body of water is not guilty of actionable negligence when a drowning occurs unless the waterway is constructed so as to constitute a trap, or unless there is some unusual element of danger about it not existent in such bodies of water naturally. 65 Florida courts have applied this rule many times since *Allen*. In *Howard v. Atlantic Coast Line Railroad Co.*, 66 the 6th circuit, applying Florida law, said that “in the drowning cases, there has invariably been required, for liability, a type of approach to the body of water in question different from and more dangerous than the approaches to most natural bodies of water.” 67 That case involved a drowning in a railroad well which had vertical sides. The court determined that the property owner was not liable, because steep sides are found in natural bodies of water. 68

*Newby v. West Palm Beach Water Co.* 69 applied this principle again. The plaintiff’s minor child drowned in a water reservoir. The reservoir was constructed so that a water spray produced a rainbow during periods of operation. The parent alleged that the rainbow attracted the child and therefore the construction of the reservoir was the proximate cause of the child’s death. The court denied liability, and determined that the waterway was not constructed so as to constitute a trap, nor was there any unusual element of danger not existent in ponds generally. 70 The court observed that this was a tragic situation:

62. Id. at 513, 1 So. 2d at 463.
63. See, e.g., 41 Fla. Jcu. 2d Premises Liability § 52 and cases cited therein.
64. 42 So. 2d 706 (Fla. 1949).
65. Id.
66. 231 F.2d 592 (5th Cir. 1956).
67. Id. at 594-55.
68. Id. at 594.
69. Id. at 594.
70. Id. at 513.

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[As much as we may sympathize with the victims of these concepts, the law nor the welfare state have yet devised a means to compensate for them. The defeat of laudable aims is often not compensable under law. Legal remedies should not be confused with Good Samaritan impulses. The Courts may enforce the former but they have no power to relieve against defects of the latter. 71

In *Ansin v. Thurston*, 72 the court held that the evidence presented was sufficient to establish a prima facie case against the defendant, who was aware that a floating dock and raft were placed upon an artificial lake on his property. Also, there was a sudden drop to deep water. While a drop like this is a part of the nature of a pit, the court concluded that all the circumstances should be considered together. 73

The year after the *Ansin* decision, the same court had occasion, in *Adler v. Copeland*, 74 to apply the general rule again. The plaintiff’s five year old daughter drowned in a neighborhood swimming pool. The court cited to *Howard v. Atlantic Coast Line Railroad Co.* 75 in which that court noted that steep banks are found in natural bodies of water, and that there is nothing hidden about a straight sided pool. 76 The court in *Adler* denied liability against the owner of the swimming pool. 77

The court in *Hendershot v. Kapok Tree Inn, Inc.* 78 addressed the issue of whether an artificial waterway was unreasonably dangerous. In that case a two year old boy had drowned in an artificial pond maintained by the defendant. The plaintiff alleged:

[the defendant had created and at all times material operated and maintained an inherently dangerous condition upon its premises, namely an outside garden with the following pertinent features: a) an artificial pond filled with dark, murky water, which created an illusion of shallowness, the banks of which sloped gradually down to the water’s edge and continued on in the same gradual sloping

71. Id.
72. 98 So. 2d 87 (Fla. 3d Dist. Ct. App. 1957), cert. denied, 101 So. 2d 808 (Fla. 1958).
73. Id. at 88.
74. 105 So. 2d 594 (Fla. 3d Dist. Ct. App. 1958).
75. 231 F.2d 592 (5th Cir. 1956).
76. Id. at 594. See also Banks v. Mason, 132 So. 2d 219 (Fla. 2d Dist. Ct. App.), cert. denied, 136 So. 2d 341 (Fla. 1961).
77. Adler, 105 So. 2d at 595-96.
78. 203 So. 2d 628 (Fla. 2d Dist. Ct. App. 1967).
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65. Id.
66. 231 F.2d 592 (5th Cir. 1956).
67. Id. at 594-95.
68. Id. at 594.
69. 47 So. 2d 527 (Fla. 1950).
70. Id. at 528.
71. Id.
72. 98 So. 2d 87 (Fla. 3d Dist. Ct. App. 1957), cert. denied, 101 So. 2d 808 (Fla. 1958).
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75. 231 F.2d 592 (5th Cir. 1956).
76. Id. at 594. See also Banke v. Mann, 132 So. 2d 219 (Fla. 2d Dist. Ct. App.), cert. denied, 136 So. 2d 348 (Fla. 1961).
77. 67. Adler, 103 So. 2d at 595-96.
78. 203 So. 2d 628 (Fla. 2d Dist. Ct. App. 1967).
manner to a point approximately two feet from the water’s edge where there was a trap-like sharp drop off with the water suddenly going from a depth of approximately six to twelve inches to approximately four feet in depth; that in the center of the pond, a short distance off shore, there was a small island which further contributed to the deceptive illusion of shallow water between the shore and the island; b) a red fire truck with bell on the opposite shore; c) live ducks on the pond and between the island and banks; d) shade trees, shrubs and flowers in and about the island and adjacent to the pond and the opposite shore, and; e) a high fence which completely enclosed the garden except for an eighteen foot opening or gap at which there was no fence, gate or other obstacle to entering the grounds.**

With these facts before it, the court concluded that the pond did not possess any unusual element of danger which did not exist in ponds generally. The court denied liability against the property owner.**

III. The Dissent and the Attractive Nuisance Doctrine

It is conceivable that there is little prior case law in Florida in which a young business invitee drowned on the premises after wandering to an area that was not within the scope of his invitation. With virtually no dispositive prior case law on which to rely, Disney argued that the artificial waterway cases should apply.** Since Joel was undeniably a business invitee when he entered the park, Mrs. Goode argued that cases in which the duty to business invitees was set forth should apply.**

The dissent noted the undisputed fact that Joel was never invited to enter the waterway in which he drowned.** In fact, the area was fenced off, and evidence showed that Disney employees were to order people to leave the fenced-in areas whenever they were seen there.** Therefore it was questionable whether Joel’s status was that of a business invitee when he drowned. According to the dissent, he had become a trespasser and the attractive nuisance doctrine should have applied.**

89. Concrete Construction Inc. of Lake Worth v. Petterson, 216 So. 2d 221 (Fla. 1968).
90. Id.
91. 212 So. 2d 792 (Fla. 2d Dist. Ct. App. 1968).
92. Id. at 794-95.
93. 198 So. 2d 75 (Fla. 3d Dist. Ct. App. 1967).
94. Id.
96. See, e.g., Crutchfield, 152 So. 2d at 808; Tampa, 166 So. 2d at 227.
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maintained is one where the owner knows or has reason to know that children are likely to trespass. Second, the owner must know that the instrumentality involves an unreasonable risk of serious bodily harm. Third, the child must not be able to appreciate the danger. Fourth, the utility to the owner must be slight compared with the risk to children.97

In Crutchfield v. Adams,98 a young child injured his hand when he caught it in an unguarded revolving fan belt located on the premises of the defendant. The complaint alleged the following: the landowner knew of the trespassing habits of local children; the landowner was aware that having an unguarded revolving fan on his premises posed an unreasonable risk of serious injury to the local children who were attracted by it; the child who was injured was only three years old and therefore unable to appreciate the dangerous nature of the exposed fan belt; and the utility to the landowner was slight compared with the risk posed to the attracted children.99 The court determined that the complaint, containing these four allegations, stated a cause of action under the laws of negligence and under the attractive nuisance doctrine.100

There are many cases in which the court denied liability because one or more of the elements were missing. For example, in Lomas v. West Palm Beach Water Co.,101 where a child drowned in the water company's artificial pond, the court determined that the pond did not constitute an unreasonable risk of serious bodily harm.102 In Sparks v. Casselberry Gardens, Inc.,103 a tunnel caved in on the premises of the defendant and killed the plaintiff's minor child. The child had created the tunnel out of an excavation. The court found that two of the necessary elements were missing.104 It was unreasonable to conclude that the landowner should have known that young people would be attracted to the premises, and the excavation on which the children played did not pose an unreasonable risk of serious bodily harm.105 The child had created the tunnel, not the landowner. The court observed further:

As much as we sympathize with any victim our concept of the at

tractive nuisance doctrine cannot permit us to extend its protection to one against his clear fault. To do so would have to conclude a victim’s minority per se precludes any realization of the risk involved, and our reasoning will not permit us to go this far.106

In Johnson v. Wood,107 the court did not deny liability, but did discuss the importance that the child be of tender years. The key to determining whether to apply the attractive nuisance doctrine is to evaluate the mental capacity of a normal child, not a normal adult, under the circumstances at issue.108

The court in Green Springs, Inc. v. Calvera109 discussed the fourth element, which involves a balancing test. The utility of maintaining the dangerous condition and the cost of eliminating the danger must be compared with the risk posed to children.110 In Green Springs, a concrete planter fell on a young child and killed her. Her parents sued the developer, alleging that the attractive nuisance doctrine should apply.111 In its discussion of the doctrine, the court noted that the first three elements must be considered in light of the last. The landowner should not be expected to undergo great expense to alter his premises if the risk to the child is not as great as the utility to the owner.112

IV. Liability and Parental Negligence

In Florida, a person who is not in a position to appreciate the danger to which he is exposed is not considered negligent.113 Thus, a child of six years or younger is presumed incapable of committing contributory negligence which could serve to reduce any recovery for wrongful death.114 Therefore, Joel Goode’s behavior was not really an issue before the court.

The court did discuss the question of Mrs. Goode’s negligence as a possible intervening cause, however.115 She testified during the trial

97. Crutchfield, 152 So. 2d at 811.
98. Id. 152 So. 2d 808 (Fla. 1st Dist. Ct. App. 1963).
99. Id. at 809.
100. Id. at 810.
101. 57 So. 2d 881 (Fla. 1952).
102. Id. at 882.
104. Id. at 687.
105. Id.
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106. Id.
107. 155 Fla. 753, 21 So. 2d 353 (Fla. 1945) (en banc).
108. Id. at 754, 21 So. 2d at 355.
109. Id. at 239 So. 2d 264 (Fla. 1970).
110. Id.
111. Id. at 265.
112. Id. at 266.
114. Id. at 39-40.
115. Goode, 425 So. 2d at 1153-54; Initial Brief of Appellant at 29-31; Brief of
that she knew that Joel was not supposed to be on the other side of the fence, yet she made no attempt to stop him from climbing over.\textsuperscript{115} No one disagreed about the fact that Mrs. Goode was not watching her four year old son when the accident occurred.\textsuperscript{116}

The Florida courts have previously denied liability against the landowner when it appeared that the negligence of the parent acted as an efficient, intervening cause.\textsuperscript{117} In Alves v. Adler Built Industries, Inc.,\textsuperscript{118} a two year old child drowned in a lake on property adjacent to her parent's home. On several previous occasions, the child had been seen by the landowner playing unsupervised by the lake. The landowner had warned the parents about the child's behavior. Because the parents were put on notice, the court concluded that the negligence of the owner was not at issue. Rather, the negligence of the parents in failing to supervise their young daughter was the proximate cause of her drowning.\textsuperscript{119}

Likewise, in Perotta v. Tri-State Insurance Co.,\textsuperscript{120} the court denied liability when a man injured himself while trying to rescue a small child from a swimming pool. According to the opinion, it was not the negligence of the homeowner in failing to adequately fence the pool that was the proximate cause of the injury.\textsuperscript{121} The failure of the parents to adequately supervise their child acted as an efficient intervening cause.\textsuperscript{122} The Perotta court referred to a general rule regarding the supervision of children:

A parent in the immediate control of a child of tender years who is too young to be capable of exercising any self-reliant care for his own safety is responsible for its preservation from hazards, and it is the parent's duty to watch over such child and guard it from danger.\textsuperscript{123}


116. Initial Brief of Appellant at 29.
117. Goode, 425 So. 2d at 1153-54.
119. Id.
120. Id. at 803.
121. 317 So. 2d 104 (Fla. 3d Dist. Ct. App. 1975), cert. denied, 330 So. 2d 20 (Fla. 1976).
122. Id. at 105.
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124. Id., quoting 59 AM. JUR. 2d § 14, Parent and Child at 97.
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In Humphrey v. City of Homestead,125 the court relied on the same general rule. That court found it to be a question for the jury whether a mother who failed to supervise her three-year-old child was negligent.126 The child ran into the street and was struck and killed by a truck owned by the defendant city. The trial court had entered a verdict for the defendant.127 The mother appealed because the jury had been given instructions on the issue of her negligence. The third district court of appeal affirmed, stating that the general rule in such cases is that a parent is bound to provide the type of care that a reasonable, prudent person would apply under the same circumstances.128 It was not error to inform the jury of this general rule.129

V. Proximate Cause: The Question of Foreseeability

Was Joel's drowning death proximately caused by the fact that the fences surrounding the moat were short enough to be easily scaled by children? In her initial complaint, Mrs. Goode alleged that Disney was negligent because of its failure to provide a fence which would prevent children from climbing over and onto the grassy area which borders the moat.130

The general rule is well established in Florida, that a defendant is not liable under a negligence theory unless the injury was a foreseeable result of the negligence.131 The Florida Supreme Court in Cone v. Inter County Telephone and Telegraph Co.,132 discussed foreseeability and stated:

Not every negligent act of omission or commission gives rise to a cause of action for injuries sustained by another. It is only when injury to a person . . . is such as ordinarily and naturally should have been regarded as a probable, not a mere possible result, of the negligent act, that such an injured person is entitled to recover damages as compensation for his loss. . . . 'Natural and probable'

125. 224 So. 2d 739 (Fla. 3d Dist. Ct. App. 1969).
126. Id. at 740.
127. Id. at 739.
128. Id. at 740, citing 39 AM. JUR. Parent and Child § 46.
129. Id.
130. Goode, 425 So. 2d at 1153.
132. 40 So. 2d 148 (Fla. 1949) (en banc).
consequences are those which a person by prudent human foresight can be expected to anticipate as likely to result from an act, because they happen so frequently from the commission of such act that in the field of human experience they may be expected to happen again. "Possible" consequences are those which happen so infrequently from the commission of a particular act, that in the field of human experience they are not expected to happen again from the commission of the same act.\textsuperscript{138}

That phrase, "in the field of human experience they may be expected to happen again" has been quoted often by the Florida courts, and the principle has been widely applied.\textsuperscript{134} Thus in Langevin v. Gray Drug Stores, Inc.\textsuperscript{138} the court held that it was not foreseeable to the defendant that a minor who purchased potassium nitrate would create a bomb and that another minor would be injured as a result.\textsuperscript{138} In another case, the plaintiff's decedent was robbed and murdered in the parking lot of a bank.\textsuperscript{137} Even though the bank knew that its patrons left with cash in their possession, this knowledge was not enough to meet the test of foreseeability because such an incident had never happened before.\textsuperscript{138}

VI. Confusing Legal Remedies with Good Samaritan Impulses

The dissent of Judge Cobb in \textit{Walt Disney World} claimed that the majority had ignored the bulk of prior case law in reaching its conclusion.\textsuperscript{138} A closer look at the facts in \textit{Walt Disney World} as they compare to the facts of some of the prior Florida cases reveals that Judge Cobb's position in the dissent is amply supported.\textsuperscript{140}

\textsuperscript{133} Id. at 149.
\textsuperscript{134} See, e.g., Gibson v. Avis Rent-a-Car System, Inc., 386 So. 2d 520 (Fla. 1980).
\textsuperscript{135} Langevin v. Gray Drug Stores, Inc., 216 So. 2d 70 (Fla. 3d Dist. Ct. App. 1968).
\textsuperscript{136} Id. at 71.
\textsuperscript{138} Id.
\textsuperscript{139} \textit{Walt Disney World}, 501 So. 2d at 629.
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Disney used the moat to run swan boat rides for its patrons. Mrs. Goode alleged in her complaint that the waterway was unreasonably dangerous because it was deep enough to create a drowning hazard, but the designer of the waterway testified at trial that four feet of water was necessary in order for the boats to run. Disney argued that, in any event, water of any depth poses a drowning hazard to small children who do not know how to swim.

Regarding the fences, Disney argued that there was no evidence presented that a higher fence would have prevented the accident. It is common knowledge that a truly determined child is capable of climbing a rather tall fence. Constructing a fence which would hopefully prevent a child from climbing over it could have virtually defeated Disney’s purpose in having the moat constructed in the first place. Tall fences would surely detract from the beauty of the water, and it is conceivable that Disney intended the waterway to be an attractive and integral part of the park. It is situated picturesquely in the heart of the Magic Kingdom, surrounding Cinderella’s Castle.

In *Florida Coastal Theatres, Inc. v. Bellflower*, the court held that when a plaintiff wants to establish liability against the owner of a place of public amusement, it is helpful to prove that others have been injured in the same or a similar manner previously. In the twelve months prior to Joel’s death, there were approximately 11,000 reports of missing children. Of the cases reported, 1,600 involved children under the age of five. None of the reports indicated that any of these children had been injured. There was no evidence that any of these children had been found in the waterway. In fact, no evidence indicated that anyone, child or adult, had ever been harmed in the waterway at all.

Despite this abundance of evidence before the court, the majority opinion still upheld the jury verdict, apparently agreeing that a reasonably prudent person in Disney’s position with the same amount of risk involved would have exercised a greater degree of care than Disney.

150. Initial Brief of Appellant at 17.
151. Id. at 20.
152. 159 Fla. 741, 32 So. 2d 738 (Fla. 1947).
153. Id. 32 So. 2d at 738.
154. Initial Brief of Appellant at 4.
155. Id. at 5.

B. Business Invitees

Mrs. Goode placed great emphasis on the undisputed fact that Joel was a business invitee when he entered the premises and thus Disney owed him a duty of reasonable care. Did Disney use ordinary care to keep the premises in a reasonably safe condition?

Proprietors are not required to place warnings on property where the public is not supposed to go. Nor is there a duty to warn when the danger posed is an obvious one. Thus, Judge Cobb noted:

In point of law, there is no case authority anywhere, prior to the instant case, that implies a duty on the part of the owner of premises to warn parents of young children that the latter may drown in water over their heads. That is an obvious danger parents are responsible to know . . . . In the instant case, Mrs. Goode, the mother, had actual knowledge of the existence of the moat, having taken the swan boat ride earlier in the visit.

Children have been treated in a special manner by the Florida courts and it has been said that they are owed a higher standard of care as business invitees than are adults. But those cases which assess liability against the proprietor when children are involved are distinguishable from *Walt Disney World*, in that Disney did take certain measures to protect children from the moat. In the *Burdine’s* case, for example, the owner knew that children were playing unsupervised on the escalator but made no effort to restrict their activity.

Another of the duties owed to a business invitee is to warn of con-

156. *Walt Disney World*, 501 So. 2d at 626.
157. *Id.*
158. Brief of Appellee at 11.
159. Drastadt v. City of West Palm Beach, 81 So. 2d 484 (Fla. 1955).
161. *Walt Disney World*, 501 So. 2d at 628 n.5.
162. *Burdine’s*, Inc. v. McConnell, 146 Fla. 512, 1 So. 2d 462 (1941).
163. *Walt Disney World*, 501 So. 2d at 625.
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Disney used the moat to run swan boat rides for its patrons. Mrs. Goode alleged in her complaint that the waterway was unreasonably dangerous because it was deep enough to create a drowning hazard, but the designer of the waterway testified at trial that four feet of water was necessary in order for the boats to run. Disney argued that, in any event, water of any depth poses a drowning hazard to small children who do not know how to swim.

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Despite this abundance of evidence before the court, the majority opinion still upheld the jury verdict, apparently agreeing that a reasonably prudent person in Disney’s position with the same amount of risk involved would have exercised a greater degree of care than Disney did. The court concluded: “Based on the evidence presented, the jury found that Disney had not complied with its duty of due care and this failure proximately caused the child’s death, and we will not disturb those findings because the evidence supports them.”

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Another of the duties owed to a business invitee is to warn of con-
cealed dangers. No one ever contended that the moat constituted a concealed danger. The supreme court had held that an owner is under no obligation to alter the premises in order to eliminate obvious or known dangers. Yet the court in *Walt Disney World* has ruled that Disney breached a duty of care because it maintained a known danger on its premises. Disney argued in this regard that to impose this type of a standard would make the property owner the insurer of the safety of his patrons, and would make every owner of a beach, lake, or other waterway in Florida where business invitees may be present guilty of negligence per se.

It is also well established in Florida that a property owner need not maintain his premises so that an accident could not possibly happen to a business invitee. Yet it appears that the *Walt Disney World* court is asking Disney to take measures to prevent possible, not just probable accidents.

C. Artificial Waterways

Both Disney and Mrs. Goode cited to *Allen v. William P. McDonald Corp.*, in which the child who drowned was an infant trespasser. The rule established by that case, and often quoted, states that an owner of an artificial waterway is "not guilty of actionable negligence on account of drownings therein unless they are constructed so as to constitute a trap or raft or unless there is some unusual element of danger lurking about them not existent in ponds generally.

The majority determined that this rule had its inception in the attractive nuisance cases, and therefore should only apply when the child involved was a trespasser on the premises. A closer look at Florida case law, however, reveals that this is a general rule which is applicable whenever the landowner maintains an artificial waterway, whether the drowning victim is categorized as a trespasser or not. In *Hendershot v.*

165. Hylazewski, 432 So. 2d at 1371.
166. Hall v. Holland, 47 So. 2d 889, 891-92 (Fla. 1950); Earley v. Morrison Cafeteria Co. of Orlando, 61 So. 2d 477, 478 (Fla. 1953).
167. *Walt Disney World*, 501 So. 2d at 626.
168. *Initial Brief of Appellant at 9.*
169. Earley, 61 So. 2d at 478.
170. 42 So. 2d 706 (Fla. 1949).
171. *Id.*
172. *Id.*

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*Kapok Tree Inn, Inc.*, the court discussed the rule and noted that it had been relied on both in cases "in which the attractive nuisance doctrine was applied and those in which it was not."

In the recent case of *Kinya v. Lifter*, parents brought a wrongful death action against the owner of the apartment complex in which they resided. Their unattended fifteen month old son drowned in a lake which formed a part of the common space of the complex. It was undisputed that the child was not a trespasser. Yet the court relied on the general rule stated in *Allen v. William P. McDonald Corp.* and denied liability against the landowner because the lake was not proven to contain any element of unusual or hidden danger.

Quite probably, the *Allen* rule is applied so often in attractive nuisance cases because it is common for young children to be attracted to artificial waterways on property to which they were not invited. In the opinion of this writer, this does not necessarily mean that the *Allen* rule should not have applied to the facts of *Walt Disney World*, just because Joel might not have have been a trespasser. The court should still have placed a burden on the plaintiff to prove that the moat constituted a trap or contained a hidden element of danger, even though Joel was a business invitee when he originally entered the park. If the court had focused on the *Allen* rule, it is possible that on the basis of the waterway cases, liability against Disney would have been denied.
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175. Id. at 630.
176. 489 So. 2d 92 (Fla. 3d Dist. Ct. App.), rev. denied, 496 So. 2d 142 (Fla. 1986).
177. Id. at 93.
178. 42 So. 2d 706 (Fla. 1949).
179. Kinya, 489 So. 2d at 95.
180. 42 So. 2d at 706.
181. Despite the fact that the waterway in Hendershot was dangerous and alluring to small children, the court denied liability because the waterway was not designed so as to constitute a trap and was not different from such waterways found in nature. Hendershot, 203 So. 2d at 630. The court in Kinya denied liability against the landowner for the same reason, because there was no element of unnatural danger about the water. Kinya, 489 So. 2d at 94-95. See also, Banks v. Mason, 132 So. 2d 219-20 (Fla. 2d Dist. Ct. App.), cert. denied, 136 So. 2d 348 (Fla. 1961) in which the court held that there was no duty to erect a fence around a pool which contained no unnatural element of danger. If the Walt Disney World court had focused on the question of whether there was unnatural danger, as these courts had, the conclusion probably would have been that the moat was not unnaturally dangerous, and liability may have been denied here as well.

165. Hylazewski, 432 So. 2d at 1371.
166. Hall v. Holland, 47 So. 2d 889, 891-92 (Fla. 1950); Earley v. Morrison Cafeteria Co. of Orlando, 61 So. 2d 477, 478 (Fla. 1955).
167. Walt Disney World, 501 So. 2d at 626.
169. Earley, 61 So. 2d at 478.
170. 42 So. 2d 706 (Fla. 1949).
171. Id.
172. Id.
173. Walt Disney World, 501 So. 2d at 624.
example, the waterway in question in *Hendershot* contained a "trap-like sharp drop off with the water suddenly going from a depth of approximately six to twelve inches to approximately four feet in depth." There were certain other features which also made it particularly alluring and deceptive to small children. 

There was ample information provided by Mrs. Goode intending to show that the moat was unreasonably dangerous. She noted that there was a grassy slope next to the moat and that there was algae present on the sides which could have made them slippery to a child who was trying to climb out. Surely it could be argued that the waterway in *Hendershot* was no less dangerous than Disney's moat, yet in that case the court denied liability, concluding that the condition of the premises was not unnatural and did not contain any unusual element of danger.

D. Did Joel Become a Trespasser?

Why was the court so quick to conclude that Joel was not a trespasser at the time that he fell into the moat? Even though other children had been seen playing on the grassy areas before, Disney personnel were instructed to inform anyone who climbed the fences that this was an off-limits area. Mrs. Goode knew that Joel was not supposed to cross the fence. Even if Joel did not become a trespasser, was it fair to conclude that he remained a business invitee at this point, thereby imposing the strictest standard for determining whether Disney was negligent?

The premises liability cases on which the majority relied to formulate its opinion all involved situations in which persons were injured at locations within the scope of the invitations. Since Joel was injured in an off-limits area, it might have been reasonable to apply the attractive nuisance doctrine.

As previously stated, four elements are necessary to sustain a cause of action under this doctrine. It has already been established that Disney knew children were likely to trespass onto the moat area. Surely Joel did not appreciate the danger which the moat could pose to small children.

As to the other necessary elements, it could be argued that they were missing. As the waterway cases point out, Florida courts have consistently held that an artificial waterway is not an unreasonably dangerous condition unless it constitutes a trap or possesses an element of danger not found in such bodies of water naturally. Arguably, the moat does not possess this unnatural element of danger. How about the utility of the moat to Disney compared with the risk involved? Disney World is supposed to represent a microcosm of the United States, with its many bodies of water. The moat is intended not only to facilitate the swan boat rides, but also to duplicate nature and add to the attractiveness of the premises, thereby benefitting the business conducted there. The risk that the moat poses to small children is arguably not as great as this utility is to Disney. In analyzing the risk factor, should Disney have been able to foresee that a non-supervised child would climb at least two fences, cross a grassy area, enter the moat, drift to the four foot area when there was virtually no current, and drown when thousands of people were within hearing and viewing distance? It seems unreasonable to formulate such a conclusion.

E. Mrs. Goode's Negligence

The court had observed in the initial appeal, *Goode v. Walt Disney World Co.* that the mother's admitted negligent supervision could not serve as an efficient, intervening cause shielding Disney from liability, because it was foreseeable that this type of negligence on the part of parents would occur. Under this reasoning, the parent of an injured invitee in any situation could argue that it is foreseeable to the proprietor that a parent will fail to supervise a child. After all, all busi-

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182. *Hendershot*, 203 So. 2d at 628-29.
183. Id.
185. Id.
186. *Hendershot*, 203 So. 2d at 630.
187. Brief of Appellee at 5.
188. Initial Brief of Appellant at 2.
189. *Walt Disney World*, 501 So. 2d at 627.
190. See, e.g., Crutchfield v. Adams, 152 So. 2d 808; Tampa Electric Co. v. Larisey, 166 So. 2d 227 (Fla. 2d Dist. Ct. App. 1964); and RESTATEMENT (SECOND) OF TORTS § 339 (1965), which lists the fifth element as lack of liability unless the landowner has failed to exercise reasonable care and the other elements are present.
191. Initial Brief of Appellant at 21 notes that there is never any significant current in the moat.
193. Id. at 1156.
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ness invitee situations contain some element of distraction for the parent. The rule is well established that when a small child is in the immediate control of a parent, that parent is responsible for guarding that child from danger. In light of that rule, and because the contrary holding in *Goode* could be broadly applied in the future, perhaps the court dismissed the issue of Mrs. Goode’s negligence too quickly.

F. The Foreseeability Factor

The trial court had refused to instruct the jury on foreseeability, specifically on whether the injury was a reasonable consequence of the condition of the premises. Yet it is well settled law that a person can only be liable when the injury is a reasonably foreseeable result of that person’s actions. This analysis has already noted the statistics regarding the lack of any prior similar injury in the history of the park despite the millions of people who have passed through its gates. Perhaps it was error, then, for the jury not to be fully instructed on this critical issue. Conceivably, the verdict would not have been the same.

VII. Possible Future Ramifications

The ramifications of the *Walt Disney World* decision are especially significant in Florida. Artificial waterways are relatively easy to create and are extremely popular. After *Walt Disney World*, every land developer who dredges a canal, builds a pool, and then opens model homes could have his liability expanded to an alarming extent. After all, the developer has created a business invitee situation where there are artificial waterways on the premises. Surely it is foreseeable that children will accompany their parents to the model homes. What if an unsupervised child runs off and drowns in a canal or pool on the premises? These areas are typically not bordered by tall, unscaleable fences. Based on *Walt Disney World*, the plaintiff can now argue that it was foreseeable that a parent would fail to supervise a child; that it was irrelevant that the child was not supposed to roam to this area; that the fact that the waterway did not possess an unnatural element of danger is not at issue; that the owner should be liable even though this type of an injury may never have occurred on his premises before; and that the utility of the waterway to the developer should be given slight attention.

Undeniably, there is an abundance of land development going on in Florida today, and waterways on the premises typically increase the value of the property. But beyond the model home scenario, there are any number of parks and business settings on which waterways are located in Florida. There is every reason to believe that artful attorneys will rely on *Walt Disney World* in an attempt to extend liability to these situations as well. Thus, it is not unreasonable to conclude that the *Walt Disney World* decision will encourage future litigation which otherwise would not have been instigated.

Perhaps courts in the future should focus more carefully on the long established rule in Florida that a waterway must constitute a trap before the owner is found liable. This rule has applied regardless of the status of the injured party at the time the injury occurred. The *Walt Disney World* court refused to focus on these principles of law, and ignored the fact that the moat contained no unnatural element of danger. Courts could also be more appreciative of the fact that harsh facts encourage the sympathy of juries. Just because of this, “deep pocket” defendants should not be expected to protect a person against “his own fault, bad luck, improvidence or misfortune.”

VIII. Conclusion

The facts in this case are tragic. In August of 1977, the Goodes surely anticipated a wonderful vacation at Disney World. As it turned out, a horrible misfortune befell them instead. The jury must have been saddened by the stories of the sorrow that this loss brought upon the Goode household. But the fact remains that there are many stories of human tragedy, and not always a culprit to blame. Beyond the question of Disney’s culpability, there is no way to be certain that a $1.5 million damage award will have a preventative effect. Short of removing the waterway from the premises entirely, it is hard to imagine any precau-

194. See supra Section V.
195. Initial Brief of Appellant at 15.
197. See supra text accompanying notes 158-59.
198. See generally *Walt Disney World*, 501 So. 2d at 622.
199. See supra text accompanying notes 68 to 85.
200. See supra text accompanying notes 181 to 183.
202. Id. at 629.
203. Id.
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200. See supra text accompanying notes 181 to 183.
201. Walt Disney World, 501 So. 2d at 623.
202. Id. at 629.
203. Id.

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tion that Disney could take which would absolutely prevent a future drowning. Disney argued that the decision of the Fifth district court of appeal imposed exactly this type of absolute duty on them — to prevent drowning by preventing access to water. This would establish a new rule for property owners in Florida, regardless of the nature of the waterway on their premises. It is the opinion of this writer that to expand liability to this extent would have an undesirable and far reaching negative impact on Florida property owners.

Sandra Greenberg Krawitz

The Drug Courier Profile and Airport Stops: Reasonable Intrusions or Suspicionless Seizures?

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I. Introduction

In October of 1982, President Reagan declared "war on drugs." The resulting escalation in law enforcement efforts to combat the flow of illegal drugs created an increased interest in drug detection techniques at federal, state and local levels.

One such technique currently in wide use is the "drug courier profile," a compilation of characteristics thought common of persons transporting drugs. Despite being labeled a "particularly invidious practice" and compared to the forecasts of Orwell and Huxley by some courts, the profile is gaining increased use in a variety of law enforcement efforts.

2. See S. Witosky, BREAKING THE IMPASSE IN THE WAR ON DRUGS 91 (1986).
3. Id.
4. The drug courier profile is sometimes referred to informlly as the "Markonni drug courier profile" after DEA agent Paul J. Markonni who is often credited with creating the profile. See, e.g., United States v. McClain, 452 F. Supp. 195, 199 (E.D. Mich. 1977), and Comment, Mendenhall and Reid: The Drug Courier Profile and Investigative Stops, 42 U. Pitt. L. Rev. 835, 837 n.15 (1981) ("Agent Markonni apparently played a significant part in developing the profile, it now, at least informally, bears his name.")
5. United States v. McCranie, 703 F.2d 1213, 1220 (10th Cir. 1983) (McKay, J., dissenting).
7. See Note, Drug Courier Profile Stops and the Fourth Amendment: Is the