IN THE SUPREME COURT OF FLORIDA

LINDA MCGHEE,

Petitioner,

vs.

DEPARTMENT OF CORRECTIONS,

Respondent.

CASE NO. 85,636

DISTRICT COURT OF APPEAL
FIRST DISTRICT, No. 93-3757

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Introduction

Petitioner, Linda McGhee, appellee below, seeks review of the decision of the District Court of Appeal, First District, reported as Department of Corrections v. McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995). The decision below reversed a final judgment entered in petitioner's favor with directions to enter final judgment in favor of respondent, Department of Corrections. The district court certified to this court a question of great public importance and this court has jurisdiction pursuant to Art. V, § 3(b)(4), Fla. Const.

References in this brief to the record on appeal will be made by designation "R." A copy of the decision subject to review is appended to this brief at Tab 1.

Course of Proceedings in the Courts Below

Linda McGhee filed suit against the State of Florida, Department of Corrections (DOC), following the shooting death of her husband, Robert McGhee, Jr., in Mississippi, by two escaped Florida inmates, John Fred Woolard and Dempsey Alexander Bruner (R 623). McGhee alleged that DOC was negligent in its care, supervision and control of Woolard and Bruner, and that, as a result of such negligence, the inmates escaped from Holmes Correctional Institution (HCI) on May 24, 1990, and thereafter caused the death of plaintiff's decedent (R 623-27). McGhee also alleged that DOC knew or should have known, prior to the escape,

that Woolard and Bruner would commit violent crimes of the type committed upon plaintiff's decedent if they were permitted to escape (R 625). McGhee claimed damages for lost support and services of her husband, loss of companionship and protection, mental pain and suffering and the estate's loss of net accumulations (R 625-26).

DOC moved to dismiss the complaint on the ground that Mississippi law, rather than Florida law, should determine the rights and liabilities of the parties as required by the Federal Reservations Act, 16 U.S.C. § 457, and Mississippi conflict of laws rules (R 637-38). DOC's motion, as amended, contended that Mississippi law provided absolutely immunity from suit against DOC and that DOC owed no legal duty to plaintiff's decedent under the law of that state (R 637). The trial court denied DOC's motion to dismiss and found that the state of Florida had the most significant relationship with the events and occurrences surrounding the claim and that Florida law therefore applied (R 665-66).

The cause proceeded to trial under DOC's admission that it was negligent for allowing Woolard and Bruner to escape from its custody, subject to DOC's argument that it owed no legal duty to protect plaintiff's decedent from harm (R 4, 6). DOC also admitted that it breached "operational level functions," thus eliminating any question concerning sovereign immunity in the context of the operational level--planning level dichotomy (R

12). At the close of McGhee's case, DOC moved for direct verdict on the ground that it owed no duty of care to plaintiff's decedent as a matter of law (R 488). The trial court denied the motion (R 489). DOC renewed its motion at the close of the evidence (R 574).

The jury returned a verdict in McGhee's favor and apportioned fault as follows:

Department of Corrections	50%
John Fred Woolard	25%
Dempsey Alexander Bruner	25%
Total	100%

(R 615). The jury awarded damages totaling $2,220,000 (R 615). Applying section 768.81, Florida Statutes, the jury's apportionment of half the fault to Woolard and Bruner reduced McGhee's award of non-economic damages from $1,450,000 to $725,000 and resulted in a final judgment in McGhee's favor and against DOC for $1,485,000 (R 838, 947).

The District Court of Appeal, First District, reversed. While the court determined that the trial court properly applied Florida law, the court held that the trial court erred by finding that DOC could be held liable for the death of plaintiff's decedent at the hands of the escaped inmates. The court relied upon its earlier decision in State of Florida, Department of

Corrections v. Vann, 650 So. 2d 658 (Fla. 1st DCA 1995, and, as it did in Vann,[1] certified the following question to this court:

> WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

McGhee, 653 So. 2d at 1093.

Statement of Facts

On the morning of May 24, 1990, officers Williams and McMahan transported six HCI inmates, including Woolard and Bruner, to the Bonifay office of Dr. David Pelt for eye examinations (R 56, 172). Williams escorted inmates into Dr. Pelt's examination room while McMahan sat in a chair in the waiting room (R 176-77). Near the end of the last inmate eye examination, Bruner and Woolard subdued McMahan by using a knife fashioned from barbers' scissors Bruner had obtained from the prison barber shop[2] and took McMahan's revolver (T 69-72). Woolard and Bruner then escaped in Dr. Pelt's receptionist's vehicle wearing Dr. Pelt's clothing (R 206-07).

At 4:47 a.m. on May 25, 1990, Woolard and Bruner kidnapped Carrie Marie Burnett from the Brewton Motor Inn in Brewton, Alabama, where Burnett was employed as the night auditor, and drove Burnett to Ocean Springs, Mississippi (R 266-269, 275). The inmates stayed with Burnett in a wooded area for about seven

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[1] The Vann case is presently pending in this court under case number 85,415.

[2] Prior to the escape, barber shears were reported missing from the prison barber shop where Bruner worked (R 116).

hours and then checked into the Sundown Motel in Ocean Springs (R 278). Burnett escaped on Saturday morning, May 26, 1990, and reported the incident to the police (R 278-80).

The inmates fled the motel and eventually traveled through the Gulf Islands National Seashore in Ocean Springs where they encountered plaintiff's decedent who was employed as a uniformed federal park ranger (R 329, 397-99). The inmates shot and killed Ranger McGhee and were subsequently convicted of murder and sentenced to life without parole (R 341). Mississippi officials recovered from the vehicle used by Woolard and Bruner a .38 caliber pistol, a scissors shank, Dr. Pelt's drivers license and an escape route map which originated inside HCI (R 340, 342-43, 359).

DOC admitted negligence in allowing the inmates to escape (R 4). Itemizing the acts of DOC negligence, plaintiff's expert witness noted that one of the transportation officers who escorted the inmates to Dr. Pelt's office was untrained and unarmed and was working a second shift after working the night shift; that the other transportation officer was 67 years of age, recovering from recent open heart surgery; that neither inmate was searched before leaving the prison (a search which would have uncovered the scissors shank and escape map); that the prison vehicle had not been searched and that the prison inmates

undoubtedly were aware of the lax security measures taken during transportation of prisoners (R 111-13, 117).[3]

The record indicates that Bruner was incarcerated at HCI for sexual battery, kidnapping and robbery and had been classified as a "close custody" inmate, the highest security classification available under DOC regulations (R 220-21). Bruner considered himself a "prisoner of war" in the Florida prison system and had been labeled by DOC as posing a "high risk of escape" (R 214). Bruner had served in the Marine Corps as an embassy guard and once told a prison psychologist that if the embassy was ever overrun, his job was to go to the roof, take the flag down, wrap himself in the flag and shoot himself (R 214).

Woolard was an "habitual offender" with an extensive record of arrests and violent criminal activity, which included previous prison escapes and violence against a police officer with a weapon (R 120). Woolard also attempted previously to escape from Holmes Correctional Institution by producing falsified release documents (R 120-21). Woolard and Bruner both had histories of prison disciplinary problems (R 120).

Bruner was born in Brewton, Alabama, where he had been previously incarcerated (R 114, 116, 234, T 419). Bruner had friends living in Ocean Springs, Mississippi, where McGhee was

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[3] Numerous additional acts of negligence were alleged by McGhee (R 801-18), but, because DOC admitted negligence, the trial court restricted the proof of DOC's negligence plaintiff was allowed to present (R 23, 112-13, 117, 263, 356, 413).

shot and killed, although DOC claimed this information was not available until after the escape (R 503). Bruner's relatives lived in Pensacola, which is the nearest major city to Brewton, Alabama, and Bruner resided in Pensacola before his imprisonment at HCI (R 114). Woolard had family and friends located in Pensacola and Brewton (R 121).

ISSUE PRESENTED FOR REVIEW

(as framed by the certified question)

WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

SUMMARY OF ARGUMENT

Conflict of laws. The district court correctly determined that Florida law applied to the issues raised for review because Florida enjoyed all the significant contacts and relationships with respect to the issues of sovereign immunity and legal duty.

Legal duty. Under Florida's limited waiver of sovereign immunity, liability against a governmental agency is imposed in the same manner and to the same extent as liability against a private individual under similar circumstances. Under principles embodied by the Restatement (Second) of Torts, Florida courts have held that private parties who take charge of persons they know or should know are likely to cause bodily harm to others if not controlled are under a legal duty to exercise reasonable care to prevent those persons from doing harm. The same rule should be applied to the Department of Corrections to impose liability for criminal acts committed by escaped prisoners.

ARGUMENT

The district court below limited its decision to the conflict of laws and legal duty issues. Because the district court held that DOC owed no duty to plaintiff's decedent, thus entitling DOC to a directed verdict, the district court did not decide the other issues presented by DOC for review or the issue raised by McGhee on cross-appeal, although those issues were addressed by Judge Ervin's dissenting opinion. As reflected by Judge Ervin's opinion, the other issues included whether the trial court erred in allowing an expert witness to render an opinion on the issue of foreseeability; whether the trial court erred in refusing to give DOC's requested jury instruction defining the term "reasonable foreseeability;" and, on cross-appeal, whether the trial court erred in permitting the jury to apportion fault to the intentional tortfeasors, Woolard and Bruner, under section 768.81, Florida Statutes (1989). McGhee, 653 So. 2d at 1099 n.8, 1099. Because no ruling has been obtained from the district court, these additional issues are not addressed in this brief. If this court determines that the additional issues should be considered, petitioner requests leave to file a supplemental brief.

A. The district court correctly determined that Florida law applied.

As a threshold issue, the district court reviewed the trial court's ruling that Florida law, rather than Mississippi law,

controlled the issue of DOC's legal duty. McGhee, 653 So. 2d at 1092-93. DOC contended in the trial court that Mississippi law applied because, DOC argued, that state maintained the more significant contacts with the occurrence and events surrounding the case. DOC argued further that it enjoyed complete immunity from suit and owed no legal duty to plaintiff's decedent under Mississippi law.

Because Ranger McGhee was killed in a national park, DOC urged that the Federal Reservations Act, 16 U.S.C. § 457, controlled. Under that federal statute, in cases involving injury or death within a federal park, the rights and liabilities of the parties are governed by the laws of the state in which the national park is located. Vasina v. Grumman Corp., 644 F.2d 112, 117 (2d Cir, 1981). In those instances where the Federal Reservations Act requires application of the law of the state surrounding the federal enclave, the host state's entire body of law, including its choice of law rules, should be applied by the forum court. Jenkins v. Whittaker, 785 F.2d 720 (9th Cir. 1986), cert. denied, 479 U.S. 918, 107 S.Ct. 324, 93 L.Ed.2d 296 (1986); Burgio v. McDonnell Douglas, Inc., 747 F. Supp. 865 (E.D.N.Y. 1990).

The district court correctly noted that Mississippi, like Florida, follows the "significant relationships" or "center of gravity" test from the Restatement (Second) of Conflict of Laws §§ 145, et. seq. (1971), for choice of law decisions in tort

cases. Mitchell v. Craft, 211 So. 2d 509 (Miss. 1968). As the district court's opinion indicates, DOC emphasized the location of Ranger McGhee's death, Mississippi, as the controlling choice of law factor. McGhee, 653 So. 2d at 1093. The district court correctly observed, however, that DOC's position was erroneous because it focused upon the significant contacts with respect to the case as a whole, rather than the significant contacts applicable to the particular issues raised by DOC's amended motion to dismiss--sovereign immunity and legal duty.

Section 146 of the Restatement provides:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146 (1971)(emphasis supplied). Mississippi decisions follow the Restatement approach and hold that the significant relationship test may require application of the law of different jurisdictions to different issues within the same case:

> First, the law of a single state does not necessarily control every issue in a given case. We apply the center of gravity test to each question presented, recognizing that the answer produced in some instances may be that the law of this state applies and on other questions in the same case the substantive law of another state may be enforceable.

Boardman v. United Services Automobile Association, 470 So. 2d 1024, 1031 (Miss. 1985). See also Hanley v. Forester, 903 F.2d 1030, 1032 (5th Cir. 1990)(Mississippi "center of contacts test may be applied in piecemeal fashion such that in a single case, the law of one state may be applied to one issue in the case while the law of another state may apply to another issue in the case depending upon which state has the most significant contacts with respect to each particular issue.").

Florida follows the same rule applicable in Mississippi. In Stallworth v. Hospitality Rentals, Inc., 515 So. 2d 413 (Fla. 1st DCA 1987), following section 146 of the Restatement, the court stated:

> The Restatement's significant relationships test does not require the court to evaluate the recited contacts with a view to determine which state's local law should be applied to all issues in the case as a whole; rather, the contacts must be evaluated with respect to the particular issue under consideration.

Id. at 413(emphasis supplied).

DOC's emphasis upon the situs of the wrong, Mississippi, was misplaced because the location of Ranger McGhee's death was unrelated to the issues of sovereign immunity and legal duty, the only issues raised on appeal by DOC's amended motion to dismiss. As the district court found, "DOC's immunity was determined by deciding whether its conduct in allowing the inmates to escape could result in liability for the criminal conduct of the escapee[s]. All facts relevant to the issue of immunity and duty

were centered in the state of Florida, and the state of Mississippi had no relationship to any of DOC's activities giving rise to its potential liability." McGhee, 653 So. 2d at 1093. The district court below, thus, correctly applied Florida law to determine whether DOC owed a legal duty to plaintiff's decedent.[4]

B. The district court erred by holding that DOC owed no duty of care to plaintiff's decedent.

1. Sovereign immunity statute

The district court held that DOC, as a matter of law, owed no legal duty to exercise reasonable care for the safety of plaintiff's decedent and specifically that DOC could not be held liable for the criminal conduct of the escapees based upon its earlier holding in State, Department of Corrections v. Vann, 650 So. 2d 658 (Fla. 1st DCA 1995). McGhee, 653 So. 2d at 1093. In

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[4] DOC erroneously argued below that it enjoyed complete sovereign immunity under Mississippi law. In Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982), the Mississippi Supreme Court abolished sovereign immunity for the state and its political subdivisions, effective July 1, 1984. The Mississippi legislature, however, enacted legislation which delayed operation of Pruett until July 1, 1985, and has extended the effective date each year thereafter, at least through 1991, after the date of the subject incident. Miss. Code. Annot. 11-46-6. Responding to the legislative action, the Mississippi Supreme Court declared Miss. Code Annot. 11-46-6 "unconstitutional and void" for violating the separation of powers clause and other provisions of the Mississippi Constitution, thus eliminating sovereign immunity in Mississippi. Presley v. Mississippi State Highway Commission, 608 So. 2d 1288 (Miss. 1992). Therefore, under Mississippi law, DOC would not have been immune from suit. See also Morgan v. City of Ruleville, 627 So. 2d 275 (Miss. 1993); Churchill v. Pearl River Basin Development District, 619 So. 2d 900 (Miss. 1993).

Vann, Donald David Dillbeck escaped from custody at the Quincy Vocational Center and murdered Faye Lamb Vann while she was parked outside Gayfer's department store at the Tallahassee Mall. Plaintiff alleged in that case that DOC allowed Dillbeck to escape "by improperly classifying the prisoner (including the failure to follow their own rules and procedures in the method of classification), by failing to properly supervise the prisoner, and by failing to warn the public of the prisoner's escape." Vann, 650 So. 2d at 659. DOC appealed a judgment in favor of Vann's estate and the district court addressed the issue "whether the State of Florida, Department of Corrections, may be held liable as a result of criminal acts of an escaped prisoner." Id. Finding no common law duty between DOC and the decedent, the court reversed the judgment and certified to this court the same question of great public importance certified in the present case.

Citing Trianon Park Condominium Association, Inc. v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), the Vann court correctly confirmed that governmental liability requires consideration of two distinct issues:

> (1) Whether there exists a common law or statutory duty of care which inures to the benefit of the plaintiffs as a result of the alleged negligence, and
>
> (2) [W]hether the alleged action is one for which sovereign immunity has been waived.

Vann, 650 So. 2d at 660.[5]

The Vann court's finding of no common law duty rested on the following general principle:

> A governmental duty to protect its citizens is a general duty to the public as a whole, and where there is only a general duty to protect the public, there is no duty of care to an individual citizen which may result in liability.

Vann, 650 So. 2d at 660, citing Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985). The Vann court then reasoned that "the only duty which existed was a general duty owed to the public not to allow a prisoner to escape" and, thus, DOC was insulated from tort liability for injuries or deaths of citizens at the hands of those whom DOC carelessly allowed to escape. Vann, 650 So. 2d at 662. For the reasons that follow and for the reasons cited by Judge Ervin in his well-reasoned dissenting opinion below, Vann's rationale is faulty and should be disapproved.

Vann's analysis ignores the fundamental basis for this state's limited waiver of sovereign immunity: "Section 768.28, Florida Statutes [(1989)], waives governmental immunity from tort liability 'under circumstances in which the state or [an] agency or subdivision, if a private person, would be liable to the

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[5] In Vann, the court found no common law duty and therefore never addressed the sovereign immunity issue. No issue of sovereign immunity (under Florida law) was raised by DOC on appeal in this case because DOC conceded at trial that its conduct gave rise to "operational level" negligence for which it was not immune from suit (R 12). McGhee, 653 So. 2d 1095 n.4. At oral argument in the district court, DOC acknowledged that its conduct in allowing

claimant, in accordance with the general laws of this state.' § 768.28(1), Fla. Stat. [(1989)]." Department of Health and Rehabilitative Services v. B.J.M., 20 Fla. L. Weekly S188, S189 (Fla. April 27, 1995). Section 768.28(5), Florida Statutes (1989), also provides that "[t]he state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances." Thus, duty in the context of governmental tort liability may be founded upon "a common law or statutory duty of care . . . that would have been applicable to an individual under similar circumstances." Kaisner v. Kolb, 543 So. 2d 732, 734 (Fla. 1989). See also Butler v. Sarasota County, 501 So. 2d 579 (Fla. 1986)(analyzing duty owed by county, as operator of swimming facility, from same perspective as "private owner" of swimming facility). Because section 768.28 imposes governmental liability to the same extent as private individuals, Judge Ervin correctly recognized that "the Department may, under appropriate conditions, be subject to an underlying common law duty to exercise reasonable care to control an inmate or inmates the Department knows or should know would be likely to cause bodily harm to others if not properly controlled by it." McGhee, 653 So. 2d at 1094.

Woolard and Bruner to escape involved Trianon Park "Class III" activities.

2. Restatement analysis

Judge Ervin's opinion notes this court's citation in Trianon Park to Restatement (Second) of Torts § 315 (1964) for "the general common law rule that there is no duty to prevent the misconduct of a third person." Trianon Park, 468 So. 2d at 917. Section 315 provides:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1964)(emphasis supplied). To apply section 315(a), the comment refers the reader to §§ 316-319 for the rules applicable to "relations between the actor and a third person which require the actor to control the third person's conduct." Restatement (Second) of Torts § 315, comment c. (1964).

Section 319, entitled "Duty of Those in Charge of Person Having Dangerous Propensities," squarely addresses the issue before this court and provides:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Restatement (Second) of Torts § 319 (1964)(emphasis supplied).

As Judge Ervin's dissent recognizes, Florida cases involving private parties have adopted the exception under sections 315(a) and 319 to impose liability for the failure to control the conduct of third persons. This court specifically applied section 319 to impose liability against a private party for the criminal conduct of a person who escaped from its control in Nova University, Inc. v. Wagner, 491 So. 2d 1116 (Fla. 1986). In Nova, two youths who had exhibited violent propensities escaped from Nova University's Living and Learning Center, a residential rehabilitation facility which accepted children with behavioral problems. After remaining at large for several days, the youths beat two young children, killing one and leaving the other seriously injured. The parents of the two young children sued Nova University and its director for negligently allowing the youths to escape and inflict harm on the two young children who were members of the general public unconnected to Nova University or the residential facility. The trial court entered summary judgment for defendants based upon a finding that Nova University owed no duty to plaintiffs as a matter of law. The district court of appeal reversed and certified a question of great public importance, which this court rephrased as follows:

> Does a child care institution that accepts as residents delinquent, emotionally disturbed and/or ungovernable children have a duty to exercise reasonable care in its operation to avoid harm to the general public?

Nova University, 491 So. 2d at 1118.

In answering the rephrased certified question in the affirmative, this court quoted and relied upon Restatement (Second) of Torts § 319 (1964) and held:

> that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons. If reasonable care is exercised, there can be no liability. The alternative, the exercise of no care or unreasonable lack of care, subjects the facility to liability.

Nova University, 491 So. 2d at 1118. If the private Nova University facility owes a duty of care to third persons to avoid foreseeable attacks committed by dangerous individuals in its custody, DOC owes a concomitant duty to third persons, such as plaintiff's decedent, in the same manner because the limited waiver of sovereign immunity subjects DOC to liability for the escape of prisoners in its custody to the same extent as private parties under similar circumstances. § 768.28(1) and (5), Fla. Stat. (1989). See also Garrison Retirement Home Corp. v. Hancock, 484 So. 2d 1257 (Fla. 4th DCA 1985)(following sections 315(a) and 319 of the Restatement, court held that private retirement home owed duty of care to roofing company worker who was on retirement home's premises to inspect roof and was struck by vehicle operated by elderly retirement home resident whom retirement home failed to supervise and to prevent, if necessary, from operating vehicle).

Following Nova University, Judge Ervin's dissent correctly concluded that section 319 applied "to the relationship between DOC and the escapees in this case, thus DOC's duty of care is encompassed by section 315(a) of the Restatement." McGhee, 653 So. 2d 1095. The same conclusion was reached by Judge Gerald Wetherington and Donald Pollock in their comprehensive article on Florida governmental tort liability:

> Persons who assume custody of others create a special relationship necessitating special precautions. Similarly, a relationship involving the state's right or ability to control a third person's conduct creates an exception to the general rule of custodial liability stated in Restatement section 315. The Restatement indicates that there is no tort duty to control the conduct of a third person for protection of others. However, if a governmental entity enters this special custodial relationship, the entity may not be immune when it negligently performs operational level activities. Thus, the entity may be liable for negligently supervising inmates, or releasing a mental patient without adequate evaluation.

Wetherington and Pollock, Tort Suits Against Governmental Entities in Florida, 44 U. Fla. L. Rev. 1, 71 (1992)(footnotes omitted)(emphasis supplied).

3. This court's decisions

As Judge Ervin indicates, this court's previous governmental liability decisions do not preclude a finding that DOC owed a common law duty in this case to plaintiff's decedent. McGhee, 653 So. 2d at 1096-97. The Vann opinion suggests that "courts of this state have determined that the state is not liable for

injuries resulting from the criminal acts of escapees" and specifically quotes the following from Department of Health and Rehabilitative Services v. Whaley, 574 So. 2d 100, 102-03 n.1 (Fla. 1991): "'[T]he Department of Corrections has no specific duty to protect individual members of the public from escaped inmates.'" Vann, 650 So. 2d at 658. The entire footnote which contains the quoted statement reads:

> Moreover, Reddish is further distinguished because the department of corrections has no specific duty to protect individual members of the public from escaped inmates while HRS has specific statutorily imposed duties to protect children.

Whaley, 574 So. 2d at 103, n.1.

A close inspection of the facts and legal theories upon which the claim in Reddish was based indicates that the above-quoted dicta does not apply to the case at hand. In Reddish v. Smith, 468 So. 2d 929 (Fla. 1985), plaintiff claimed damages against DOC for injuries he sustained when abducted and shot by an escaped prisoner three months after the escape. Plaintiff claimed that DOC and its agents, including Reddish, negligently reclassified the prisoner to minimum custody status and that Reddish himself acted willfully and in bad faith by using the prisoner's services for personal gain. The trial court dismissed on sovereign immunity grounds and based on lack of foreseeability due to the lapse of time between escape and injury. The district court reversed. Smith v. Department of Corrections, 432 So. 2d 1338 (Fla. 1st DCA 1983).

This court quashed the district court's decision and held that the claim was barred by sovereign immunity because the classification and assignment of prisoners was a planning-level decision. (Here, the complaint was not based upon classification of the inmates but rested upon admitted operational-level negligence of DOC employees.) In dicta, the Reddish court discussed DOC's liability if operational-level negligence had been involved. Noting first that a governmental agency's liability is coextensive with that of a private person for the same conduct, the court found that the activity involved in the claim, classification and reassignment of prisoners, "is an inherently governmental function not arising out of activity normally engaged in by private persons," and, therefore, liability could not be imposed. Reddish, 468 So. 2d at 932. The court also concluded that no cause of action had been stated against Reddish and that, as a matter of law, there was no causal connection between the transfer of the prisoner and his escape some eighteen months later. Reddish, 468 So. 2d at 933

Reddish is not dispositive of the present case because that decision was based on sovereign immunity. Here, the question is common law duty of care, the first prong in Trianon Park's two-step approach, which requires an analysis of duty before the issue of sovereign immunity is considered. Also, in Department of Health & Rehabilitative Services v. Yamuni, 529 So. 2d 258, 261 (Fla. 1988), this court receded from that portion of the

court's Reddish opinion which held that DOC could not be liable because private persons do not engage in prisoner classification activities. Thus, the quoted statement from the Whaley footnote was, at best, dicta which should not furnish controlling precedent in this case. See State v. Florida State Improvement Commission, 60 So. 2d 747 (Fla. 1952)(inessential language in the court's opinion is obiter dicta and should not control).

4. District court decisions

The Vann court also relied upon three district court decisions to support its holding that DOC owes no duty of care: Parker v. Murphy, 510 So. 2d 990 (Fla. 1st DCA 1987), George v. Hitek Community Control Corp., 639 So. 2d 661 (Fla. 4th DCA 1994), and Bradford v. Metropolitan Dade County, 522 So. 2d 96 (Fla. 3d DCA 1988). Vann, 650 So. 2d at 661. Mrs. McGhee respectfully submits that Judge Ervin correctly assessed these opinions as "incorrectly decided as a matter of law" because none of the cases addresses Restatement sections 315(a) and 319. McGhee, 653 So. 2d 1097.

Parker v. Murphy also is distinguishable procedurally. In that case, the district court affirmed a summary judgment in favor of the Sheriff of Taylor County in an action brought for injuries sustained by plaintiffs at the hands of an escaped prisoner. The opinion indicates quite clearly that the summary judgment and the district court's affirmance thereof were based on sovereign immunity grounds, not on the basis of legal duty.

In this case, sovereign immunity was not an issue because DOC conceded that it was guilty of operational level negligence. The Parker court's statement that no legal duty was owed to plaintiff absent a special relationship with the sheriff was dicta.

In George, although the court held that DOC's supervision of a prisoner's community control does not create a common law duty of care, the court appears to blur the distinction between legal duty and sovereign immunity. The Bradford case suffers from the same infirmity. There, plaintiff sued Dade County, alleging negligence of the public safety department for failure to execute an arrest warrant on an individual who had escaped from the county's mental health program, for failure to investigate the patient's disappearance and for failure to insure that the escaped patient received her medication and treatment. The allegations pertaining to the county's failure to arrest the patient and investigate her disappearance clearly involved discretionary law enforcement activities for which no liability attaches and which are not implicated in the present case. See Everton v. Willard. Moreover, while the district court affirmed the Bradford judgment because it found no common law duty to the plaintiff who was assaulted by the escaped mental patient, the case was decided at the trial court level on sovereign immunity grounds and, adding to the confusion, several of the case relied upon by the district court for its finding of no duty actually were sovereign immunity decisions. Bradford, 522 So. 2d at 96-

97. Compare Belevance v. State, 390 So. 2d 422 (Fla. 1st DCA 1980)(court finding no immunity in favor of state hospital for its negligent release of patient confined under Baker Act).

5. DOC's position

The district court below held that DOC under no circumstances owes a duty of care to members of the general public to protect them from harm committed by escaped prisoners. Interestingly, DOC took a different position below. Quoting from its reply brief filed in the district court, Judge Ervin noted the following concession made by DOC:

> "Had inmates Bruner and Woolard shot an individual in Bonifay at the time they escaped from DOC custody or within the parameters of DOC's search and recapture efforts immediately after the escape, there would be no question as to whether that individual was owed a duty of care by DOC."

McGhee, 653 So. 2d 1098.

DOC, thus, has conceded that a duty of care arises to protect members of the public who reside in the immediate search and recapture perimeter around the prison or near the area from which the prisoners escaped. The distinction raised by DOC, however, between the duty owed to citizens in the search and recapture perimeter and the duty owed to citizens residing outside that area raises a factual issue of forseeability for determination by the trier of fact, rather than an issue of legal duty to be decided by the court as a matter of law. Therefore, by conceding that a duty of care is owed to a limited segment of

the general public, DOC has effectively acknowledged in this case that it owes a legal duty to protect members of the general public from harm committed by escaped prisoners. The time and distance parameters imposed upon that legal obligation should be left to the jury to decide based upon traditional principles governing proximate cause.

DOC regulations lend further support to its concession that a duty is owed to the general public. Section 945.04, Florida Statutes (1989), broadly mandates that the "Department of Corrections shall be responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all buildings, grounds, property of, and matters connected with, the correctional system." DOC also is obligated by statute to classify prisoners according to an objective classification scheme. § 944.1905, Fla. Stat. (1989). In furtherance of that obligation, DOC regulations create certain "custody levels" which establish "restrictions required to ensure that an inmate remains within the control of the Florida Department of Corrections." Fla. Admin. Code Rule 33-1.001(19).[6] DOC regulations specifically provide that "[t]he function of the [inmate] classification system is the maintenance

[6] The "close custody" classification assigned to Bruner and Woolard, required DOC to maintain these inmates within an armed perimeter and under constant armed supervision. Fla. Admin. Code Rule 33-1.001(19)(d).

of security and order for the protection of the general public, staff, and inmates." Fla. Admin. Code Rule 33-6.0011 (emphasis supplied). Additionally, the regulations which define the goals and objectives of the DOC classification system specifically address public safety. See Fla. Admin. Code Rule 33-3.006(1)(a)("to maintain institutional security and order so that the general public, staff, and inmates are protected to the greatest extent possible"); Fla. Admin. Code Rule 33-3.006(2)(a)("to establish a custody classification level that minimizes risk to the general public, staff and other inmates").

"A construction given to a statute by the agency charged with its administration is highly persuasive with the court." Bryan v. State Board of Medical Examiners of Florida, 381 So. 2d 1122, 1123 (Fla. 1st DCA 1979), affirmed, 398 So. 2d 1354 (Fla. 1981). DOC's construction of the statutes which make it responsible for inmate custody and classification, emphasizing protection of the general public, is consistent with a legal duty being imposed in this case, and DOC's construction should be given considerable weight.

6. "Zone of risk" analysis

As Judge Ervin notes, DOC below argued that it was free from liability based upon a "zone of risk" analysis. In McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992), this court stated: "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk'

that poses a general threat of harm to others." McCain, 593 So. 2d at 502. Similarly, with reference to the duty owed by a governmental entity, this court also said:

> Where a defendant's conduct creates a foreseeable zone of risk, the law generally will recognize a duty placed upon defendant either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risks poses.

Kaisner v. Kolb, 543 So. 2d at 735.

DOC argued below that it was not foreseeable that Ranger McGhee would be killed in the exact place and in the precise manner in which the crime was committed by inmates Bruner and Woolard. DOC specifically argued that plaintiff's decedent was outside the "zone of risk" because he was killed by the escaped inmates "more than 300 miles from the place of escape, across two state lines and 46 hours following the escape." McGhee, 653 So. 2d at 1098. DOC's foreseeability analysis is suspect, however, because it confuses foreseeability in the context of legal duty (a question of law) with foreseeability in the context of proximate causation (a question of fact). See McCain, 593 So. 2d at 502. The question of defendant's legal duty as an element of the negligence cause of action "focuses on whether the defendant's conduct foreseeably created a broader "zone of risk' that poses a general threat of harm to others." McCain, 593 So. 2d at 502 (emphasis supplied). A legal duty arises "whenever a human endeavor creates a generalized and foreseeable risk of harming others." McCain, 593 So. 2d at 503 (emphasis supplied).

Foreseeability as it relates to proximate cause "is concerned with the specific, narrow factual details of the case, not with the broader zone of risk the defendant created." McCain, 593 So. 2d at 502. Unlike the issue of legal duty, the question of foreseeability in the proximate cause context is a question of fact for the jury. McCain, 593 So. 2d at 504.

To satisfy the test of proximate cause, plaintiff does not have to prove foreseeability of the exact nature and extent of the injury in the precise manner of its occurrence. Rather, it is essential only that some injury occur in a generally foreseeable manner as a likely result of the negligent conduct. McCain, 593 So. 2d at 503 ("it is immaterial that the defendant could not foresee the precise manner in which the injury occurred or its exact extent")(emphasis the court's). The question below, therefore, was not whether DOC could have foreseen that Bruner and Woolard would have murdered Ranger McGhee under the precise circumstances in which the incident occurred, but whether it was foreseeable to DOC that someone would be injured or killed if these dangerous inmates with histories of violent criminal activity were allowed to escape. That aspect of foreseeability was a jury issue, not a question of law for the court to determine. The jury specifically decided that Ranger McGhee's

murder was foreseeable and that finding should not be disturbed (R 609, 615).[7]

Judge Ervin's opinion notes DOC's reliance upon the test formulated by the Louisiana Supreme Court in Wilson v. State, Department of Public Safety and Corrections, 576 So. 2d 490 (La. 1991):

> Custodians of prisoners have a duty to manage the affairs of the prison so as not to create an unreasonable risk of harm to the public. This duty does not encompass all harm inflicted by escapees. Although prison authorities have a duty to prevent inmates from escaping, that duty is intended to protect persons from being harmed by escaping inmates while they are in the process of escaping. The duty is not intended to protect persons from harm inflicted by inmates who have already escaped and who subsequently commit tortious acts in the furtherance of their own pursuits. The state is not the insurer of the safety of its citizens. To recover against a custodian, a plaintiff must prove that the custodian was negligent in the management of the prison, that this negligence facilitated the escape, that the actions of the escapee caused the harm complained of, and that the risk of harm encountered by the particular plaintiff falls within the scope of the duty owed by the custodian.
>
> * * *
>
> In resolving the scope of the duty issue, improper emphasis has occasionally been placed on foreseeability or on the proximity of time and distance between the escape and the escapee's offense that caused the injury

[7] The jury answered the following question in the affirmative: "Was the death of the decedent, Robert McGhee, Jr., a reasonably foreseeable consequence of the negligence of the Department of Corrections in allowing Inmates Bruner and Woolard to escape?" (R 609, 615).

> to his victim. The proper question is whether the offense occurred during, or as an integral part of, the process of escaping.

Wilson, 576 So. 2d at 493 (emphasis supplied).

The court in Wilson held that state prison officials were liable for injuries sustained by two members of the general public who were assaulted by two escaped prisoners, even though the incident took place thirteen days after the escape. Although DOC urged below that its liability should be limited to the search and recapture perimeter surrounding Bonifay, the Louisiana Supreme Court in Wilson steadfastly refused to draw an arbitrary line between the occurrence of the injury and its time and distance from the escape. Instead, the controlling factor under Louisiana law is "whether the offense occurred during, or as an integral part of, the process of escaping." Wilson, 576 So. 2d at 493. While the injury in Wilson occurred within fifteen miles from the prison and within the prison's search perimeter, the court was quick to caution that "arbitrary cut-off points . . . serve neither the interests of plaintiffs nor those of the State." Wilson, 576 So. 2d at 494.

Mrs. McGhee adopts Judge Ervin's application of the Wilson test to the facts at bar:

> In applying the above test to the instant case, it appears that the injuries suffered by appellee's decedent transpired during an integral part of the inmates' process of escape, as the facts disclose that they occurred while the two escapees were continuing their flight from custody. Because I conclude, after applying the test

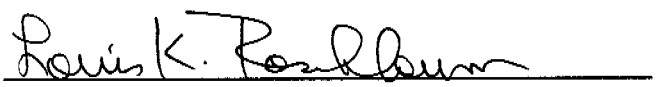
> approved in McCain, that the DOC's negligence more likely than not created a foreseeable zone of risk that included the harm suffered by the victim, I would affirm as to the second issue raised by DOC.

McGhee, 653 So. 2d at 1099.

CONCLUSION

The certified question should be answered in the affirmative. The decision below should be quashed with directions to the district court on remand to address the remaining issues presented for review by appeal and cross-appeal.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Laura Rush, Esquire, Assistant Attorney General, Office of the Attorney General, The Capitol - Suite Pl - 01, Tallahassee, Florida 32399-1050; Jack W. Shaw, Jr., Esquire, Suite 1400, 225 Water Street, Jacksonville, Florida 32202-5147; and to Loren E. Levy, Esquire, Post Office Box 10583, Tallahassee, Florida 32302 by mail this 30th day of June, 1995.

LOUIS K. ROSENBLOUM

CERTIORARI, APPEAL OF A NON–FINAL ORDER PURSUANT TO RULE 9.130, OR APPEAL OF A FINAL ORDER?

BARFIELD and VAN NORTWICK, JJ., concur.

DEPARTMENT OF CORRECTIONS, Appellant/Cross Appellee,

v.

Linda MCGHEE, Appellee/Cross Appellant.

No. 93–3757.

District Court of Appeal of Florida, First District.

April 13, 1995.

Negligence action was brought against Department of Corrections by widow of man killed in Mississippi by Florida escapees. Judgment for plaintiff was entered in the Circuit Court, Leon County, P. Kevin Davey, J., DOC appealed. The District Court of Appeal, Wolf, J., held that: (1) Florida rather than Mississippi law applied to the issues of sovereign immunity and duty, and (2) DOC could not be held liable for criminal conduct of escapees.

Reversed with direction, and question certified.

Ervin, J., filed concurring and dissenting opinion.

1. Torts ⇐2

Under both Florida and Mississippi choice of law rule for tort cases, focus of significant contacts analysis is as to the particular issue which is to be decided rather than the case as a whole. Restatement (Second) of Conflict of Laws § 146.

2. States ⇐112.2(2)

In negligence action against the Florida Department of Corrections arising when escaped Florida prisoners killed plaintiff's decedent in Mississippi, Florida rather than Mississippi law applied to the issues of sovereign immunity and duty. Restatement (Second) of Conflict of Laws § 146.

3. Prisons ⇐10

Department of Corrections could not be held liable for criminal conduct of escapees.

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WOLF, Judge.

The Department of Corrections (DOC) appeals from a final judgment awarding damages in a negligence action in favor of Linda McGhee (appellee). The appellant raises four issues on appeal; appellee filed a cross appeal which raises one issue. As a result of our disposition, it is only necessary for us to rule on two issues raised by appellant: (1) Whether the trial court erred in determining that the law of Florida rather than the law of Mississippi applied in determining whether DOC could be held liable as a result of criminal acts of escaped convicts, and (2) whether the trial court erred in determining that DOC owed a duty to appellee under the circumstances of this case.

We find that the trial court did not err in applying Florida law in determining whether the Florida DOC could be held liable as a

result of alleged negligence occurring in Florida. We do find, however, that no common law or statutory duty existed in favor of appellee or her deceased husband, and reverse the final judgment. We also certify the same question which was certified in *State of Florida, Dep't of Corrections v. Vann*, 650 So.2d 658 (Fla. 1st DCA 1995), as being one of great public importance.

John Fred Woolard and Dempsey Alexander Bruner escaped from the custody of DOC while being taken to the doctor for an eye examination. The escapees fled from Florida to Alabama and ultimately to Mississippi where they were responsible for the shooting of appellee's husband, a park ranger. Appellee filed suit against DOC, alleging that the agency was negligent in its care, supervision, and control of Woolard and Bruner, and that as a result of such negligence, the inmates escaped on May 24, 1990, and thereafter caused the death of Robert McGhee, Jr., her husband, on May 26, 1990. DOC moved to dismiss the complaint on the grounds that the law of Mississippi rather than Florida should determine the rights and liabilities of the parties, and that Mississippi law did not recognize liability under these circumstances. Following the submission of written memoranda of law by the parties and a hearing, the trial court denied the motion on a finding that Florida had the most significant relationship with the events and occurrences surrounding the claim. Prior to trial, the parties submitted written memoranda of law pertaining to the issue of whether DOC owed a duty of care to the decedent. At the close of McGhee's case, DOC moved for a directed verdict on grounds that DOC did not owe a duty of care to the decedent as a matter of law, relying on arguments set forth in its memorandum of law. The court denied the motion. DOC's timely motion for a new trial on the same grounds was also denied. The jury returned a verdict in favor of appellee.

[1] Mississippi, like Florida, follows the "significant relationships" or "center of gravity" test from the *Restatement (Second) of Conflict of Laws* § 145, et seq. (1971), for choice of law decisions in tort cases. The focus of the significant contacts analysis is as to the particular issue which is to be decided rather than the case as a whole.

Section 146 of the Restatement provides:

> In an action for personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, *with respect to the particular issue*, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146 (1971) (emphasis added). Following the Restatement's mandate, the Mississippi Supreme Court has specifically ruled that the center of gravity test followed in that state may require application of the law of different jurisdictions to different issues within the same case:

> First, the law of a single state does not necessarily control every issue in a given case. We apply the center of gravity test to each question presented, recognizing that the answer produced in some instances may be that the law of this state applies and on other questions in the same case the substantive law of another state may be enforceable.

Boardman v. United Services Automobile Ass'n, 470 So.2d 1024, 1031 (Miss.1985). *See also Hanley v. Forester*, 903 F.2d 1030, 1032 (5th Cir.1990) (Mississippi "center of contacts test may be applied in piecemeal fashion such that in a single case, the law of one state may be applied to one issue in the case while the law of another state may apply to another issue in the case depending upon which state has the most significant contacts with respect to each particular issue.")

Florida follows the same rule applicable in Mississippi. In *Stallworth v. Hospitality Rentals, Inc.*, 515 So.2d 413 (Fla. 1st DCA 1987), following section 146 of the Restatement, this court stated,

> The Restatement's significant relationships test does not require the court to evaluate the recited contacts with a view to determine which state's local law should be applied to all issues in the case as a whole; rather, *the contacts must be evaluated*

with respect to the particular issue under consideration.

Stallworth at 413 (emphasis added).

[2] DOC's emphasis upon the situs of the injury, Mississippi, is misplaced because the location of the injury is unrelated to the issues of sovereign immunity and duty. DOC's immunity was determined by deciding whether its conduct in allowing the inmates to escape could result in liability for the criminal conduct of the escapee. All facts relevant to the issue of immunity and duty were centered in the state of Florida, and the state of Mississippi had no relationship to any of DOC's activities giving rise to its potential liability.

The determination of whether a state agency may be held liable for its conduct within the state of Florida is properly determined pursuant to Florida law.

[3] While we have no problem with the trial court's decision to apply Florida law, we do find that it was error to find that DOC could be held liable for the criminal conduct of escapees. The trial court did not have the benefit of this court's recent decision in *Vann, supra*, at the time it was faced with this issue. We find that *Vann* is controlling, and that under the rationale stated in the opinion, DOC could not be held liable under these circumstances. We, therefore, reverse the final judgment and direct the trial court to enter a final judgment in favor of appellant. As in *Vann*, however, we certify the following question to be one of great public importance:

WHETHER THE DEPARTMENT OF CORRECTIONS MAY BE HELD LIABLE AS A RESULT OF THE CRIMINAL ACTS OF AN ESCAPED PRISONER?

MINER, J., concurs.

ERVIN, J., concurs and dissents with written opinion.

ERVIN, Judge, concurring and dissenting.

I concur with the majority in affirming the trial court's denial of appellant's motion to dismiss for the reason that the law of Florida rather than the law of Mississippi was correctly applied in determining that the Department of Corrections (Department or DOC) could be held liable as a result of the escaped convicts' criminal acts. I dissent from that portion of the majority's decision reversing the denial of appellant's motion for directed verdict on the ground that the DOC owed no duty to appellee's decedent, for the reasons set out under part one of this opinion, but I concur with the majority in certifying a question to the Florida Supreme Court. I would also affirm the remaining issues appellant raised. Because the majority has reversed as to the above point, its consideration of the issue submitted in appellee's cross-appeal was rendered moot. Since I dissent from the reversal of the denial of the motion for directed verdict, I will also address the issue presented in the cross-appeal under the second portion of this opinion, and I would affirm as to it.

I.

I cannot agree with the majority that no common law duty exists in favor of appellee or her deceased husband under the circumstances involved in this case. In so concluding, I note that the majority relies upon a recent opinion of this court in *Department of Corrections v. Vann*, 650 So.2d 658 (Fla. 1st DCA 1995), wherein it was similarly held that the Department owed no common law duty to a decedent, the victim of a criminal act committed by an escaped inmate. I acknowledge that the decisions in the case at bar and *Vann* are consistent with those in *Parker v. Murphy*, 510 So.2d 990 (Fla. 1st DCA 1987); *George v. Hitek Community Control Corp.*, 639 So.2d 661 (Fla. 4th DCA 1994); and *Bradford v. Metropolitan Dade County*, 522 So.2d 96 (Fla. 3d DCA 1988). I am convinced, however, that these holdings are inconsistent with Florida's waiver of sovereign immunity statute, section 768.28, Florida Statutes (1989), as well as certain general rules of law enunciated by the Florida Supreme Court in *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So.2d 912 (Fla. 1985), and *Kaisner v. Kolb*, 543 So.2d 732 (Fla.1989).

Because section 768.28(5) imposes liability upon government entities "for tort claims in

the same manner and to the same extent as a private individual under like circumstances," the Department may, under appropriate conditions, be subject to an underlying common law duty to exercise reasonable care to control an inmate or inmates the Department knows or should know would be likely to cause bodily harm to others if not properly controlled by it. In reaching this conclusion, I think it necessary to restate basic principles applicable to the issue. In *Trianon Park*, the supreme court emphasized that section 768.28 did not, per se, create any new cause of action in tort but merely eliminated the immunity which had previously prevented recovery for existing common law torts committed by the government. *Trianon Park*, 468 So.2d at 914. In order for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care in regard to the alleged negligent conduct. *Id.* at 917. The duty issue is entirely separate from the question of whether the complained-of activity is barred by governmental immunity, *i.e.*, a discretionary rather than operational function, as analyzed in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla. 1979). *See also Kaisner v. Kolb*, 543 So.2d 732 (Fla.1989) (a court is required to find no liability as a matter of law if either (1) no duty of care arose, or (2) the doctrine of governmental immunity bars the claim).

Thus, the preferred analysis is to decide first whether a duty of care is owed. If not, the court is not obligated to determine whether the challenged act is a discretionary or operational-level activity. I consider that the only substantial question before us for resolution is whether a common law duty could be imposed upon a private person under circumstances similar to those at bar.[1] Because I believe a common law duty of care does exist, I am convinced that the DOC was properly held liable. Moreover, I feel confident that the bar of governmental immunity is inapplicable, because the facts clearly show, as discussed *infra*, that the DOC's conduct was operational.

Turning to the element of duty, the court in *Trianon* noted "the general common law rule that there is no duty to prevent the misconduct of a third person," referring to the *Restatement (Second) of Torts* § 315 (1964), which provides:

> "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection."

Trianon, 468 So.2d at 917 n. 2.

Comment c. to section 315 refers the reader to sections 314A and 320 in regard to clause (b). *Restatement (Second) of Torts* § 315, at 123 (1965) (hereinafter "*Restatement*"). The supreme court explicitly recognized section 320, involving the duty of a person having custody of another to control the conduct of third persons, in subjecting HRS to liability for failing to take adequate measures to protect a juvenile placed in its care from a sexual assault by fellow detainees housed in the same holding cell. *See Department of Health & Rehab. Servs. v. Whaley*, 574 So.2d 100, 103 & n. 2 (Fla.1991). The court earlier acknowledged the existence of such a duty in *Everton v. Willard*, 468 So.2d 936, 938 (Fla.1985): "[I]f a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual."

Unlike the duty a public custodian owes to a person placed in its care, described under clause (b) of section 315, the supreme court has not explicitly held that a governmental entity owes a duty to a person injured by the intentional acts of a third person with whom the agency has a special relationship, as provided in clause (a). Nevertheless, such duty clearly exists at common law in actions involving private individuals, as section 315 and the comments appended thereto demonstrate.

1. The Department owes no *statutory* duty of care to a person injured by the violent acts of an escaped inmate. *Department of Health & Rehab. Servs. v. Whaley*, 574 So.2d 100, 102-03 n. 1 (Fla.1991); *George v. Hitek Community Control Corp.*, 639 So.2d 661, 663 (Fla. 4th DCA 1994).

Florida jurisprudence has, moreover, in a number of cases involving private parties, specifically adopted the exception recognized under clause (a) to the general common law rule barring a duty of one to prevent the criminal acts of another or to warn those placed in danger by such acts when a special relationship exists between the defendant and the person whose behavior needs to be controlled. *Nova Univ., Inc. v. Wagner*, 491 So.2d 1116 (Fla.1986); *Palmer v. Shearson Lehman Hutton, Inc.*, 622 So.2d 1085 (Fla. 1st DCA 1993); *Boynton v. Burglass*, 590 So.2d 446 (Fla. 3d DCA 1991); *Garrison Retirement Home Corp. v. Hancock*, 484 So.2d 1257 (Fla. 4th DCA 1985). Additionally, Comment c. to clause (a) of section 315 refers the reader to sections 316 through 319 of the *Restatement*,[2] and the Florida Supreme Court has specifically applied section 319 in a case involving an action for damages between private parties.

In *Nova University, Inc. v. Wagner*, 491 So.2d 1116 (Fla.1986), the supreme court held that the university, operating a residential rehabilitation program which accepted delinquent, emotionally disturbed and/or ungovernable children as residents, had a duty to exercise reasonable care in its operation to avoid harm to the general public. There, two juvenile residents who had exhibited a propensity toward physical violence, of which the defendants were aware or should have been aware, ran away from the center and the following day encountered two small children, one of whom they killed and the other permanently injured. The complaint alleged that the defendants were negligent in failing to supervise and control the two delinquents assigned to their custody. In approving the Fourth District's decision reversing the trial court's summary judgment in favor of the university, the court relied upon the principle of law provided in section 319[3] of the *Restatement* and concluded "that a facility in the business of taking charge of persons likely to harm others has an ordinary duty to exercise reasonable care in its operation to avoid foreseeable attacks by its charges upon third persons." *Nova Univ.*, 491 So.2d at 1118. I think it clear that the special relation described in section 319 applies to the relationship between the DOC and the escapees in this case, thus DOC's duty of care is encompassed by section 315(b) of the *Restatement*.

In her complaint filed against the DOC, McGhee alleged that before the escape, the defendant knew or should have known that the two inmates placed in its care would commit violent crimes of the kind committed on the plaintiff's decedent, because they had been convicted of violent felonies before they were committed to DOC's custody. She further alleged that the Department, through its agents and employees, was negligent in allowing the inmates to escape during their transfer from the Holmes Correctional Institution to a doctor's office in Bonifay, Florida, for an eye examination, by, among other things, failing to provide adequate secure detention for them, failing to provide adequate security while moving the prisoners, failing to adequately search the inmates for weapons, and failing to have the inmates properly restrained to prevent their escape.[4]

2. The special relations listed in clause (a) are parent-child, master-servant, possessor of land, and custodian of a person with dangerous propensities. As observed in *Garrison Retirement Home Corp. v. Hancock*, 484 So.2d 1257, 1261 (Fla. 4th DCA 1985): "Implicit in the special relationship exception [under clause (a)], however, is the proposition that such special relationship must include the right *or the ability* to control another's conduct."

3. This section, involving the duty of those in charge of persons having dangerous propensities, provides: "One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm." *Restatement* § 319. An example provided in the *Illustrations* to section 319 is similar to the factual pattern in *Nova University* and the case at bar: "A operates a private sanitarium for the insane. Through the negligence of the guards employed by A, B, a homicidal maniac, is permitted to escape. B attacks and causes harm to C. A is subject to liability to C." *Id.* at 130.

4. The facts alleged and the evidence presented in the instant case show obvious operational-level activity which is not barred by governmental immunity in that the failure of the guards to properly supervise the inmates placed in their custody can hardly be considered a discretionary function of the government which is inherent in the act of governing. *See Trianon*, 468 So.2d at

I have found nothing in any Florida Supreme Court opinion which supports the majority's conclusion that a governmental entity owes no common law duty of care to individual members of the public to protect them from injuries perpetrated by escapees. A supreme court opinion presenting the most analogous factual situation to that at bar is *Reddish v. Smith*, 468 So.2d 929 (Fla.1985). In that case, the court held that because the theory of liability expressed in plaintiff's complaint was that the DOC, in reclassifying an inmate's institutional status from "medium custody" to "minimum custody," had failed to conform to the proper standard of care required in classifying and assigning the custody of prisoners, its conduct was immune from liability to a victim of the escaped prisoner's criminal acts, as it involved simply a planning-level function which was an inherent feature of an essential governmental role assigned to the Department. *Cf. Everton v. Willard*, 468 So.2d 936, 939 (Fla.1985) (law enforcement officer's decision of whether to arrest an individual for an offense is a basic discretionary, judgmental decision which is inherent in enforcing the laws of the state and is therefore immune from liability). In so holding, the court proceeded directly to the second prong of the analysis the court approved in *Trianon*, *i.e.*, the issue of governmental immunity, but never reached the question of whether any duty of care existed.

By focusing on the discretionary nature of inmate classification, it is possible that the court in *Reddish* considered that a duty arose because of the special relation between the DOC and the inmate. Indeed, the following statement in the opinion suggests that a cause of action might have been stated if the plaintiff had pled a different theory of liability: "The complaint in this case was based on the classification and assignment of Prince [the inmate] and not on the possible negligence of the department's employees having a direct and operational-level duty to supervise him and keep him confined at the time of his escape." *Reddish*, 468 So.2d at 931–32. Clearly, then, *Reddish* provides no authority for concluding that the Department can never owe a common law duty to one injured by the intentional, tortious acts of an escapee who had been placed in the DOC's custody.

In the case which the majority cites to support its conclusion that the state cannot be held liable for injuries stemming from the criminal acts of its escapees, *Department of Corrections v. Vann*, the court quotes the following excerpt from *Department of Health & Rehabilitative Services v. Whaley*, 574 So.2d at 102–03 n. 1: "'[T]he Department of Corrections has no specific duty to protect individual members of the public from escaped inmates.'" *Vann*, 650 So.2d at 661. A complete reading of the above footnote in *Whaley* shows, however, that the supreme court was not confronted with the issue of whether a common law duty of care could arise. Rather, the certified question before the court in *Whaley* was whether the assignment of juvenile delinquents to an HRS detention facility was an inherently governmental function protected by sovereign immunity, a question the court answered in the negative. In arguing that the assignment constituted a discretionary act for which sovereign immunity had not been waived, HRS relied on, among other cases, *Reddish v. Smith*. In rejecting this argument, the court in *Whaley* distinguished the facts in *Reddish* from those before it and made the following pertinent observations:

> Moreover, *Reddish* is further distinguished because the department of corrections has no specific duty to protect individual members of the public from escaped inmates while HRS has specific statutorily imposed duties to protect children. *See Yamuni* [*Department of Health & Rehabilitative Services v. Yamuni*, 529 So.2d 258 (Fla. 1988)]. HRS' statutory duties toward children are, ultimately, the main difference between this case and prisoner cases

918. The conduct of the DOC, moreover, is similar to the nonexclusive examples the supreme court listed in *Trianon* as indicative of existing common law duties of care: the negligent operation of motor vehicles or the handling of firearms by public employees during the course of their employment for the purpose of enforcing compliance with the law. *Id.* at 920. Indeed, before the trial of the case, the DOC admitted that it was negligent in allowing the two prisoners to escape, but that it owed no duty to the victim because his injuries were not a foreseeable consequence of DOC's admitted negligence.

such as *Reddish* ... and we decide this case solely on HRS' duty, not the duty of any other governmental agency.

Whaley, 574 So.2d at 103 n. 1.

Consequently, I maintain that the quoted portion from *Whaley*, referred to in *Vann*, means simply that a statutory duty was imposed upon HRS for the protection of children transferred to its care,[5] whereas no such duty was placed on the DOC by statute for the protection of members of the public from escaped prisoners.[6] Nothing in *Whaley* addresses the question of whether an underlying common law duty of protection may arise in favor of members of the general public once a special relationship has been established between a state agency and a person entrusted to its charge whom the agency knows to be likely to cause bodily harm to others if not properly controlled.

Although I have found no Florida Supreme Court opinions directly supporting the majority's decision that DOC is not under a duty to exercise reasonable care to control the conduct of an inmate in order to prevent him or her from doing harm to another, I admit that authority for same is furnished in the three district courts of appeal cases cited in *Vann*: *Parker v. Murphy*, 510 So.2d 990 (Fla. 1st DCA 1987); *George v. Hitek Community Control Corp.*, 639 So.2d 661 (Fla. 4th DCA 1994); and *Bradford v. Metropolitan Dade County*, 522 So.2d 96 (Fla. 3d DCA 1988), all involving victims of attacks by escapees from custodial restraints placed on them by various governmental entities. Unlike appellee, I am unable to distinguish the facts in the above cases from those at bar in order to reach a different result. My position is simply that all three were incorrectly decided as a matter of law. Although these opinions emphasize the lack of a special relationship between the person injured and the particular governmental entity, none address the question of whether, because of the existence of a special relationship between a custodian and the person placed in confinement as described in *Restatement* section 315(a), the caretaker could owe a duty to individual members of the general public injured by the person in its control as a reasonable consequence of its negligent failure to monitor such person's conduct. Thus, the above three cases ignore or overlook the special relationship recognized under section 315(a), apparently because the Florida Supreme Court has not yet specifically acknowledged its applicability in any of its opinions involving negligent actions brought against public agencies, and the confusion spawned by this omission continues to plague appellate court decisions.[7]

5. Why the court considered it necessary to emphasize the existence of a statutory duty as a distinguishing factor is unclear in that the court otherwise mentioned that one who takes a person into custody owes such person a common law duty of care, and in support thereof the court referred to *Restatement (Second) of Torts* § 320 (1965), pertaining to the duty of a person having custody of another to control the conduct of third persons. Consequently, as a common law duty of care exists under such circumstances, the portion of the opinion discussing the imposition of a statutory duty appears nonessential to the court's decision.

6. Although no statutory duty exists, clearly DOC has the statutory *right* of control over inmates placed in its custody, which gives rise to the special relationship discussed under *Restatement* section 315(a). Section 945.04(1), Florida Statutes (1989), makes DOC "responsible for the inmates and for the operation of, and shall have supervisory and protective care, custody, and control of, all ... matters connected with, the correctional system."

7. An additional reason for such confusion is the tendency of some of the district courts to read certain portions of the supreme court's opinions in isolation and out of context. For example, in *George v. Hitek Community Control Corp.* the court relied upon the following quoted material as support for its conclusion that governmental responsibility to manage persons under criminal sentences flows from the state's inherent police power to enforce the laws, and, therefore, the challenged activity could not give rise to a duty of care: "'How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there has never been a common law duty of care.'" *George*, 639 So.2d at 663 (quoting *Trianon Park*, 468 So.2d at 919). See also the following statement in *Everton v. Willard*, 468 So.2d 936, 938 (Fla.1985): "The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim."

I am therefore of the view that because of the special relation between the DOC and the two inmates placed in its custody, a duty of care was owed to appellee's deceased husband to the same extent as it exists at common law between private persons. Liability was therefore correctly imposed upon the DOC as a result of the criminal acts of the escapees, persons whom the DOC knew to be likely to cause bodily harm to others if it did not exercise reasonable care to control them from doing such harm.

As a result of the confusion previously alluded to, I concur with the majority in certifying to the Florida Supreme Court a question of great public importance. I think, however, the question should be more narrowly tailored to the facts and law before us to ask:

> WHETHER THE DEPARTMENT OF CORRECTIONS, WHICH IS IN THE BUSINESS OF TAKING CHARGE OF PERSONS WHOM IT KNOWS TO BE LIKELY TO CAUSE BODILY HARM TO OTHERS IF NOT CONTROLLED BY IT, IS UNDER A DUTY TO EXERCISE REASONABLE CARE TO CONTROL SUCH PERSONS TO PREVENT THEM FROM DOING SUCH HARM?

In concluding that a common law duty is present under the circumstances, I think it important to note that the DOC advanced an argument based on a different theory from that addressed by the majority in its decision to reverse. Indeed, the Department makes the following pertinent concession: "Had inmates Bruner and Woolard shot an individual in Bonifay at the time they escaped from DOC custody or within the parameters of DOC's search and recapture efforts immediately after the escape, there would be no question as to whether that individual was owed a duty of care by DOC." (Appellant's reply brief at 12.) The thrust of the Department's argument is that it owed no duty, because it was not foreseeable that the harm which was in fact suffered would ensue from the inmates' escape, and it noted that *Restatement* section 319, while imposing a duty of care upon those taking charge of dangerous persons, does not define the scope and extent of such duty.

In support of this argument, the DOC cites *McCain v. Florida Power Corp.*, 593 So.2d 500, 502 (Fla.1992), which states: "The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." The court continued that each defendant who creates a risk is required to exercise prudence whenever others might conceivably be injured as a result of the defendant's breach of such risk. It concluded its discussion with the following admonition: "[T]he trial and appellate courts cannot find a lack of duty if a foreseeable zone of risk more likely than not is created by the defendant." *Id.* at 503.

It is appellant's position that any negligence the DOC committed in permitting the two inmates to escape from its custody did not create a foreseeable zone of risk which encompassed the victim, because the facts disclose that the victim's injuries were suffered more than 300 miles from the place of escape, across two state lines and 46 hours following the escape. Thus, the Department contends that the facts at bar are determinative regarding whether it was foreseeable that DOC's negligent conduct would create a zone of risk which posed a general threat of harm to others. *See McCain*, 593 So.2d at 503 n. 2 (citing *Restatement (Second) of Torts* § 285 (1965)).

In its discussion of why the facts demonstrate the lack of any foreseeable risk, the DOC cites *Wilson v. Department of Public Safety & Corrections*, 576 So.2d 490 (La. 1991), a case which provides a more specific test than *McCain* for determining whether a victim of an escaped prisoner's criminal acts comes within the zone of risks that can be considered a reasonably foreseeable consequence resulting from a custodian's negligent act. The test there adopted, however, provides little assistance to appellant's cause. The court stated:

> In resolving the scope of the duty issue, improper emphasis has occasionally been placed ... on the proximity of time and distance between the escape and the escapee's offense that caused the injury to his victim. The proper question is wheth-

er the offense occurred *during, or as an integral part of, the process of escaping.*

Wilson, 576 So.2d at 493. In so deciding, the court noted that the operative word in the analysis is "process," because "there is no bright-line point of delineation which will satisfactorily assist a court in making the appropriate duty-risk analysis." *Id.* at 494. It concluded that the time and distance from the escape to the time and place of injury were but two factors among many which should be considered in determining whether the acts for which the plaintiff sought compensation were committed during, or as an integral part of, the process of escaping. *Id.*

In applying the above test to the instant case, it appears that the injuries suffered by appellee's decedent transpired during an integral part of the inmates' process of escape, as the facts disclose that they occurred at a time while the two escapees were continuing their flight from custody. Because I conclude, after applying the test approved in *McCain*, that the DOC's negligence more likely than not created a foreseeable zone of risk that included the harm suffered by the victim, I would affirm as to the second issue raised by the DOC.[8]

II.

Appellee urges as a point of reversal in her cross-appeal that the trial court erred in permitting the jury to apportion noneconomic damages between negligent and intentional tortfeasors,[9] and, in so doing, it misconstrued the intent of the legislature in enacting section 768.81(3), Florida Statutes (1989), a portion of the comparative fault statute. As to this issue, I would also affirm.

In allowing apportionment of damages, the trial court proceeded according to the provisions of section 768.81(3), which provides:

> (3) APPORTIONMENT OF DAMAGES.—In cases to which this section applies, the court shall enter judgment against each party liable on the basis of such party's percentage of *fault* and not on the basis of the doctrine of joint and several liability; provided that with respect to any party whose percentage of fault equals or exceeds that of a particular claimant, the court shall enter judgment with respect to economic damages against that party on the basis of the doctrine of joint and several liability.

(Emphasis added.)

Although McGhee concedes that no Florida decision has as yet decided whether the above subsection authorizes apportionment of fault between both negligent and intentional defendants in the same action, she relies upon section 768.81(4) as an indication that the legislature intended to exclude intentional tortfeasors from the ambit of the comparative fault statute. Section 768.81(4)(a) and (b) explain:

> (a) *This section applies to negligence cases*[,] ... [which] includes ... civil actions for damages based upon theories of negligence, strict liability, products liability, professional malpractice whether couched in terms of contract or tort, or beach of warranty and like theories. In determining whether a case falls within the term "negligence cases," the court shall look to the substance of the action and not the conclusory terms used by the parties.
>
> (b) *The section does not apply* to any action brought by any person to recover actual economic damages resulting from

8. I would also affirm all of DOC's remaining issues. The third point urges reversal on the ground that the trial court erred in allowing an expert witness to opine that the injuries the victim suffered were a reasonably foreseeable consequence of the DOC's negligence in permitting the inmates to escape. Although I agree with the DOC that the court erred in permitting the testimony, because the opinion had the effect of applying a legal standard to a set of facts, I think the error was harmless considering the totality of other evidence supporting the verdict. *Cf. Tallahassee Memorial Regional Medical Ctr. v. Meeks*, 560 So.2d 778 (Fla.1990). As to the final issue, that the lower court erred in refusing to give a requested special jury instruction defining the term "reasonably foreseeable," I agree with appellee that Florida Standard Jury Instruction 5.1(c) adequately covered the request. *Cf. Reeder v. Edward M. Chadbourne, Inc.*, 338 So.2d 271 (Fla. 1st DCA 1976).

9. The jury allocated 50 percent of the fault to the Department and 25 percent to each of the two inmates.

pollution, *to any action based upon an intentional tort*, or to any cause of action as to which application of the doctrine of joint and several liability is specifically provided by chapter 403, chapter 498, chapter 517, chapter 542, or chapter 895.

(Emphasis added.) (Footnotes omitted.)

The DOC argued successfully before the trial court that the two inmates, who were not named parties to the action, were partially at fault based upon their intentional, criminal conduct; therefore, the jury should consider the percentages of fault of all tortfeasors in reaching its verdict on damages. Due to the non-negligent nature of the inmates' acts, McGhee now contends that DOC's claim for apportionment must be barred by the provisions of section 768.81(4)(b), excluding from its operation any action based upon an intentional tort.

McGhee argues that her interpretation of the statute is consistent with the common law rule preventing a defendant from raising the defense of contributory negligence once such defendant has been found liable because of his or her intentional conduct. McGhee admits that she did not charge the DOC with an intentional tort in her complaint, but contends that the earlier cases show that fault based on negligence cannot be compared with fault grounded on intentional conduct. It follows, under her theory, that it is not fair to allocate responsibility among negligent and intentional tortfeasors, because their conduct is governed by different legal standards.

McGhee concludes that the comparative fault statute is in derogation of common law, thus should be strictly construed. In support of her argument, she cites *Kansas State Bank & Trust Co. v. Specialized Transportation Services, Inc.*, 249 Kan. 348, 819 P.2d 587 (1991), wherein an action was brought on behalf of a mentally retarded child against a school bus driver, school bus transportation service, and school district for the bus driver's molestation of the child. On appeal, the transportation service and school district argued that the trial court erred by refusing to allow the jury to compare the fault of the intentional tortfeasor (the bus driver) with their own fault, which was based on negligence. The court affirmed, reasoning that intentional acts of third parties cannot be compared with the negligent acts of a defendant whose duty it is to protect the plaintiff from the intentional acts committed by the third party. *Id.* at 606. *Accord Bach v. Florida R/S, Inc.*, 838 F.Supp. 559 (M.D.Fla. 1993); *Doe v. Pizza Hut of Am., Inc.*, No. 93–709 (M.D.Fla. June 21, 1994).

The Academy of Florida Trial Lawyers joins McGhee in urging reversal, contending that section 768.81 only abrogates joint and several liability to the extent it would otherwise apply under common law. It explains that under the common law, joint and several liability was only imposed against joint tortfeasors, defined as parties whose negligence combined to produce the plaintiff's injury. Thus, a defendant could not reduce his or her liability by pointing to wrongdoing (negligent or intentional) which occurred in a separate transaction, and he or she could not seek contribution except from a joint tortfeasor. *See* § 768.31(2)(a) & (c), Fla.Stat. (1989). Consequently, it is the Academy's position that because section 768.81 allows apportionment in cases involving joint tortfeasors, but says nothing about non-joint tortfeasors, it does not alter the common law rule prohibiting contribution among non-joint tortfeasors.

The Florida Defense Lawyers Association has filed an amicus brief in this appeal urging affirmance of the trial court's action, and it distinguishes *Kansas State Bank & Trust*, because the statute there was worded in terms of a party's negligence, and not, as in Florida, in terms of a party's fault. Moreover, it cites contrary authority allowing a negligent defendant to apportion liability with an intentional tortfeasor. *See Blazovic v. Andrich*, 124 N.J. 90, 590 A.2d 222 (1991). The Association explains that while an intentional tortfeasor could not seek contribution from a negligent tortfeasor, the latter could seek contribution from an intentional tortfeasor. It also refers to case law indicating that although a third party's conduct may be intentional, such fact does not preclude the application of comparative negligence between the negligent parties. *See Island City Flying Serv. v. General Elec. Credit Corp.*, 585 So.2d 274 (Fla.1991) (in aircraft owner's

suit against flying service for negligent hiring or retention of employee who stole and crashed owner's plane, flying service was entitled to comparative negligence defense against owner who failed to lock plane, despite employee/thief's intentional tort).

After considering the arguments by counsel and the authorities cited, I would affirm as to this issue. It is clear that plaintiff's *action* against the DOC was based on negligence, and the comparative fault statute specifically applies to actions for negligence. § 768.81(4), Fla.Stat. (1989). No action was brought by appellee on the theory of intentional tort. In reaching my conclusion, I am greatly persuaded by the cogent analysis of the Supreme Court of New Jersey in *Blazovic v. Andrich*, 124 N.J. 90, 590 A.2d 222 (1991), which appears to be in harmony with the spirit of Florida's comparative negligence law. In *Blazovic*, the court explained that early cases had distinguished between negligent and intentional conduct in order to circumvent the harsh effect of the contributory-negligence bar, under the view that intentional tortfeasors should be required to pay damages as a means of deterring them from future wrongdoing, regardless of whether a plaintiff had been partially negligent. Additionally, under common law, joint tortfeasors could not seek contribution from each other. With the passage of contribution law, joint tortfeasors could recover their pro rata share of the judgment from the other joint tortfeasors, thereby limiting their liability. Intentional tortfeasors could not seek contribution, however, and such prohibition was intended to deter future wrongdoing;[10] the same theory advanced vis-a-vis a plaintiff and an intentional tortfeasor. *Id.* at 228–29.

With the advent of comparative negligence, the all-or-nothing result of contributory negligence was eliminated and recovery was allowed based on a percentage of the parties' negligence. Moreover, under the comparative fault statute, joint tortfeasors were no longer liable for a pro rata share, but were liable in proportion to their percentage of fault. In the court's view, the application of the law in such manner results in greater fairness to both moderately negligent plaintiffs, as well as joint tortfeasors. *Id.* at 230.

The court further observed that some courts had refused to apportion negligence to intentional tortfeasors, but it was unpersuaded by those cases. It found the more just result was to allow comparative negligence as to both negligent and intentional tortfeasors, because it distributes the loss according to the respective faults of the parties causing the loss. *Id.* at 231.

The reasoning of the court's opinion in *Blazovic* appears to me to be consistent with the Florida courts' general interpretations of section 768.81 in that the statute clearly requires a jury's consideration of each individual's *fault* contributing to an injured person's damages, even if such person is not or cannot be a party to the lawsuit. *See Fabre v. Marin*, 623 So.2d 1182 (Fla.1993); *Allied–Signal, Inc. v. Fox*, 623 So.2d 1180 (Fla. 1993). As observed in *Marin:* "Clearly, the only means of determining a party's percentage of fault is to compare that party's percentage to all of the other entities who contributed to the accident, regardless of whether they have been or could have been joined as defendants." 623 So.2d at 1185.

I consider that the comparative fault statute, in precluding the comparing of fault in any action based upon intentional fault, expressed an intent to retain the common law rule forbidding an intentional tortfeasor from reducing his or her liability by the partial negligence of the plaintiff in an action based on intentional tort. However, such exclusion has no applicability to an action, such as that at bar, based solely on negligence, and, consequently, the fault of both negligent and intentional tortfeasors may appropriately be apportioned as a means of fairly distributing the loss according to the percentage of fault of each party contributing to the loss. I would therefore affirm as to this issue.

10. The common law rule has also been retained in Florida's Contribution Among Joint Tortfeasors statute. Although section 768.31(2)(a) and (3) permits two or more persons jointly or severally liable to seek contribution among them based on their relative degrees of fault, contribution is denied intentional tortfeasors. § 768.31(2)(c), Fla.Stat. (1989).