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Kelly Frels

Jeffrey J. Horner

THE INTERRELATIONSHIP OF TORT LIABILITY, GOVERNMENTAL IMMUNITY, AND THE CIVIL RIGHTS STATUTES

KELLY FRELS*
JEFFREY J. HORNER**

I. INTRODUCTION

It is a well known fact that public school students are sometimes injured while in attendance at school. While these injuries may be accidents, some injuries may also result from school officials' negligent acts. When a person feels he or she has been victimized as a result of the conduct of a school official, the individual will often seek redress through the legal system. Actions to recover for the negligent

* Partner, Bracewell & Patterson, Houston, Texas. B.S., Southwest Texas State University, 1966; J.D., University of Texas, 1970.

** Associate, Bracewell & Patterson, Houston, Texas. B.A., Vanderbilt University, 1980; J.D., University of Virginia, 1983.

conduct of school officials based on state law are often controlled by the doctrine of governmental immunity, state tort claims acts, and the United States civil rights statutes.

Texas law affords a negligent school official a virtually complete blanket of immunity from liability for negligence. Texas common law has long recognized governmental immunity for school districts.[1] The Texas Tort Claims Act[2] abrogated governmental immunity and opened the door to school district liability only in the one narrow circumstance[3] where a school district or junior college employee is negligent in the operation or use of a motor vehicle while in the scope of employment.[4] In addition, section 21.912 of the Texas Education Code immunizes professional employees of school districts from liability for acts involving the use of judgment and discretion, except when a disciplinary act involves the use of excessive force and results in injury to the student.[5]

Given the barriers of state law which a plaintiff must overcome to recover for the negligence of school officials, some allegedly injured parties have begun seeking redress in federal courts, against both

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1. *See* Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978) ("[A]n independent school district is an agency of the state and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort."). Other Texas courts have been consistent in the application of this doctrine. *See, e.g.,* Duson v. Midland County Indep. School Dist., 627 S.W.2d 428, 429 (Tex. Civ. App.—El Paso 1981, no writ) (suit for injuries suffered by student when swing she was using during school hours broke); Garza v. Edinburg Consol. Indep. School Dist., 576 S.W.2d 916, 917 (Tex. Civ. App.—Corpus Christi 1979, no writ) (suit for injuries suffered while participating in school's football program); Coleman v. Beaumont Indep. School Dist., 496 S.W.2d 245, 246 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e) (suit for injuries suffered by painter while working at school); *see also* Sarmiento v. City of Corpus Christi, 465 S.W.2d 813, 815-16 (Tex. Civ. App.—Corpus Christi 1971, no writ) (factors reviewed to determine whether activity by state agency is governmental or proprietary; if proprietary, state agency liable for negligence of employees).

2. TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970 & Supp. 1985).

3. *See id.* § 3(b). The statute states, in relevant part:

> (b) Each unit of government in the state shall be liable for money damages for property damage or personal injuries or death when proximately caused by the negligence or wrongful act or omission of any officer or employee acting within the scope of his employment or office arising from the operation or use of a motor driven vehicle and motor driven equipment . . . .

Id. § 3(b).

4. *See id.* § 19A ("The provisions of this Act shall not apply to school districts or to junior college districts except as to motor vehicles.").

5. *See* TEX. EDUC. CODE ANN. § 21.912(b), (c) (Vernon Supp. 1985); *id.* § 13.503(c) (extends immunity to non-certified teachers such as student teachers and teachers' aides); *see also* Barr v. Bernhard, 562 S.W.2d 844, 849 (Tex. 1978).

school districts and their employees, under 42 U.S.C. § 1983. Under section 1983, a plaintiff can recover for injuries proximately caused by state officials acting under the color of state law, when the injuries deprive the person of any rights, privileges, or immunities secured by the United States Constitution.[6] While school districts and their employees do not enjoy the extensive immunity under section 1983 which is available under state law, other rigid standards must be met before a plaintiff can recover under the applicable federal statutes.[7]

This article will discuss the tort liability of Texas school districts and their employees for negligence under both Texas and federal law. The primary emphasis of the article will be to discuss and analyze the interrelationship between the relevant legal principles in these areas, and to outline the strict standards which must be met for a plaintiff to recover against school districts and their officials in state and federal courts, based on both state and federal law.

II. TEXAS LAW—GOVERNMENTAL IMMUNITY FOR SCHOOL DISTRICTS AND THEIR PROFESSIONAL EMPLOYEES

A. *The Liability of Independent School Districts*

Plaintiffs will often bring negligence suits against school districts and/or their employees in state courts under Texas law. The courts have uniformly considered that providing educational services is governmental in nature.[8] An independent school district is an agency of the state,[9] and the activities of school districts are in furtherance of

6. *See* 42 U.S.C. § 1983 (1982). For a general overview of the application of § 1983 to public schools, see Frels & Horner, *The Negligent Deprivation of Liberty Interests Under 42 U.S.C. § 1983: Flores v. Edinburg Consolidated Independent School District,* 14 W. EDUC. L. REP. 615 (1984); Valente, *Federal Tort Liability for Civil Rights Deprivations in Public Schools,* 5 W. EDUC. L. REP. 701 (1982).

7. These standards will be specifically discussed in a later portion of this article. *See infra* notes 66-76 and accompanying text.

8. *See* Duson v. Midland County Indep. School Dist., 627 S.W.2d 428, 429 (Tex. Civ. App.—El Paso 1981, no writ); Garza v. Edinburg Consol. Indep. School Dist., 576 S.W.2d 916, 918 (Tex. Civ. App.—Corpus Christi 1979, no writ); Braun v. Trustees of Victoria Indep. School Dist., 114 S.W.2d 947, 949-50 (Tex. Civ. App.—San Antonio 1938, writ ref'd).

9. *See* Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978); Davis v. Houston Indep. School Dist., 654 S.W.2d 818, 821 (Tex. App.—Houston [14th Dist.] 1983, no writ); Duson v. Midland County Indep. School Dist., 627 S.W.2d 428, 429 (Tex. Civ. App.—El Paso 1981, no writ); Garza v. Edinburg Consol. Indep. School Dist., 576 S.W.2d 916, 917 (Tex. Civ. App.—Corpus Christi 1979, no writ). Junior colleges, also known as community colleges, are also considered agencies of the state. *See* Op. Tex. Att'y Gen. No. M-707 (1970).

the state's obligation to provide for the general welfare of the public.[10] In fact, no Texas appellate decision has ever recognized that a Texas independent school district has served in a non-governmental capacity.[11] In *Garza v. Edinburg Consolidated Independent School District,*[12] the court discussed the function and operation of Texas school districts and concluded: "A school district is an integral part of the statewide public school system, and its activities . . . even though performed within the territorial limits of the district . . . are performed for the benefit of all the people in this State."[13]

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10. *See* Garza Edinburg Consol. Indep. School Dist., 576 S.W.2d 916, 918 (Tex. Civ. App.—Corpus Christi 1979, no writ). The *Garza* court stated: "Our public school system is not of mere local concern, rather, it is statewide in scope. . . . [T]he effect and importance of such activities [here, participation in state interscholastic football programs] is statewide, and such activities are performed for the benefit of all the people in this State." *Id.* at 918.

11. *See* McManus v. Anahuac Indep. School Dist., 667 S.W.2d 275, 277 (Tex. App.—Houston [1st Dist.] 1984, no writ). The *McManus* court recognized that no appellate decision in Texas had ever characterized a school's activities as nongovernmental. The court also addressed, but did not determine the validity of plaintiff's argument that the language in an earlier Texas Supreme Court decision was ambiguous as to the nature of functions which a school may perform. In *McManus,* the plaintiff argued that the language of the opinion in *Barr v. Bernhard* implied that a school district may act in a non-governmental capacity. The *Barr* opinion stated that "an independent school district is an agency of the state *and, while exercising governmental functions,* is not answerable for its negligence in a suit sounding in tort." *See id.* at 278 (emphasis in original) (quoting Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978)). The *McManus* court stated that, while plaintiff's argument was well reasoned, the opinion in *Garza v. Edinburg Consolidated School Dist.* had established that an activity such as the one involved here, a school sponsored and sanctioned pep rally-bonfire, "was so interrelated with the school's football program as to constitute a governmental function . . . ." *See* McManus v. Anahuac Indep. School Dist., 667 S.W.2d 275, 278 (Tex. App.—Houston [1st Dist.] 1984, no writ); *see also* Duson v. Midland County Indep. School Dist., 627 S.W.2d 428, 429 (Tex. Civ. App.—El Paso 1981, no writ) (generally, all authorized functions are governmental).

12. 576 S.W.2d 916 (Tex. Civ. App.—Corpus Christi 1979, no writ).

13. *Id.* at 918; *see also* Treadaway v. Whitney Indep. School Dist., 205 S.W.2d 97, 99 (Tex. Civ. App.—Waco 1947, no writ). The *Treadaway* court stated:

> The question is whether the school district was, at the time in question, functioning as a governmental agency or was acting in a proprietary capacity, as contended by plaintiffs. . . . There are many respects in which a city can act in a proprietary capacity, but it is hard to imagine how a school district could act in such a capacity, the purpose for which it is created being purely governmental, and when carrying out the functions for which it was thus created it could act only as an agent of the state.

Id. at 99. One court has gone so far as to say that a school district is purely a governmental agency. *See* Braun v. Trustees of Victoria Indep. School Dist., 114 S.W.2d 947, 950 (Tex. Civ. App.—San Antonio 1938, writ ref'd). The appellate court stated:

> There is quite a distinction between a school district and a city or town. Cities and towns exercise a dual function, to wit, governmental and proprietary, while *a school district is purely a governmental agency* and exercises only such powers as are delegated to it by the

Recognizing the governmental function of independent school districts, Texas courts have repeatedly declared: "An independent school district is an agency of the state and, while exercising governmental functions, is not answerable for its negligence in a suit sounding in tort."[14] The Texas Tort Claims Act abrogates the immunity recognized under the common law only in situations involving the operation or use of motor vehicles.[15] The controlling factor is injury or death to a person or damage to property which is caused by a school district officer's or employee's negligent operation or use of a motor vehicle, while functioning within the scope of his or her employment.[16]

Because the terms "operation" and "use" are not defined in the Texas Tort Claims Act, they must be given their common and ordinary meaning.[17] "Operation" has been defined as doing or perform-

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state. It performs no proprietary functions which are separate and independent of its governmental powers.

Id. at 950 (emphasis added).

14. *See* Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978); *see also* Coleman v. Beaumont Indep. School Dist., 496 S.W.2d 245, 246 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.) (quoting Braun v. Trustees of Victoria Indep. School Dist., 114 S.W.2d 947, 949 (Tex. Civ. App.—San Antonio 1938, writ ref'd)).

15. *See* TEX. REV. CIV. STAT. ANN. art. 6252-19 (Vernon 1970 & Supp. 1985); *see also* Lowe v. Texas Tech Univ., 540 S.W.2d 297, 298 (Tex. 1976) (cites statute as authority for waiver of immunity in situations involving "use" or "operation" of motor vehicle); Bishop v. State, 577 S.W.2d 377, 378 (Tex. Civ. App.— El Paso 1979, no writ) (statute waives immunity when injury caused by "use" or "operation" of motor vehicle).

16. *See* Slaughter v. Abilene State School, 561 S.W.2d 789, 791-92 (Tex. 1977) (employee of school negligently backed tractor over fellow employee; tractor is "motor vehicle"); Brookshire v. Houston Indep. School Dist., 508 S.W.2d 675, 677-78 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (appellee's employee negligently operated forklift causing injury; forklift not a "motor vehicle"); *accord* Brantley v. City of Dallas, 545 S.W.2d 284, 286-87 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e) (plaintiff's suit against city under Tort Claims Act failed because no proof injuries proximately caused by operation or use of motor vehicle). The mere fact that an injury was incurred while situated on a school-owned motor vehicle is not sufficient to impute liability to the school district. *See* Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526, 528 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (school district not liable for stabbing death on bus resulting from failure to control public rather than from operation or use of vehicle).

17. *See* Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526, 527 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (supreme court has approved ordinary dictionary definition of "use"); Brookshire v. Houston Indep. School Dist., 508 S.W.2d 675, 678 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (cardinal rule of construction stipulates term not defined by statute to be given ordinary meaning); *see also* Slaughter v. Abilene State School, 561 S.W.2d 789, 791 (Tex. 1977) (Tort Claims Act does not define "motor vehicle" so must be given ordinary and usual definition).

ing a particular job, or something concerning the practical application of principles or processes.[18] "Use" has been defined as the act or practice of employing something,[19] putting or bringing into action or service, or to employ for or apply to a given purpose.[20] Only if the acts in a particular case fall within the common and ordinary meanings attributed to "operation" and "use" can a school district be subject to liability for the negligence of its officers or employees.

In summary, Texas independent school districts are not liable under state law for the negligence of their officers and employees as a result of the protections afforded by the doctrine of governmental immunity. The only exception to this rule is when an officer or employee, acting within the scope of, his or her employment, negligently causes death or injury to a person or damage to property through the operation or use of a motor vehicle.

B. *The Liability of Individual Employees of Independent School Districts*

School administrators or employees are often included in their individual capacities as defendants in suits against school districts. Texas Education Code section 21.912 provides that a professional employee of any school district shall not be personally liable for any act incident to, or within the scope of, his or her professional duties which involves the exercise of judgment or discretion, except in circumstances involving the discipline of a student where negligence or use of excessive force results in bodily injury to the student.[21] Section 21.912 is not applicable to the operation, use, or maintenance of any motor vehicle because the Texas Tort Claims Act preempts the area.[22] A "professional employee," by definition, "includes superintendents, principals, classroom teachers, supervisors, counselors and any other person whose employment requires certification and an exercise of

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18. *See* Jackson v. City of Corpus Christi, 484 S.W.2d 806, 809 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (citing WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 591 (1965)).

19. *See* Jackson v. City of Corpus Christi, 484 S.W.2d 806, 809 (Tex. Civ App.—Corpus Christi 1972, writ ref'd n.r.e.) (citing WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 978 (1965)).

20. *See* Estate of Garza v. McAllen Indep. School Dist., 613 S.W.2d 526, 527 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.) (quoting Beggs v. Texas Dep't of Mental Health & Mental Retardation, 496 S.W.2d 252, 253 (Tex. Civ. App.—San Antonio 1973, writ ref'd)).

21. *See* TEX. EDUC. CODE ANN. § 21.912(b) (Vernon Supp. 1985).

22. *See id.* § 21.912(c).

discretion."[23] This immunity was extended to non-certified teachers with the recent enactment of Texas Education Code section 13.503(c).[24] Section 13.503(c) immunizes a non-certified or part-time instructor from personal liability for acts and omissions in the scope of employment to the same extent that a certified teacher is immune from such liability. As a result, these provisions, sections 21.912 and 13.503(c), combine to provide individual immunity to most school employees for their negligent acts.

Prior to the Texas Supreme Court's decision in *Barr v. Bernhard,*[25] Texas Education Code section 21.912 was susceptible to conflicting interpretations. The statute could have been interpreted to make professional employees liable for all student injuries or deaths, or just those involving student discipline which result from employee negligence. In *Barr,* the plaintiff-student was enrolled in a vocational-agricultural program requiring each student to raise a calf. As part of the program, the school district owned and operated a farm where students were permitted, but not required, to raise their animals; the plaintiff chose to raise his calf at the school's farm. On a Saturday, when no school personnel were present at the farm, the plaintiff's calf inadvertently struck a metal pole causing the roof over the entrance to the barn to collapse on the student.[26] The student sustained serious and permanent injuries, and he brought suit against the school district and a host of district employees, alleging negligence in several respects.

The court addressed the proper interpretation of the statute with regard to the individual defendants and concluded that the legislature intended that the final clause of section 21.912(b), that portion of the statute which qualifies the immunity of professional employees, would limit the liability of professional school employees to acts incident to the discipline of students.[27] The court reasoned that to hold otherwise would be inconsistent with the other provisions of the statute.[28] Consequently, the supreme court stated:

> We hold Section 21.912(b) of the Texas Education Code to mean

23. *Id.* § 21.912(d).
24. *See id.* § 13.503(c).
25. 562 S.W.2d 844 (Tex. 1978).
26. *See id.* at 846.
27. *See id.* at 849.
28. *See id.* at 849.

> that a professional school employee is not personally liable for acts done within the scope of employment, and which involve the exercise of judgment or discretion, except in circumstances where disciplining a student, the employee uses excessive force or his negligence results in bodily injury to the student.[29]

As a result of section 21.912, individual employees enjoy an immunity similar to that accorded school districts themselves. A professional employee of a school district is liable for his or her negligent acts only when the employee uses excessive force in the discipline of students. This leaves the potential plaintiff with very limited prospects of recovery under state law in Texas.

III. FEDERAL LAW RECOVERY UNDER 42 U.S.C. § 1983

Given the limitations upon recovery available in state court, students have increasingly sought redress from school districts and employees in federal court under 42 U.S.C. § 1983. A federal cause of action under section 1983 accrues to a person who, because of acts taken by a state official under the color of state law, has been deprived of any rights, privileges, or immunities secured by the United States Constitution.[30]

A. *Actions Against School Districts*

For years, school districts were not considered "persons" within the meaning of section 1983; thus, they were not subject to liability.[31] In *Monell v. Department of Social Services of the City of New York,*[32] however, the United States Supreme Court stated that local govern-

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29. *Id.* at 849. The Texas Supreme Court's decision in *Barr* has been followed by other Texas courts. In Wagner v. Alvarado Indep. School Dist., 598 S.W.2d 51, 53 (Tex. Civ. App.—Waco 1980, no writ), the appellate court recognized the immunity accorded professional employees under § 21.912. Citing *Barr,* the court held that a school employee is immune from liability so long as:

1) the acts are *not* acts of discipline, which through the use of excessive force or negligence, resulted in bodily injury;

2) the acts fall within the scope of employment; and

3) the acts involve the exercise of judgment and discretion of the employee.

Id. at 53. Thus, so long as a professional employee is not disciplining a student, is acting within the scope of his employment, and his act involves the exercise of judgment and discretion, he is entitled to the immunity afforded by § 21.912 as interpreted in *Barr* and *Wagner.*

30. *See* 42 U.S.C. § 1983 (1982).

31. *See* Monroe v. Pape, 365 U.S. 167, 191 (1961); *see also* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) ("person" as used in § 1983 does not apply to municipal corporations).

32. 436 U.S. 658 (1978).

mental units, such as school districts, are "persons" within the meaning of section 1983.[33] These governmental units are not liable under section 1983 unless a person, through the execution of a *policy* or the toleration of a *custom* of the governmental unit, is deprived of constitutionally protected rights.[34] Thus, under *Monell,* school districts are liable under section 1983 only if a plaintiff is deprived of his or her constitutionally protected rights by the acts of a school official taken pursuant to a formally promulgated district policy or well-established custom.

Another benchmark decision in section 1983 litigation by the United States Supreme Court was rendered in 1980 in *Parratt v. Taylor.*[35] Previously, section 1983 liability was considered to extend only to damages occasioned by the *intentional* acts of state officers.[36] In

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33. *See id.* at 690. The *Monell* court stated:

> Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief . . . .

Id. at 690 (emphasis added). *Monell* also made it eminently clear that school boards were "persons" to which § 1983 applies. The Court stated with respect to school boards:

> [T]he principle of blanket immunity established in *Monroe* cannot be cabined short of school boards. Yet such an extension would itself be inconsistent with recent expressions of congressional intent. In the wake of our decisions, Congress not only has shown no hostility to federal-court decisions against school boards, but it has indeed rejected efforts to strip the federal courts of jurisdiction over school boards. Moreover, recognizing that school boards are often defendants in school desegregation suits, which almost without exception have been § 1983 suits, Congress has twice passed legislation authorizing grants to school boards to assist them in complying with federal court decrees. . . . Far from showing that Congress has relied on *Monroe,* therefore, events since 1961 show that Congress has refused to extend the benefits of *Monroe* to school boards . . . .

Id. at 696-97, 699.

34. *See id.* at 690. The Court stated that a governmental body will be liable under § 1983 if it unconstitutionally "implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom'." *See id.* at 690-91. After determining that § 1983 liability must be occasioned by the deprivation of one's constitutional rights through the execution of governmental policy or custom, the Court was quick to conclude that governmental bodies cannot be held liable under § 1983 solely because they employ a tortfeasor. The Court stated: "We conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691 (emphasis in original). Mere action by an agent or employee of a governmental body is not sufficient to impose § 1983 liability; such action must be taken pursuant to the policies or customs of the governmental entity. *See id.* at 691.

35. 451 U.S. 527 (1981).

36. From its adoption until the time of the *Monroe* decision, the courts construed § 1983

Parratt, a prisoner sought to recover for the negligent loss of hobby materials by prison officials.[37] The Court succinctly stated: "Section 1983 affords a 'civil remedy' for the deprivation of federally protected rights caused by persons acting under the color of state law *without any express requirement of a particular state of mind."*[38]

Monell and *Parratt* have exposed independent school districts to greater potential liability under section 1983 than ever imagined. However, the standards which a plaintiff must meet to prove a claim under section 1983 are burdensome. First, a plaintiff must prove that he or she was deprived of a constitutionally protected right through the acts of a state official taken pursuant to district *policy or custom.*[39] Second, the plaintiff must also show that the governing body of the school district had *knowledge* of any alleged wrongful policy or custom.[40] Finally, the plaintiff must establish that the alleged tort was "egregious" enough to implicate his constitutional rights.[41] This

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to require proof of an *intentional* invasion of a constitutional right. *See* Snowden v. Hughes, 321 U.S. 1, 7-8 (1944); United States v. Classic, 313 U.S. 299, 327 (1941); Lane v. Wilson, 307 U.S. 268, 276 (1939). For a general discussion of § 1983 law and its purposes, see Note, *Limiting the 1983 Action in the Wake of Monroe v. Pape,* 82 HARV. L. REV. 1486 (1969). In the *Monroe* case, the Supreme Court determined that the petitioner need not prove a willful violation of his constitutional rights, as had been propounded by earlier decisions construing § 1983. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961). Despite the decision in *Monroe,* at least one court continued to require intentional conduct to establish a § 1983 cause of action. *Cf.* Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976) (*Monroe* only establishes that specific intent not required, not that negligence is actionable; here, guard's culpability not of sufficient degree to invoke § 1983), *cert. denied,* 435 U.S. 932 (1978). *See generally* Kirkpatrick, *Defining A Constitutional Tort Under Section 1983: The State-of-Mind Requirement,* 46 U. CIN. L. REV. 45 (1977) (discussion of necessary degree of fault and culpability); Note, *Civil Rights: The Supreme Court Finds New Ways to Limit Section 1983,* 33 U. FLA. L. REV. 776 (1981) (discussion of *Monroe* and *Parratt).*

37. *See* Parratt v. Taylor, 451 U.S. 527, 530 (1981).

38. *Id.* at 535 (emphasis added).

39. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

40. *Cf.* Bennett v. City of Slidell, 728 F.2d 762, 768 (5th Cir. 1984) ("sufficient duration . . . of abusive practices . . . must warrant a finding of knowledge . . . that . . . conduct has become customary practice of city employees").

41. *See* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980). The court stated that:

> [T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. [citation omitted] Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

Id. at 613; *see also* Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) ("some state-

combination of factors forces a plaintiff to meet a significant burden of proof before he or she recovers under section 1983.

The courts have fully explored the "policy or custom" requirement enunciated in *Monell.* They have consistently held that isolated instances of negligence do not constitute the kind of systematic abuse to which *Monell* applies. A good example of this concept is illustrated by the case of *Berry v. McLemore.*[42] In *Berry,* the plaintiff was stopped for a traffic offense, and when he protested his innocence, the police officer became enraged and began to hit the plaintiff in the face. The plaintiff attempted to retaliate, whereupon the officer shot him several times.[43] The district court granted the municipality's motion for a directed verdict, and the Fifth Circuit found that the directed verdict had been properly granted.[44] The Fifth Circuit, in agreeing that the incident was unprecedented, stated: "[A]n isolated incidence of police misconduct does not indicate the sort of systematic, municipally supported abuse to which *Monell* makes reference."[45] Other courts have reached similar results.[46]

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agent-inflicted injury is so minor as to occasion only a tort claim, not a constitutional invasion").

42. 670 F.2d 30 (5th Cir. 1982).

43. *See id.* at 31.

44. *See id.* at 33.

45. *Id.* at 32. The Fifth Circuit, in *Berry,* also attempted to define the term "custom." The opinion cited decisions defining custom as "persistent and widespread practices," or "settled government practice or [d]eeply imbedded traditional ways of carrying out [government] policy." *See id.* at 32. The cases relied on by the Fifth Circuit in forming its definitions are Adickes v. S.H. Kress & Co., 398 U.S. 144, 167 (1970), and Knight v. Carlson, 478 F. Supp. 55, 58 (E.D. Cal. 1979) (quoting Nashville, Chattanooga & St. L. Ry. v. Browning, 310 U.S. 362, 369 (1954)). The terms "custom" and "policy" were also defined in the recent Fifth Circuit decision of Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984). The *Webster* court defined the terms as follows:

> *Official policy* is:
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> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
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> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a *custom* that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority. Actions of officers or employees of a municipality do not render the municipality liable under § 1983 unless they execute official policy as above defined.

Id. at 841 (emphasis added).

46. *See* Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (city not liable for single tortious altercation between police chief and sister-in-law); Rheuark v. Shaw, 628 F.2d

Courts have also uniformly held that there should be no recovery under section 1983 unless a tort is sufficiently "egregious."[47] By enunciating this standard, courts are distinguishing between simple common-law torts which should be litigated in state courts and constitutional torts which can be addressed in the federal courts.[48] In *Paul v. Davis,*[49] the United States Supreme Court warned that section 1983 was designed to deter only real abuses by state officials.[50] To hold otherwise makes the fourteenth amendment "a font of tort law," which the Supreme Court has expressly forbidden.[51] "Egregiousness" is primarily a measure of the deprivation of the plaintiff's constitutional rights combined with the relative severity of the tort committed by the defendant.[52]

The egregiousness standard has been applied in many cases. For

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297, 305 (5th Cir. 1980) (must have custom or policy), *cert. denied,* 450 U.S. 931 (1981); Landrigan v. City of Warwick, 628 F.2d 736, 747 (1st Cir. 1980) (city's failure to probe isolated perjury charge does not establish liability under § 1983); Turpin v. Mailet, 619 F.2d 196, 200 (2d Cir. 1980) (city may be liable for conduct which constitutes policy despite fact that policy not "formally adopted"), *cert. denied,* 449 U.S. 1016 (1980).

47. *See* Shillingford v. Holmes, 634 F.2d 263, 264-65 (5th Cir. 1981) (where police used excessive force by smashing camera into plaintiff's face, constitutional violation established); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (parents of child have no cause of action for violation of rights where school officials disregarded parents' request that child not receive corporal punishment); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973) (inmate has cause of action against guard for beating inflicted and refusal to provide medical service), *cert. denied,* 414 U.S. 1033 (1973).

48. *See* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (every state law tort not necessarily federally cognizable constitutional tort).

49. 424 U.S. 693 (1976).

50. *See id.* at 700-01.

51. *See id.* at 700-01 (plaintiff must show specific constitutional guarantee which has been violated in order to impose liability under § 1983).

52. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied,* 414 U.S. 1033 (1973). The *Johnson* court stated:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id. at 1033. A recent decision by the Fifth Circuit, *Raley v. Fraser,* emphasizes that in order to impose § 1983 liability the state officer's action must be malicious. The court further implied that such action must also "amount to an abuse of official power that shocks the conscience." Raley v. Fraser, 747 F.2d 287, 289 (5th Cir. 1984) (quoting Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981)); *see also* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (same standard applied in police brutality suit, such as in *Johnson,* applies equally to suit against school officials involving issue of corporal punishment).

instance, in *Williams v. Kelley*,[53] a prisoner was strangled to death by a police officer while attempting to escape from prison. The prisoner's mother brought a wrongful death action against his jailors. The court stated that the plaintiff must prove the damage resulted from "the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a violation of the Constitution."[54] In *Williams,* the Fifth Circuit regarded the prisoner's strangulation to be "at most an arguably negligent performance of lawful custodial functions."[55] The court found that the defendant's conduct did not constitute the sort of abuse of governmental power which is cognizable under section 1983 and affirmed the trial court's judgment in favor of the jailors.[56] Other courts have also employed the egregiousness test with similar results.[57]

A recent Fifth Circuit decision adds a third element of proof necessary for a plaintiff to recover for the negligent deprivation of a constitutionally protected right under section 1983. In *Bennett v. City of Slidell,*[58] a builder sued the city and its building inspector for damages allegedly caused by his dealings with the building inspector and other municipal officials. The plaintiff had sought a liquor license and an occupancy permit for the operation of a bar in Slidell. The city building inspector refused to issue a certificate that would verify the premise complied with city and state safety standards because the owner of the adjacent property opposed the operation of the lounge.[59] The plaintiff contended that his constitutionally protected rights of due process and equal protection were violated by the city and its officers.[60]

Regarding the liability of the municipality, the Fifth Circuit acknowledged that the interference with the rights of the plaintiff must be due to a violation for which city government itself is responsible.[61]

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53. 624 F.2d 695 (5th Cir. 1980), *cert. denied,* 451 U.S. 1019 (1981).

54. *Id.* at 697 (quoting Turpin v. Mailet, 579 F.2d 152, 169 (2d Cir. 1978)).

55. *See id.* at 698.

56. *See id.* at 698.

57. *See* Hall v. City of Duncanville, 678 F.2d 582, 584 (5th Cir. 1982) (touched directly upon issue of governing body's liability in holding conduct of governing body not sufficiently egregious to impose liability); Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) (court inquired into nature of force used and required, as well as extent of injury).

58. 728 F.2d 762 (5th Cir. 1984).

59. *See id.* at 765.

60. *See id.* at 765.

61. *See id.* at 767.

In most instances, a council, commission, or governing board will be the governmental body to which responsibility must be attached.[62] The court then determined that for a municipality to be held liable under section 1983, the governing body of the municipality must have underlying knowledge of a custom or policy which it allegedly tolerates in violation of the plaintiff's constitutional rights.[63] The requisite knowledge of a continuing practice of government employees may be attributed to the governing body in either of two ways. The court stated:

> *Actual knowledge* may be shown by such means as discussions at council meetings or receipt of written information. *Constructive knowledge* may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or of a high degree of publicity.[64]

Accordingly, the governing body of a municipality must have actual or constructive knowledge of a custom which deprives a plaintiff of his or her constitutional rights before the municipality can be held liable under section 1983. A recent Fifth Circuit case has followed this line of reasoning.[65]

In summary, to prevail against a governmental entity, particularly a school district, under a section 1983 negligence claim, a plaintiff must satisfy three rigid tests. First, the plaintiff must show that his or her constitutional rights were violated by conduct taken pursuant to school district policy or custom. Second, the plaintiff must establish that the governing body of the school district had knowledge of the wrongful policy or customary practice. Finally, the plaintiff must establish that the tort was "egregious" enough to implicate the plaintiff's constitutional rights. As can be seen, these rigid standards greatly restrict the plaintiff's prospects for recovery under section 1983.

B. *Actions Against School Officials in Their Official Capacities*

In actions against school districts, a plaintiff will, on frequent occa-

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62. *See id.* at 767.
63. *See id.* at 768.
64. *Id.* at 768 (emphasis added).
65. *See* Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir. 1984).

sions, sue school officials in both their official and individual capacities. Actions for damages against a party in his or her official capacity are, in essence, actions against the governmental entity for which the officer is an agent.[66] Thus, the same standard must be applied to section 1983 liability for officers sued in their official capacities as is applied to the governmental entity itself.[67] That is, the government officer must participate in the implementation of a policy or the toleration of a custom which causes the deprivation of the plaintiff's constitutional rights.[68]

C. *Actions Against School Officials in Their Individual Capacities*

The more pressing question, however, is an official's *individual* liability under section 1983. The United States Supreme Court has addressed the issue of individual liability in two significant decisions. In *Wood v. Strickland,*[69] public high school students who were expelled from school brought a section 1983 action against certain school officials, alleging that school board members had violated their due process rights.[70] The United States Supreme Court stated the standard for official immunity:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. . . . A compensatory award will be appropriate *only* if the school board member has acted with such an imper-

66. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690 n.55 (1978); Universal Amusement Co. v. Hofheinz, 646 F.2d 996, 997 (5th Cir. 1981); Jensen v. Conrad, 570 F. Supp. 91, 98-99 (D.S.C. 1983).

67. *See* Monell v. Department of Social Servs., 436 U.S. 658, 690 n.55 (1978); Universal Amusement Co. v. Hofheinz, 646 F.2d 996, 997 (5th Cir. 1981); Jensen v. Conrad, 570 F. Supp. 91, 98-99 (D.S.C. 1983).

68. *See* Bradford v. Edelstein, 467 F. Supp. 1361, 1375 (S.D. Tex. 1979) ("[L]ocal governmental officials may be sued and held responsible under § 1983 in their official capacities when execution of official policy or custom inflicts the injury involved in a plaintiff's complaint."); *see also* Wanger v. Bonner, 621 F.2d 675, 679 (5th Cir. 1980) (plaintiff must show personal involvement of official; must establish "causal connection between . . . act of . . . official and the alleged constitutional violation"); Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979) (sheriff may be liable under § 1983 for participation in obtaining warrants and coordinating search party).

69. 420 U.S. 308 (1975).

70. *See id.* at 310.

> missible motivation or with such disregard of the student's *clearly-established* constitutional rights that his actions cannot reasonably be characterized as being in good faith.[71]

Thus, in *Wood,* the Supreme Court found that determining individual liability under section 1983 involved an analysis of both an *objective* and *subjective* standard of good faith.

This test was modified by the Supreme Court in *Harlow v. Fitzgerald.*[72] In *Harlow,* the plaintiff brought suit for damages for his allegedly unlawful discharge from the United States Air Force. The Court held that in actions brought directly under the United States Constitution against federal officials, the official's immunity could be penetrated only by a showing that the official lacked objective good faith.[73]

Harlow was applied to section 1983 actions in *Davis v. Scherer.*[74] In *Davis,* the Supreme Court applied the holding of *Harlow* directly to section 1983 cases against state governmental agencies when it stated: "[O]fficials 'are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' "[75] As a result of *Davis,* school officials are not liable under section 1983 in their individual capacities unless, while acting within the scope of their employment, they violate the *clearly-established* constitutional rights of another.[76] While school officials do not have absolute immunity for official actions under section 1983, this restricted immunity affords some limitation to their potential liability.

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71. *Id.* at 322 (emphasis added); *see also* Clanton v. Orleans Parish School Bd., 649 F.2d 1084, 1100 (5th Cir. 1981) (school official not entitled to defense if acted maliciously, or if knew, or should have known, action would violate constitutional rights); Doe v. Renfrow, 631 F.2d 91, 92-93 (7th Cir. 1980) (nude search of 13-year-old-child violates principles of decency and is outrageous), *cert. denied,* 451 U.S. 1022 (1981); Martin v. University of Louisville, 541 F.2d 1171, 1177 (6th Cir. 1976) (citing *Wood* decision for proposition that official not immune if acting maliciously).

72. 457 U.S. 800 (1982).

73. *See id.* at 818. The *Harlow* opinion did not specifically address the immunity of a state official sued under § 1983. However, the Court, in citing *Butz v. Economou,* stated: "It would be 'untenble to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.' " *Id.* at 818 n.30 (citing Butz v. Economou, 438 U.S. 478, 504 (1978)). Thus, *Harlow* appears to limit the two-tiered immunity standard established in *Wood* to simply one tier, retaining the objective standard of good faith while discarding the subjective.

74. 52 U.S.L.W. 4956 (U.S. June 28, 1984).

75. *Id.* at 4958 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

76. *See id.* at 4959.

IV. A Special Case in Point Relating to the School District Context—*Flores v. Edinburg Consolidated Independent School District*

A recent Fifth Circuit decision touches upon virtually all of the topics discussed in this article. In *Flores v. Edinburg Consolidated Independent School District,*[77] a student severely injured his hand on a table saw while working in a shop class. He later committed suicide. The estate of the student initiated a suit in state court, where the defendants' motion for summary judgment based upon governmental immunity was granted.[78] No section 1983 claim was raised in the state action. A different suit based on the same facts was subsequently brought in federal court pursuant to section 1983. The jury verdict in favor of the student's estate was based on an instruction that a public school student has a constitutionally protected liberty interest in a safe environment while attending school.[79] The district court further instructed the jury that if a school district undertakes a practice of not insuring a safe environment and a student is injured, the student is deprived of that liberty interest without due process of law.[80] The court stated: "[Legitimate liberty interests] are implicated

77. 554 F. Supp. 974 (S.D. Tex. 1983), *rev'd,* 741 F.2d 773 (5th Cir. 1984).

78. *See id.* at 980.

79. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 774 (5th Cir. 1984). With reference to the liberty rights issue, the district court stated: "[T]he injury herein is a liberty right, and the loss was definitely a deprivation. Therefore, the plaintiff has seemingly alleged a cause of action within the purview of § 1983 as defined by the Supreme Court in *Parratt v. Taylor.*" Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 979 (S.D. Tex. 1983), *rev'd,* 741 F.2d 773 (5th Cir. 1984). The district court also seemed to place special emphasis on the educational nature of this activity. On this basis it attempted to distinguish the case *sub judice* from many other "constitutional tort" cases. The court declared that "[a]lthough public education is not a right secured by the Constitution, it is more than a mere governmental benefit. [citations omitted]. The Supreme Court has recognized the 'Public school as a most vital civic institution for the preservation of a democratic system of government.'" *Id.* at 979-80.

80. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 774 (5th Cir. 1984). This instruction, which is essentially that a student has a constitutional right to a safe environment, constitutes judicial groundbreaking. *Rodriguez v. San Antonio Indep. School Dist.* and the lack of judicial precedent are persuasive support for the position that there is no such constitutional right and that the instruction was erroneous. *See* 411 U.S. 1, 31, 35 (1973). The district court further attempted to justify the application of the liberty interest analysis to the school setting by stating: "The Supreme Court has held that a student's Fourteenth Amendment liberty interests are implicated when a teacher administers corporal punishment as a disciplinary measure." *See* Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983) (citing Ingraham v. Wright, 430 U.S. 651 (1977)), *rev'd,* 741 F.2d 773 (5th Cir. 1984).

when a teacher causes serious injury to a child, even though that injury was a result of negligence rather than deliberate action. Accordingly, the court is of the opinion that a sufficient claim has been alleged under Section 1983 . . . ."[81] Because the school district did not, in the court's view, provide a safe environment for its children, the district court entered judgment against it based upon the jury verdict. Despite the lack of judicial support for the holding that students are constitutionally entitled to a safe environment, the district court held that by its custom of failing to provide a safe environment, the school district had deprived the student of his liberty interest without due process.[82] The court, however, dismissed the claim against the teacher based upon the teacher's qualified immunity under *Wood v. Strickland.*[83]

The Fifth Circuit panel reversed the trial court decision on the basis of res judicata.[84] Two judges of the panel held that the federal court action arising from the alleged negligence of the school district official was based on the same facts as the state court suit which had been dismissed. These judges reasoned that the plaintiff should have brought the section 1983 claim in the original state suit because the critical issues raised in both actions were the same.[85] Therefore, the failure to raise the section 1983 claim in state court barred the plaintiff from raising that claim in a subsequent lawsuit, including a federal

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81. Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 980 (S.D. Tex. 1983), *rev'd,* 741 F.2d 773 (5th Cir. 1984).

82. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 774 (5th Cir. 1984).

83. *See* Flores v. Edinburg Consol. Indep. School Dist., 554 F. Supp. 974, 984 (S.D. Tex. 1983), *rev'd,* 741 F.2d 773 (5th Cir. 1984). Regarding the teacher's immunity, the court stated:

> The Court is not persuaded that Defendant Cantu [a shop teacher] acted with a lack of objective good faith . . . . It cannot be said that the Defendant reasonably should have known that his actions would violate the Plaintiff's constitutional rights. The Court is further of the opinion that, under the facts as alleged, the Defendant's good faith immunity would still be intact even if the law in this area had been clear at the time of the Plaintiff's injury. As this Court interprets that defense, the Defendant is held to have lacked good faith when he deliberately engages in conduct that he knew or should have known would violate the Plaintiff's clearly established constitutional rights. No such deliberate action has been alleged in this case. Defendant Cantu, therefore, is immune from liability for damages in his individual capacity.

Id. at 984. This two-tiered standard has, as previously noted, been modified by Davis v. Scherer, 52 U.S.L.W. 4956, 4958 (U.S. June 28, 1984).

84. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 774 (5th Cir. 1984).

85. *See id.* at 779.

court action under section 1983.[86]

Judge Garza specially concurred with the panel's decision on other grounds which are important to the development of section 1983 law. He reasoned that the trial court's decision should be reversed not on res judicata grounds, but because the plaintiff's section 1983 claim was insufficient to warrant recovery.[87] Judge Garza reached this result for several reasons. First, he concluded that the alleged wrong was not egregious enough to be labeled a constitutional tort.[88] Second, he felt that the *Parratt* decision expressly limited the scope of recovery under section 1983 to those cases in which a clearly established constitutional right is violated, circumstances which did not exist in this case.[89] Furthermore, Judge Garza felt that the plaintiff was not injured as a result of an official policy, custom, or practice of the school district.[90] The evidence in the record did not establish that

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86. *See id.* at 778-79. Regarding res judicata, the court found persuasive the Texas case of Gilbert v. Fireside Enters., 611 S.W.2d 869 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.). In this regard, the *Flores* court stated:

> As *Griffin* states, issues of fact actually litigated and determined in one suit are barred in all later suits, whether or not the later suit arises from the same cause of action; only when the subsequent suit is on a different cause of action will those issues which have not been actually litigated and determined not be barred. [citation omitted]. If the subsequent suit is not on a different cause of action, even issues not actually litigated in the prior suit will be barred.

Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 778 (5th Cir. 1984).

87. *See* Flores v. Edinburg Consol. Indep. School Dist., 741 F.2d 773, 779 (5th Cir. 1984) (Garza, J., concurring). Judge Garza stated:

> Although Judge Higginbotham presents an excellent argument for the proposition that the Texas law of res judicata precludes the section 1983 action before us, I disagree with the majority's interpretation of Texas law and believe that the Texas courts would not find appellee's claim precluded. Although I concur in the result reached by the majority, I would reverse this case on the merits because the appellee failed to establish that his section 1983 claim occurred as a result of an official policy, custom or usage of the school district.

Id. at 779 (Garza, J., concurring).

88. *See id.* at 779 n.1 (Garza, J., concurring). Although the thrust of Judge Garza's discussion related primarily to the appellee's failure to establish the existence of an official policy, custom, or usage of the school district which deprived him of a constitutional right, he expressed serious concern that the appellee's § 1983 claim was deficient for other reasons as well. For example, Judge Garza stated that, " '[T]he alleged wrong in this case is not sufficiently egregious as to be 'constitutionally tortious.' " *Id.* at 779 n.1 (Garza, J., concurring).

89. *See id.* at 779 n.1 (Garza, J., concurring). Judge Garza also pointed out that unlimited expansion of § 1983 has been disapproved by the Supreme Court. *See id.* at 779 n.1 (Garza, J., concurring).

90. *See id.* at 779 (Garza, J., concurring). The primary focus of Judge Garza's concurrence dealt with the issue of whether or not the plaintiff was injured as a result of a custom, policy, or practice of the school district. The judge placed great credence in the Supreme

the school district customarily offered students an unsafe environment in school sufficient to impose section 1983 liability.[91] Moreover, Judge Garza considered the incident in this case to be an isolated negligent act, because any negligent acts occurring in shop classes were not so persistent or widespread as to constitute a custom.[92] Based on these rationales, he concurred that the case should be reversed.

The *Flores* decision encompasses nearly all of the issues important to the analysis of governmental immunity and the civil rights statutes as related to student injuries. While Judge Garza's writing is only a concurrence, it suggests a direction for the Fifth Circuit and other courts to take regarding section 1983 actions; therefore, it offers substantial guidance in determining the proper scope and application of section 1983 for student injuries. Only subsequent litigation in the Fifth Circuit and other courts will settle this perplexing issue.

V. CONCLUSION

In most instances, the governmental immunity afforded Texas school districts and school officials precludes recovery based on state law. Only if a student is negligently injured through a school employee's use or operation of a motor vehicle, or if excessive force or negligence in the discipline of a student causes injury, can the student expect relief based on state law in a Texas court. As a result of this immunity and the somewhat more expansive interpretation some

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Court's decision in *Monell,* as well as the recent Fifth Circuit decision in *Webster v. City of Houston,* wherein the court defined "custom" and "policy." *See id.* at 780-81 (Garza, J., concurring).

91. *See id.* at 782 (Garza, J., concurring). To illustrate, Judge Garza stated:

> There is little, if any, evidence in the record that other teachers, or other shop teachers created or maintained unsafe conditions in their classrooms. Moreover, there is little or no evidence that there was any persistent, widespread practice of this nature. Indeed, the student injury rule for the school district was low.

Id. at 782 (Garza, J., concurring).

92. *See id.* at 782 (Garza, J., concurring). In reaching this conclusion, Judge Garza reasoned:

> The jury correctly found that Cantu was negligent in removing the guard from the saw that caused the injury. Proof of this isolated negligent act, however, is insufficient to justify the verdict that a policy, custom, or usage of unsafe safety procedures existed. Appellee failed to produce evidence sufficient to show that the negligent actions of Cantu were made known to the district officials, were so common and settled that they should be attributed to school officials, or that they provoked "public discussion or . . . a high degree of publicity" such as to constitute a custom fairly representing a school district policy.

Id. at 782 (Garza, J., concurring).

courts have recently taken with regard to section 1983, more and more litigants may bypass state law and, instead, file suit in federal or state court under section 1983. Even under section 1983, however, a plaintiff must meet a substantial burden before he or she can recover. Therefore, as can be seen, while the burden on a plaintiff is somewhat lessened under federal as opposed to Texas law, the plaintiff still must comply with significant and substantial requirements in order to be successful in his suit, regardless of the forum he or she chooses.