place to meet it". Moreover, it held that policies designed to combat bullying "are of little value unless they are also put into practice". As Auld L.J. summarised the position in *Gower* v. *London Borough of Bromley* [1999] E.L.R. 356, 359, "a head teacher and teachers have a duty to take such care of pupils in their charge as a careful parent would have in like circumstances, including a duty to take positive steps to protect their well-being". In extreme cases, this may require a school to use its power to expel a bully. However, the school must be careful not to infringe the rights of the alleged bully by, for example, expelling him with no opportunity to make representations (*R.* v. *Newham LBC, ex parte X* [1995] E.L.R. 303).

Educational consultants agreed in *Bradford-Smart* that where an incident between pupils outside school carried over into school, a reasonable head teacher should investigate if it had a deleterious effect upon the victim. In the instant case, there were no adverse effects upon Leah's educational performance and development clearly attributable to the problems outside school, and the school was taking "thoroughly sensible and well-balanced steps both to prevent the same thing happening in school and to counteract any effects upon her educational performance and development".

Head teachers may be worried that they could be flooded with compensation cases from the victims of school bullies (*The Times*, 4 January and 26 October 2000). However, the decision in *Bradford-Smart* shows that bullying cases can be far from straightforward for claimants. Only a handful of claims have been successful in the courts, with similarly small numbers reaching out-of-court settlements (*The Times*, 26 October 2000; L. Berman and J. Rabinowicz, "Bullying in Schools Claims" [2001] Journal of Personal Injury Litigation 3, 247). Given the barriers to successful litigation by the victims of bullies, it is unsurprising that parents rarely litigate on behalf of their child if they are dissatisfied with the way their child's school has dealt with bullying.

JESSE ELVIN

AN UNLUCKY ESCAPE

CARLO Vellino, who had numerous convictions for burglary, theft and other offences, received frequent visits in his second-floor flat from the police. To their knowledge, he often sought to evade arrest by leaving through a window, normally lowering himself to the ground from a balcony. In September 1994 three police officers

arrested him in the flat for failure to appear in court. In circumstances of which there was conflicting evidence, the two officers who were holding Vellino let go of him, and he leaped out of the window, fracturing his skull when he hit the ground. He claimed damages for the resulting brain damage and tetraplegia, alleging that the Chief Constable was vicariously liable for the officers' negligence. The Court of Appeal (Schiemann L.J. and Sir Murray Stuart-Smith, Sedley L.J. dissenting) upheld Elias J.'s decision to dismiss the claim, on the grounds that: (i) the police owed an arrested person no duty to take care that he was not injured in a foreseeable attempt to escape from lawful custody; (ii) the claimant was the author of his own misfortune; and (iii) as a matter of policy he should not be allowed to base a claim on his own criminal act of escaping from lawful custody (*ex turpi causa non oritur actio*): *Vellino* v. *Chief Constable of the Greater Manchester Police* [2001] EWCA Civ 1249, [2002] 1 W.L.R. 218.

It was accepted by all the members of the court that if the officers owed Vellino a duty of care, they were in breach of it, and it was assumed, though without any ruling on the point, that they were guilty of the crime of permitting a prisoner to escape. There was no evidence, however, that they had encouraged Vellino to take life-threatening risks, so the offences committed by the claimant and defendant were causally connected but not joint (unlike *Ashton* v. *Turner* [1981] 1 Q.B. 137 and *Pitts* v. *Hunt* [1991] 1 Q.B. 24 where the claimant and defendant were taking part in a joint criminal enterprise). The majority accepted that the police might owe a duty to an arrested person, but considered that this duty would arise from the prisoner's detention rather than from the arrest, and would therefore be a duty to protect him from types of injury which the detention rendered him powerless to avoid, such as water deprivation or injury caused by detention in an unsafe building; the duty would cease, however, when the prisoner broke away from the arresting officer.

The Court of Appeal reserved judgment to await publication of the Law Commission's Consultation Paper No. 160, *The Illegality Defence in Tort*, but the majority concluded that nothing in the paper would entitle the claimant to succeed, either under present law or if the Commission's proposals for legislation were implemented. These proposals would give the court a "structured discretion" to bar a claim when it arises from, or is in any way connected to, an illegal act on the part of the claimant. The factors to be taken into account in exercising the discretion would include: the seriousness of the illegality; the knowledge and intention of the claimant; whether denying relief would further the purpose of the

rule which renders the claimant's conduct illegal; and whether denying relief would be proportionate to the illegality involved. The Commission considers that the underlying rationale should be that identified by McLachlin J. in the Supreme Court of Canada in *Hall* v. *Hebert* [1993] 2 S.C.R. 159: the need to maintain consistency in the law by denying a claim where allowing one would undermine the coherence of the legal system.

Elias J. and the majority in the Court of Appeal considered that if *ex turpi causa* applied, it made no difference whether the analysis was that the defendants owed no duty of care, because it was not just and reasonable to impose one, or that the principle provided a freestanding reason for failure of the claim. Elias J. and Schiemann L.J. preferred the former, but Sir Murray Stuart-Smith concentrated on the latter. Yet, as McLachlin J. pointed out in *Hall* v. *Hebert*, the analysis may make a crucial difference to the burden of proof. It is for a claimant to establish that a duty is owed to him, but for a defendant to bring himself within the scope of a defence. The "no duty" analysis has been preferred by the High Court of Australia (*Gala* v. *Preston* (1991) 100 A.L.R. 29), but rejected by the Canadian Supreme Court (*Hall* v. *Hebert*), and the Law Commission considers that it is only appropriate in cases such as *Ashton* and *Pitts* where the claimant encourages the defendant to do the very act which causes the injury. In other situations the Commission would treat illegality as a defence, and one which "should not be lightly invoked" and which will very rarely be applicable in personal injury cases. It is suggested, however, that the "no duty" approach was appropriate in *Vellino* despite the lack of common criminal purpose, since it is always difficult to establish a duty of positive action.

Elias J. held that if he was wrong in finding that the police owed no duty to Vellino, and if *ex turpi causa* did not apply, the claimant's damages should be reduced by two-thirds for contributory negligence. Sedley L.J., in his dissenting judgment, preferred this solution. In his view, the effect of denying redress to Vellino was "both to make him an outlaw and to reward the misconduct of his captors", and the power to apportion liability under the Law Reform (Contributory Negligence) Act 1945 is "a far more appropriate tool for doing justice than the blunt instrument of turpitude". Sedley L.J. acknowledged that in certain quarters his approach might be even more unpopular than the Law Commission's proposals, which were greeted by the *Daily Express* with the headline "Law paves way for thugs to sue victims", but

his carefully reasoned judgment may give the Commission food for thought as it prepares its Report.

C.A. HOPKINS

A CONTINUED NUISANCE

IT is well established that in the tort of private nuisance an occupier of land is liable not only for those nuisances which he has created, but also for those which he has continued. An occupier continues a nuisance which exists on his land if, with actual or constructive knowledge of its existence, he fails to take reasonable steps to eliminate it. Two recent decisions, in the rather different contexts of root encroachment by a London plane tree and flooding from a sewer, have provided guidance on the legal consequences of continuing a nuisance.

In *Delaware Mansions Ltd. and another* v. *Westminster City Council* [2001] UKHL 55, [2002] 1 A.C. 321, the roots of a plane tree had encroached underneath blocks of flats in Maida Vale, desiccating the soil, and causing substantial structural damage. The defendant Council was the owner of the tree, and as highways authority was responsible for it. The trial judge found that the encroachment was reasonably foreseeable, that the Council had failed to take reasonable steps to abate it, and that in principle there was an actionable nuisance. However, a complication arose from the fact that the claimant did not become owner of the flats until after the damage had occurred. The structural damage took place not later than March 1990, at which time the reversionary interest in the blocks of flats was owned by the Church Commissioners (the individual flats having been let on long leases). The claimant, Flecksun Ltd., did not become owner of the freehold reversion until June 1990. (Flecksun was a wholly-owned subsidiary of the leaseholders' management company, Delaware Mansions Ltd. Delaware's own claim against the Council was dismissed at first instance on the ground that Delaware had no interest in the land and so, following *Hunter* v. *Canary Wharf Ltd.* [1997] A.C. 655, could not sue in nuisance. There was no appeal against this finding, and Delaware played no further part in the proceedings.)

In 1992 Flecksun undertook remedial work at a total cost in excess of £500,000. It sought to recover this expenditure from the Council as damages for nuisance. The trial judge dismissed the claim on the basis that the remedial expenditure was in respect of damage which had occurred before Flecksun became owner of the