Maternal prenatal negligence cases are ... plagued by moral complexity. The imposition of a duty of care upon pregnant women will interfere with their bodily integrity, privacy and autonomy rights in a way that it would not interfere with other persons who are not pregnant.¹

In July 2002, a woman who was pregnant and HIV positive refused to undergo treatment that would have had the effect of reducing the risk of transmitting the virus to her unborn child. The President of the High Court, Finnegan J., advised her that if she refused to give birth in hospital he would have to make “much more serious orders affecting her bodily integrity.”² What could such orders possibly be—forced confinement, 24-hour supervision, or the forced administration of medication? Since further details were not forthcoming we can only speculate.

At issue here is the balancing of the rights of a woman and her unborn child in situations where what is medically required for the good of one may not necessarily be for the good, medical or otherwise, of the other. While possible legal conflicts of interest between pregnant women and their unborn children may be relatively new to Ireland—to the best of my knowledge this is the only Irish case of its kind—this issue has arisen in other jurisdictions. It is therefore worthwhile to see how these conflicts have been dealt with elsewhere as a clue to how they might be treated here.

In this paper, I shall look at the way such problems have been dealt with in English law and in some of the states of the U.S.A. I shall suggest that, from the slender indications we have had, it seems more likely that the Irish courts will deal with such matters more as the Americans have done rather than as our English neighbours have done.

² The Irish Times, July 20, 2002.
The legal status of the unborn child

The key to understanding how different jurisdictions deal with this problem is to understand how they conceive of the legal status of the unborn child. Broadly speaking, if the unborn child is accorded little or no legal personality, then considerations of maternal autonomy almost invariably trump foetal autonomy. To the extent that the unborn child is accorded substantive legal personality then the road is open to a balancing of foetal autonomy and maternal autonomy that may, in concrete circumstances, result in the prioritising of one over the other.

For common law jurisdictions, the basic position in relation to the legal status of the unborn child is circumscribed by what is known as the “born alive” rule. This rule ordains that, excluding statute, a person cannot be held responsible for injuries inflicted on a foetus in utero unless and until it is born alive.

On a charge of murder or manslaughter it must be shown that the person killed was one who was in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb although it may be the statutory offences of child destruction or abortion. If however the child is born alive and afterwards dies by reason of an unlawful act done to it in the mother’s womb or in the process of birth, the person who committed that act is guilty of murder or manslaughter according to the intent with which the act is done.3

There was some initial indecision about how the common law would regard the killing or injury of the foetus in utero. The earliest authorities did not require that a child be born alive in order for its killing to be unlawful. Henry of Bracton wrote: “if one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide”.4 Fleta, an epitome of Bracton from around the end of the thirteenth century, not surprisingly, agreed with him.5 Later authorities, however, did not tend to support this view. William Staunforde, William Lambarde, Andrew Home, Edward Coke, Matthew Hale, William Hawkins and William Blackstone6 all held some variety of the doctrine that while the

---

encompassing of the death of the child in the woman might support some criminal charge, it would not be one of homicide.

However it may subsequently have been conceptualised, the born alive rule began life as a rule of evidence: “if [the child] be dead born it is not murder, for non constat, whether the child were living at the time of the batterie or not, or if the batterie was the cause of the death.”

Given the state of medical and obstetrical knowledge of the period, it often could not be known with certainty if a woman was pregnant; if it was reasonably clear that she had been pregnant, it could not be known with certainty if the child was still alive in her womb; and if a child was stillborn, it was difficult to establish definitively that any given action had been the cause of its death.

Obviously, the circumstances in which the born alive rule came to be and to operate no longer obtain. Given this, it might seem unreasonable for the law to resist its disestablishment. In the U.S.A., the rule has indeed been abrogated in many states, first in civil law and, more recently, in criminal law; but it still persists in English law. In fact, the rule has become so well established in English law that Ian Kennedy and Andrew Grubb, authors of the authoritative Medical Law, feel justified in saying that “the ‘born alive’ rule is now unassailable in England”.

In the context of tort law, the born alive rule (together with its implication that the unborn child lacks legal personality) causes conceptual difficulties in negligence cases in which damages are sought for injuries inflicted upon a child in utero. The initial attitude of the courts to such claims for damages was consistent with the born alive rule and was clearly expressed in *Walker v. Great Northern Railway Co. of Ireland* a case in which a claim for damages was made against a transport company for damages inflicted upon the plaintiff who, at the time of the accident, was *en ventre sa mere*. Declining to award damages, O’Brien J. held that, at the time of the accident,

the plaintiff had no actual existence [and] was not a human being ... the plaintiff was then *pars viscerum matris*, and we have not been referred to any authority or principle to show that a legal duty has ever been held to arise towards that which is not in esse in fact and has only a fictitious existence in law, so as to render a negligent act a breach of that duty.

---

7 Sims’ Case, the English Reports, Vol. LXXV, King’s Bench Division IV 1075.
9 *Walker v. Great Northern Railway Co. of Ireland* (1891) 28 L.R. (Ir.) 69.
10 ibid. at 88.
The intuition of contemporary judges is that it would be patently unjust not to award damages in such cases. Some 40 years after *Walker*, in *Montreal Tramways v. Léveillé*, the judges thought it proper to diverge from the principle of *Walker* and to award damages to the plaintiff. How was this to be done without conceding a legal personality to the unborn child? Cannon J. thought it unnecessary to consider the rights of the child whilst in its mother’s womb between the time of conception and birth. His view was that the cause of action arose when the damage was suffered and not when the wrongful act was committed. The plaintiff’s right to compensation came into existence only when she was born with the bodily disability from which she suffered; it was only after birth that she suffered the injury and it was then that her rights were encroached upon and she commenced to have rights.

This theory of a contingent retrospective duty exhibits some conceptual difficulties. It would seem to be a basic principle of tort law that if Y sues X for damages and the claim is to have any merits, X should have injured Y and not merely injured some other entity that is contingently associated with Y. But on the theory of recovery based upon the notion of a contingent retrospective duty, X will have physically injured Y (at time \(t-1\)) but cannot be sued by Y (at time \(t-1\)) yet can be sued (at time \(t\)) by \(Y^*\) (Y’s successor), whom he did not injure at that time! The real fiction here would appear to be not that of pretending that the foetus is a person in law but rather that of refusing to recognise that the foetus and the child are biologically continuous. Why not, then, just abandon the fiction and accept the factual and legal identity of foetus and child? The answer to this question appears to be that to do so would grant a measure of legal personality to the unborn child and so would justify not only the pursuit of damages by the child against third parties but also the pursuit of damages by the child against its own mother. This would put mother and child in an adversarial relationship.

Mother-child litigation in this context raises a most perplexing legal problem. Because the existence of mother and foetus are inextricably bound at the time of the alleged negligent act, the pedigree underlying the child’s right to sue is less obvious.

---


12 ibid. at 357

13 Kerr at 14-15. In a recent Scottish case, *Kelly v. Kelly*, the judges noted that “if the foetus had the right to its own protection which could be vindicated on its behalf by interdict there would be no reason why it should be confined to cases of abortion. If such a right existed it could be used as the basis for a father taking legal action with a view to restraining the mother from some form of activity which was claimed to be harmful to the foetus—such as smoking, and certain sports and occupations.” (*Kelly v. Kelly* [1997] S.L.T. 896 at 901.)
England

The attitude of the English courts to this possibility of mother and child as legal adversaries can be seen in *Re F. (in utero).* In this case, a local authority was concerned that a mentally disturbed, nomadic woman who was pregnant would not take care of or provide appropriate medical attention for her child at and after birth. The local authority made an ex parte application to have the foetus made a ward of court. Hollings J. refused the application, holding that the Court had no wardship jurisdiction over an unborn child. The case went on appeal to the Court of Appeal, which unanimously affirmed his decision. Hollings J. was satisfied that “there would be a repugnance on the part of a right thinking person in certain instances to think of applying the principle of paramountcy in favour of the child’s welfare at the expense of the welfare and interests of the mother.” Agreeing with Hollings J., May L.J. was of the opinion that there would be “insuperable difficulties if one sought to enforce any order in respect of an unborn child against its mother, if that mother failed to comply with the order. I cannot contemplate the court ordering that this should be done by force, nor indeed is it possible to consider with any equanimity that the court should seek to enforce an order by committal”.

Clearly, in this case, there was a reluctance on the part of the Court to impinge on the woman’s autonomy. Ten years later, however, the matter was treated somewhat differently in *St George’s Healthcare NHS Trust v. S.* This case concerned a 36-weeks-pregnant woman who was diagnosed as having pre-eclampsia. She was advised of the need for bed rest and an induced delivery, which advice she rejected. She was admitted to a mental hospital against her will and, still refusing to consent to treatment, had a Caesarean section performed on her, the hospital authorities having applied ex parte to a judge in chambers and having received a declaration which dispensed with the need for her consent to treatment.

Handing down the judgment of the Court, Judge L.J. remarked that, leaving to one side those occasions where the necessity for consent may be dispensed with on the basis of incapacity, it still did not follow that a woman was entitled to put at risk her ‘healthy viable foetus’. “Whatever else it may be”, he said, “a 36-week foetus is not nothing: if viable it is not lifeless and it is certainly human.” He cited the words of Lord Hope of

---

15 ibid. at 131.
16 ibid. at 138.
18 ibid. at 45.
Craighead in the *Attorney-General’s Reference (No. 3 of 1994)* to the effect that the Human Fertilisation and Embryology Act 1990 reminds us that “an embryo is in reality a separate organism from the mother from the moment of its conception ... the foetus cannot be regarded as an integral part of the mother.”19 He put the point at issue very sharply when he asked: “If human life is sacred, “why is a mother entitled to refuse to undergo treatment if this would preserve the life of the foetus without damaging her own?”20 A good question, and one that deserves, but does not receive, a good answer. Recalling the case of *Winnipeg Child and Family Services (Northwest Area) v. DFG*,21 he cited with approval the judgment of McLachlin J. in that case to the effect that “To permit an unborn child to sue its pregnant mother-to-be would introduce a radically new conception into the law: the unborn child and its mother as separate juristic persons in a mutually separable and antagonistic relation.”22

Kennedy and Grubb, reviewing the current status of English law, are of the opinion that the courts “will not force a competent pregnant woman to undergo medical treatment or other interventions for the benefit of her unborn child.”23 Others are not so sanguine. Emma Pickworth thinks that the decision of the House of Lords in *Attorney-General’s Reference (No. 3 of 1994)* “raises the possibility that English law will follow that of the United States in extending criminalization of those who harm a foetus.”24 Whatever about the merits of the extension of such criminalisation to third parties, Pickworth does not think it advisable to extend such criminalisation to pregnant women, characterising such a policy as “backward-looking, self-defeating and illogical.”25 Apart from following the example of the United States, there are two other reasons why English law might criminalise those actions or omissions of pregnant women that have the effect of damaging their foetuses. The first is that “the decision [in Attorney-General’s Reference (No. 3 of 1994)] shows little reasoning why criminalization of injuries to the foetus born alive should be limited to homicide ... Nor does it necessarily prohibit criminalization of pregnant women who causes [sic] the injuries to a foetus”.26

---

21 *Winnipeg Child and Family Services (Northwest Area) v. DFG* 3 B.H.R.C. 611
23 Kennedy and Grubb, p. 1505.
25 ibid. at 473.
26 ibid. at 475.
The second is that the Attorney-General’s Reference (No. 3 of 1994), taken together with some civil cases, demonstrates, in Pickworth’s view, “a willingness of the courts at the highest level to condemn maternal treatment of the unborn child.”

Broadly in agreement with Pickworth’s views are Sara Fovargue and José Miola, who claim that recent trends in English law in relation to court-ordered Caesarean sections have received unwitting support from the decision of the House of Lords in the Attorney-General’s Reference (No. 3 of 1994). They argue that “when the decision in the Attorney-General’s Reference (No. 3 of 1994) is combined with the recent court-ordered caesarean cases, and despite explicit judicial statements to the contrary, there is an underlying trend within the judgments to accord precedence to foetal protection over maternal autonomy.”

The authors analyse common law and statute law, claiming that the Abortion Act 1967 emphasised maternal autonomy “until the recent decisions regarding court-ordered caesarean section have served to reverse that trend…The caesarean section decisions are, it is suggested, at odds with both the criminal and civil law and represent dangerous interventions into the autonomy of pregnancy”.

Ultimately, what Fovargue and Miola are worried about is the judicial recognition of a foetus having legal personality and the impact that such a recognition could have on the autonomy of pregnant women. While acknowledging that some commentators, such as John Keown, have held that the common law prohibited abortion primarily for the protection of the foetus, they believe that both the common law and statute also served to protect women. With the introduction of the Infant Life (Preservation) Act in 1929, the scales were tipped for the first time in the direction of maternal rather than foetal welfare. “[N]otwithstanding the fact that the Act continued the serious view taken of child destruction and abortion, as evidenced in the O.A.P.A. [Offences Against the Person Act], it was the first statute to permit abortion, albeit in very circumscribed situations, and therefore acknowledged the existence of both foetal and maternal interests in relation to pregnancy.”

---

27 Pickworth at 476.
29 ibid. at 266.
30 ibid. at 273.
31 ibid. at 269.
The tipping of the balance between maternal and foetal interests in favour of the maternal interests was, they believe, further and dramatically altered by the Abortion Act 1967. Now, however, the balance between maternal and foetal interests that appeared to have tilted so decisively in favour of the woman as a result of the Abortion Act 1967 and a whole slew of subsequent cases appears to be moving back in the direction of the foetus. They note that the judgment of the House of Lords in Attorney-General’s Reference (No. 3 of 1994), which held that a foetus may be the object of an unlawful act, has the effect, presumably unintended, of granting a measure of legal personality to the foetus.

The danger is that, even though the foetus has no theoretical legal personality, this assumption will be, and has been, eroded in the minds of the courts ... If the courts continue to personalise the foetus, thereby granting it the rights and interests of a legal persons, then it is logical that the foetus must be protected from all harm, including that inflicted by the mother.

Under English law, could there be a successful criminal prosecution of a pregnant woman for damage inflicted by her on her child while that child was in utero, such as was seen in the American case of Whitner? (See below.) For Fovargue and Miola, the answer to this question is unclear. They suggest that their fears might be allayed if the criminal law followed the pattern set by the civil law under the provisions of the Congenital Disability (Civil Liability) Act 1976. Under this Act, a mother cannot be liable to her child (unless the injury arises from a car accident) and so “the civil law has achieved an adequate balance between providing a remedy for the injured foetus and the rights of the pregnant woman”, whereas “the criminal law has left the question of the potential liability of a pregnant woman for her foetus not so much unanswered but unasked.”

U.S.A.

The born alive rule held sway in the U.S.A. much as it did in England, and the position of the law in regard to third-party negligence claims was more or less identical to that which obtained there. In Dietrich v. Inhabitants of Northampton, the Massachusetts Supreme Judicial Court refused to consider an award of damages for injuries sustained by a five-month old foetus, subsequently born alive, whose mother tripped on a badly made

---

32 “... by omitting reference to the needs of the healthy foetus, the Act implies that the legislature regards only the mother’s interests as relevant to the abortion decision”. J. E. S. Fortin, “Legal Protection for the Unborn Child” (1988) 51 M.L.R 54 at 65.
33 Fovargue and Miola at 287-288.
34 ibid. at 293.
pavement. Sixty-two years passed before the rule denying recovery in such cases was changed. There were two reasons for the change in policy: first, the Court recognised the medico-biological fact that the foetus and mother are two individuals; and, second, the Court was struck by the absurdity of recognising the foetus as a separate entity under inheritance law while denying it such recognition in tort law. Now all U.S. jurisdictions allow recovery in such cases, and indeed most have further expanded tort law to allow a personal representative of the injured foetus to sue where that foetus is not born alive but would have been entitled to sue had it been born alive.

There has been a progressive relaxation, in some cases an abandonment, of the born alive rule in almost half of the United States. In 1984, in the case of Commonwealth v. Cass, the Massachusetts Supreme Judicial Court became the first court explicitly to abandon the born alive rule. In the same year as Cass, the Supreme Court of South Carolina held, in State v. Horne that it would be inconsistent to allow for the recovery of damages for wrongful death in civil cases while refusing to recognise a corresponding crime. In 1994 the Oklahoma Court of Criminal Appeal, in Hughes v. State, abandoned the common law approach, saying it had no difficulty finding that a viable foetus was a human being for the purposes of the state’s first-degree manslaughter statute.

In State v. Ashley, the Court, while recognising the uniqueness of the relationship between a mother and her foetus, held that “we are not persuaded that based upon this relationship, a mother’s duty to her fetus should not be legally recognized.” The Court argued that since there could be no principled objection to holding a mother answerable in negligence to her child after its birth, it would be illogical not to provide redress for such injury just because it occurred some hours, days or months before birth.

A recent case has threatened to smudge the clear distinction between actions by second and third parties. In Whitner v. State, a woman pleaded guilty to, and was convicted of, criminal child neglect for causing her baby to be born with cocaine metabolites in its system because she took crack cocaine during the last trimester of her pregnancy. The Supreme Court of South Carolina held that it would be absurd to recognise a viable foetus as a person in the context of homicide laws and wrongful death statutes, but not in the context of statutes outlawing child abuse. In arriving at its

---

decision, the Whitner court explicitly distinguished itself from the Massachusetts case of Commonwealth v. Pellegrini in which the Massachusetts Superior Court had dismissed similar charges against a woman on the grounds that to find a mother criminally liable for such injury would violate her right to privacy. The Court expressed its rationale as follows:

If, as Whitner suggests we should, we read Home only as a vindication of the mother’s interest in the life other unborn child, there would be no basis for prosecuting a mother who kills her viable fetus by stabbing it, by shooting it, or by other such means, yet a third party could be prosecuted for the very same acts. We decline to read Home in a way that insulates the mother from all culpability for harm to her unborn child.

Alison M. Leonard, in her article on this topic, holds that in distancing itself from the Pellegrini decision “the Whitner court expressly refused to recognize a distinction made by Massachusetts and other jurisdictions; that third party injury to the fetus is actionable, but injury by the mother is not”.

Actual harm to an unborn child is one thing; possible harm is quite another. Yet this was precisely the point at issue in In re Unborn Child. This case concerned a woman, Sierra K, who was found to have permanently neglected her first four children so that they were removed from her care. She had a fifth child, who was born with a positive toxicology for cocaine. After testing positive for crack cocaine, and admitting prenatal drug use, Ms K surrendered this child. The Court ordered that she attend and participate in a drug abuse rehabilitation programme, refrain from the use and possession of any illegal drugs, and attend and participate in a parent effectiveness training programme. At the time of the case she was pregnant with her sixth child but had not complied with the terms and conditions of the court order. A petition was filed by the Legal Aid Society of Suffolk County seeking summary judgment that Ms K’s unborn child was derivatively neglected based on Ms K’s history of drug abuse and child neglect.

Counsel for Ms K argued that no legal personality had been conferred on the unborn child: Freundlich J. thought otherwise. He noted: “The courts have moved from the position that no duty is owed to the unborn to allowing recovery for injury to a fetus who is subsequently born damaged or who, after birth, dies due to pre-natal injury.”

---

43 Whitner v State 492 S.E.2d 777 (S.C. 1997) at 783.
46 In re Unborn Child at 369.
added that the Wisconsin Court of Appeals in the case of State of Wisconsin ex re. Angela M.W. v. Kruzicki upheld as constitutional an order for the protective custody of a viable foetus, which, “by necessity, required the custody of the mother as well”, and concluded:

It is inconceivable that the legislature would intend a fetus to have property rights and causes of action sounding in tort, but not be protected against threats to its safety or life, from its own mother, while in utero ... It defies logical reasoning that our laws and society would preclude a mother from illegally introducing narcotics and other illegal drugs into her child and yet not protect the unborn child from those same dangers while the child is still in the womb.

These cases raise questions about the nature and extent of society’s interest in foetal life, questions that are difficult to answer. Would a woman be open to criminal sanctions if, carrying a foetus she could legally abort, she knowingly took drugs that caused severe harm to her child later born alive? Cari Leventhal believes that

it is illogical to impose criminal penalties upon a woman for harming a fetus that she could legally abort ... Allowing a woman to legally have an abortion at this time but to render her criminally liable for harming her fetus through the use of drugs or other inappropriate behaviour is inconsistent.

Suppose that, having damaged her foetus by taking these drugs, a woman were to try to avoid liability by having a (legal) abortion, would her earlier crime have to be considered as not having been committed? Murphy S. Klasing remarks:

Although many courts try to explain that abortion law is separate and distinct from tort or criminal law, there would be an ‘inherent conflict in giving the mother the right to terminate the pregnancy yet holding that an action may be brought on behalf of the same fetus under the wrongful death act.’

Taking everything into consideration, it is difficult to avoid the conclusion that the law in this area is conceptually confused.

Some abortion-rights defenders see the relationship between the respective rights of pregnant woman and foetus as something of a zero-sum game: the more rights accorded

---

47 ibid. at 370.
48 ibid. at 371.
to the foetus, the fewer to the pregnant woman. Julienne Rut Siano believes that this is a mistake:

Roe is not analogous to wrongful death actions and should only be applied in abortion cases. Justices O’Connor, Kennedy, and Souter stated in Planned Parenthood v. Casey that ‘abortion is a unique act’ and ‘though abortion is conduct ... [the] liberty of the woman is at stake in a sense unique to the human condition and so unique to law.’

Despite this affirmation by the Supreme Court of the uniqueness of abortion, which leads to it being treated in law in a singular manner, not every court is similarly persuaded that the circumstances underlying wrongful death actions and abortions are clearly and distinctly separate. Siano notes: “Some courts find it difficult to interpret wrongful death statutes to include a nonviable fetus and at the same time allow a woman to willfully [sic] terminate her pregnancy.”

Having reviewed a number of significant cases relating to the development of tort law in relation to foetal injury and death, some well known, others not so well known, Marilyn G. Hakim concludes that the “recognition of the fetus as a viable entity, with interests and rights separate from and sometimes, conflicting with those of the mother, is now well established in tort law.” The legal recognition of the rights of the foetus, while achieving its first significant foothold in tort law, has now moved beyond this beachhead into the area of criminal law. Though the early attempts to prosecute pregnant women were initially resisted by the courts, Hakim claims that the recent cases of Whitmer, Ashley and Zimmermann are evidence of a trend towards supporting criminal sanctions against pregnant women for injuries caused by them to their foetuses. “The issues raised by these cases put the rights of the unborn child at direct odds with those of the pregnant woman.”

A pregnant woman can open herself to criminal prosecution if she ends the life of her foetus other than by means of a legal abortion: Kawana Ashley was convicted of manslaughter for causing the death of her foetus by shooting herself in the stomach; in

---

52 ibid. at 291, citing Toth v. Goree 237 N.W. 2d 297 at 301.
55 State v. Zimmerman 1996 W.L. 858598 (Wis.Cir. Sep 18, 1996). Although the ruling of the court of first instance in the Zimmermann case was reversed after her article had been published, the points made by Hakim remain essentially unaffected.
56 Hakim at 111.
1998, Ayana Landon was awaiting trial on a charge of homicide for a self-induced miscarriage that led to the death of her born-alive son. Alison Tsao asks: “Should a pregnant woman get more lenient treatment than a third party, or perhaps, no punishment at all, simply because it is her fetus nestling within her womb? Many courts have answered in the negative.”²⁵⁷ Probably speaking for many, she says that cases of maternal-induced foetal homicide “are deeply unsettling, legally as well as emotionally. Assuming that the fetuses were not viable, both women could have gotten a legal abortion ... Yet they are charged with criminal fetal homicide for killing their fetuses by a non-state approved method”.²⁵⁸

Summary conclusion
In England, the born alive rule appears, at present, to be unassailable. As a consequence, as Re F. (in utero) showed, English courts appear to be unwilling to adopt or support an interventionist strategy in cases of possible conflict between the rights of pregnant women and the rights of their unborn children; and despite the misgivings of many commentators about the implications of St George’s Healthcare and the Attorney General’s Reference (No. 3 of 1994), Kennedy and Grubb believe that non-interventionism is still the order of the day in England. In the U.S.A., on the other hand, the born alive rule has been progressively abandoned (though not in all states) and, consequently, the courts have moved from a generally non-interventionist position to (in Whitmer and in In re Unborn Child) quite a strong interventionist position.

What will be the attitude of Irish courts if such cases come on here? In the case with which this paper began, Finnegan J. did not, in the end, have to make an order requiring the pregnant woman to facilitate treatment beneficial to her unborn child. However, his willingness to make such an order and his willingness to make “much more serious orders” affecting the pregnant woman’s personal bodily integrity if she refused to give birth in hospital would seem to indicate that our courts would be willing to adopt an attitude more consonant with the interventionist American model than with the non-interventionist English model. Whether they would be willing to intervene as strongly as some American courts have done remains to be seen.

²⁵⁸ ibid. at 477.