2011

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Roxanne Mykitiuk
_Osgoode Hall Law School of York University, rmykitiuk@osgoode.yorku.ca_

Dayna Nadine Scott
_Osgoode Hall Law School of York University, dscott@osgoode.yorku.ca_

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RISKY PREGNANCY: LIABILITY, BLAME, AND INSURANCE IN THE GOVERNANCE OF PRENATAL HARM

ROXANNE MYKITIUK & DAYNA NADINE SCOTT

I. INTRODUCTION

Feminist theory has exposed the body of the pregnant woman as one that is continuously made into the object of analysis and regulation, and feminist scholars have sought to understand the evolving contestation over the boundary between the woman and the fetus: the life sometimes conceptualized as part of her and other times as carried with her. Together, they are “not-one-but-not-two.” Always marked by race, class and ability, as Johnson notes, “the pregnant body is sometimes celebrated, sometimes reviled,” and, as we will argue, always judged.

As historian Barbara Duden has shown, the state of “expecting a baby” has been transformed in recent years from one of “being in good hope” to

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1. Associate Professor, Osgoode Hall Law School.
4. Johnson, supra note 1 at 158.
one of being in a state of bad expectation. Pregnancy is increasingly conceptualized as a risky state and the pregnant body is exposed as a site of risk governance and management wherein the principle aim is to protect the health of the developing fetus and to protect it from harm. Risk governance and management strategies aimed at protecting the fetus are carried out through a number of practices (e.g. surveillance and discipline) and a number of discourses (including medical, cultural, and legal) which we document and analyze throughout this article.

This article has four parts. In Part II, we situate techniques of risk governance within the current governmentality literature and examine them as part of a neo-liberal political project that has the effect of “individualizing” risk. In Part III, we explore how contemporary medical, public health, and popular-cultural discourses operate as techniques of risk governance “through which individuals are brought to work on themselves” and demonstrate how these are extremely successful at accomplishing the translation between risk and blame in the context of pregnancy. In Part IV, we examine situations where pregnant women have refused to govern themselves in expected ways, in line with protecting the health of the fetus. In this context, we examine the current legal regime in Canada through which maternal responsibility for fetal exposure to the risk of harm and maternal liability for harm to the fetus and child once born, resulting from “risky” behaviours in pregnancy, are established and assessed. As we demonstrate, the most recent Canadian jurisprudence of the highest-level courts appears as a site of resistance in the trend towards translation from risk to blame in the context of the governance of maternal behaviour during pregnancy.

Finally, in Part V, we consider Alberta’s Maternal Tort Liability Act, which provides an exception to the common law by granting a civil cause of action to a child who sustains prenatal injuries as a result of the negligent use

9 SA 2005, c M-7.5 [MTLA].
or operation of a motor vehicle by the child's mother during her pregnancy (but limits that liability to circumstances in which the child's mother has motor vehicle insurance). Here, and in the final section, we explore the connections between liability and insurance raised by the Alberta example, and the extent to which they challenge the conclusion that linking risk with blame is necessarily an individualizing move. In the end, however, we note that liability inevitably comes with blame.

We attempt in this article to take up a scholarly task articulated by Hannah-Moffat and O'Malley: to pay attention to the processes through which risk governance techniques "create gendered subjectivities and to how risk regimes produce inequalities, undermine gains and reconfigure social and individual problems." In addition, this case study invites a further consideration of the role of law in neo-liberal governance, especially in light of the widespread refusal by courts to interpret and apply common law doctrines that would assign blame for harm where women have undertaken allegedly risky behaviours during pregnancy, and in light of the legislative development in Alberta in circumstances involving motor vehicle insurance.

II. CONSTRUCTIONS OF RISK AND RISK-BASED GOVERNANCE

There is a growing body of scholarship that treats "risk" as a technique of law and governance. Governing with risk is seen as a means of channelling institutional practices and systems into a pattern that begins with assessment and

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10 Kelly Hannah-Moffat & Pat O'Malley, "Gendered Risks: An Introduction" in Hannah-Moffat & O'Malley, supra note 5, 1 at 25.

moves through *prediction* to *management*. The effect is argued to transform the pervasive uncertainties and indeterminacies generated by the interaction of complex social and biological systems into calculable probabilities of harm subject to management. The technique of risk governance is often viewed as a mechanism for making people more individually accountable for risk, and concomitantly, the technique is often tied directly to a neo-liberal political project. Socio-legal scholars have noted in recent years an increasing tendency of actors to both conceive of and address problems in the language of risk. At the same time, they acknowledge a "change in the way risk is articulated and deployed." However, many of these socio-legal scholars working in a mode of "governmentality" reject the premise that risk-based government is a new

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15 O'Malley, *supra* note 11.


17 Foucault coined the term "governmentality" to refer to the techniques and justifications through which "government"—in the sense of the whole array of programs, practices, policies and procedures by which both state and non-state actors seek to control the con-
technique and that risk consciousness is universally growing in response to scientific and technological advances. Instead, they argue that “risk is a variable technique of government”, and that we, in recent history, are witnessing the replacement of the “social” or “collective” forms of risk governance that dominated in the welfare era with “individualizing” forms. What is new about contemporary risk governance techniques is “the sense that ordinary people should exhibit some sort of responsibility for, and even expertise in managing, risk.”

According to the governmentality school, current forms of risk governance tend to create “an obligation to act in the present in relation to the potential futures that now come into view.” As Nikolas Rose explains,

By recognizing the impossibility of certainty about the future, [risk thinking] simultaneously makes this lack of certainty quantifiable in terms of probability. And once it has quantified the probability of a future event's occurring, decisions can be made and justified about what to do in the present . . .

The notion of “the future” as something amenable to alteration informs the conception of risk as a means of calculating and managing the uncertainties of the future. It is “a switch from a reactive to an active orientation toward uncertainty.”

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18 O'Malley, supra note 11 at 301.
19 Hannah-Moffat & O'Malley, supra note 10 at 2.
This focus on calculation means that risk governance is often portrayed as “amoral.”

Risk governance is often portrayed as “amoral.” Risks are held up as simple “realities,” and any behavior that denies, ignores, or resists them can be safely dismissed as “irrational.” However, “while the discourses and practices of risk-based government” are claimed to be “technical and thus neutral,” others contend they must be treated as “thoroughly imbued with politics.” At the same time, those politics are not always obvious. There is a heterogeneity to risk-based techniques: “they can operate differently in different contexts.”

Contemporary risk-based governance also tends to focus on individual “empowerment”—the “attitudinal and knowledgeable reformation of individuals” through risk communication techniques so that individuals may make “informed decisions” about risk. Consistent with a core idea of governing in contemporary liberal-democratic states that individuals should be free to control themselves and govern their own lives, the governance of individual subjects aims to promote processes of self-regulation and create the circumstances under which people may effectively govern themselves. “When law aligns with liberal governance,” as Weir notes, “it secures citizens as autonomous subjects with civil rights and freedoms guaranteed by the de-

24 O’Malley, supra note 11 at 294.
25 Ibid.
31 Mykitiuk, supra note 14 at 312.
mocratic sovereign.” This autonomous, self-regulating subject exercises his or her choices informed by expert knowledge, voluntarily seeking to maximize its opportunities and minimize its risks, allowing the state, optimally, to govern from a distance.

It is easy to see how this change is thought to introduce “new moralities of responsibility and accountability at multiple levels of society.” Most important for this article is Mary Douglas’ demonstration of the way in which the apparently “neutral” risk discourse carries undercurrents of blame and responsibility. In Douglas’ cultural approach to risk, “[w]hatever objective dangers may exist in the world, social organizations will emphasize those that reinforce the moral, political or religious order that holds the group together.” Thus even where the constructions of “risky” behaviour are framed as being objective and thus morally neutral, they necessarily work to define the parameters of morality and blameworthiness.

Several writers have demonstrated that risk has become a central concept “around which health in Western society is described, organized, and practised, both personally and professionally.” In the clinical context, risk is determined based on the characteristics of individuals, while in the epidemiological context, it is determined by observing patterns of disease in popula-

tions, and by identifying associated risk factors. However, as Lupton notes, both approaches render risks as "calculable and governable, thus bringing them into being as problems that require action."38

Through these techniques, pregnant women are being advised about, trained in, and made responsible for the management of risks.39 They are assigned to "risk categories," rather than treated as unique cases. Indeed, risk techniques were attached to pregnancy and childbirth as early as the 1950s with the intent of reducing perinatal mortality and morbidity: "whatever arguments are made about apparent moral neutrality, the value implications here are frequently near the surface, as with the moral (and sometimes legal) governance of those pregnant women deemed to expose their fetuses to risks."40 In fact, Deborah Lupton counsels us to pay attention to the political purposes to which risk discourse is put. The normative message is that it is the responsibility of the individual to avoid health risks, not just for our own safety, but for that of society.41

A consequence of this technique of governance is that the focus is placed on judging women's behaviours rather than their intentions or motivations.42 "Ironically, while government can appear morally neutral in this process, the individual's failure to govern risks becomes morally reprehensible or irrational."43 An outcome or event that may once have been viewed as "bad luck"—based on chance alone—is transformed into an event that is predictable and thus governable.44 The modern use of risk has, as Lupton explains, a "forensic' property"; it "works backwards in explaining ill-fortune, as well as

38 Ibid.
40 O'Malley, supra note 11 at 295.
41 Lupton (1993), supra note 36 at 429.
42 O'Malley, supra note 11 at 293.
43 Ibid at 295.
44 Samerski, supra note 5.
forwards in predicting future retribution."45 The fact of harm to the fetus—the absence of the “normal, healthy” state—is given as evidence that the expectant mother failed to comply with the relevant directives to reduce risk, and therefore can comfortably be assigned blame.46 The question of how these risks become individualized and successfully transferred to the expectant mother is taken up in the next section.

III. GOVERNING PREGNANCY

How do risky behaviours in pregnancy translate into the assignment of blame and responsibility to mothers? We argue that this occurs by both informal and formal means. Lealle Ruhl has examined how the process of risk-responsibilization works in pregnancy to create risk-conscious women.47 As she demonstrates, risk techniques have been instrumental in shifting focus from the woman to the fetus, and in placing responsibility on the woman to become knowledgeable and competent to manage the risks to her future baby. The pregnant woman is now expected to actively engage in various gendered practices of risk detection and regulation.

A. SLIPPAGE AND EASY TRANSLATION: MEDICAL AND POPULAR DISCOURSES

Risk discourses, both medical and popular, fuel an insidious encroachment into pregnant women's lives through the informal governance of their “lifestyle” choices, health behaviours, and decisions about prenatal care. Nowhere in medicine, claims Samerski, has risk-thinking been so powerful (and so seemingly effective) as in prenatal care.48 This is certainly a phenomenon mediated by class considerations, as working-class women are less able to conform or to appear to conform to the high standards of behaviour ex-

46 Lupton (1993), supra note 36 at 430.
48 Samerski, supra note 5.
pected of a potential mother. For example, women who smoke or drink alcohol during pregnancy are subject to intense public scrutiny, as they are constantly judged by family, friends, and strangers, in a transformation of pregnant bodies into objects of public concern. This pervasive surveillance places the woman in a panopticon of observation and regulation of her choices, leading to situations in which she may begin to self-regulate in response to these perceived pressures.

Constructions of “risk” surrounding and constituting pregnancy discourses are instrumental to the self-governance and self-discipline of the pregnant body by the informal techniques of governance acting on women’s bodies. The fetus is often represented as a vulnerable entity whose future existence, health, and well-being lie in the hands of the pregnant woman. However, in what is effectively a contradiction of this sole responsibility, pregnant women are also expected to entrust their bodies to the expertise of the medical community to regulate the fetus in a “responsible” transfer of control to experts. Throughout their pregnancy and labour women are encouraged, even expected, to seek the expertise of health-care experts who evaluate, monitor, and regulate the fetus through a range of techniques including ultra-sound, genetic screening and testing, amniocentesis, and fetal

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50 See Lupton (1999), supra note 37 at 68. It should be noted that the experience of women in the care of an obstetrician might be very different from the experience of women under the care of a midwife. Midwifery often takes a very different approach to risk than does obstetrical care, and, in fact, many women report that they seek a midwife in an explicit attempt to distance themselves from many of the risk practices described here. See e.g. Brenda Lane, “Midwife or Obstetrician: How to choose between a midwife and an obstetrician for your birth” (4 January 2007), online: Suite 101 <http://www.suite101.com>; Charlotte Grayson, “Choosing a Pregnancy Practitioner” (21 January 2002), online: MedicineNet <http://www.medicinenet.com>. There is also an indication that some midwives who work with vulnerable populations (e.g. drug and alcohol users and smokers) do not automatically counsel women to stop use during pregnancy. See Diane Phillips et al, “Factors that Influence Women’s Disclosures of Substance Abuse During Pregnancy: A Qualitative Study of Ten Midwives and Ten Pregnant Women” (2007) 37 Journal of Drug Issues 357 at 364. We are grateful to an anonymous reviewer for these insights.
While we seek to expose and investigate the selection and construction of "risks" and the interests that such discourses of risk serve, this is not to deny that "real" risks may exist in pregnancy, some of which may be associated with some maternal behaviours. It is the taken-for-grantedness of risky pregnancy constructions that must be interrogated; the invisibility of "pregnancy risk" as a discourse indicates how thoroughly embedded and pervasive it is in our culture and within our informal regulatory institutions.

The "pregnancy risk" discourse thus governs the range of options available for women in terms of their behaviour in pregnancy, and carries with it evaluative judgment and blame when the technical and purportedly "amoral" rules for a safe pregnancy are not followed. O'Malley suggests that contemporary risk techniques are part of a movement towards a model of regulation that is "categorical and predictive." Thus, risk governance focuses mainly on behaviours and general "harm reduction" using statistics rather than direct moral persuasion. Ours is the generation of "statistically graded pregnant women", according to Rapp.

A prominent example of this type of statistically-graded risk categorization comes from medical practice in relation to offering screening to pregnant women for Down syndrome and other common fetal anomalies. Because currently available screening methods are non-invasive to the fetus and minimally invasive to the mother, it has become standard practice in Canada to offer such prenatal screening to all pregnant women. Amniocentesis, differences in practice can exist depending upon whether care is provided by an obstetrician or midwife, with women under the care of midwives often choosing to undergo fewer, different or no prenatal screens or tests. See Suzanne Hope Suarez, "Midwifery is not the Practice of Medicine" (1993) 5 Yale JL & Feminism 315 at 338.

O'Malley, supra note at 294.


which involves a slight risk of pregnancy loss, would only be used to reliably confirm a positive indication from initial non-invasive screening, or as a form of initial screening if the woman’s age at the time of becoming pregnant was forty years or more, at which age the risk of giving birth to a child with Down syndrome is higher than the risk of losing a pregnancy as a result of amniocentesis.\(^6\)

Generally, the separation of governance rationales from an overt moral stance has been seen as responsible for the success of such strategies. However, while they frequently come across as technical and neutral, such strategies simultaneously assign moral blameworthiness to individuals for their failure to prevent risk or harm. This is evident in the risk calculus employed in determining to whom to offer particular types of prenatal screening. Implicit in basing the decision to offer screening on the likelihood of losing a pregnancy as a result of amniocentesis is the idea that it is as “bad” or harmful to give birth to a child with Down syndrome as it is to lose a pregnancy. Thus, a narrow focus on the techniques of harm reduction tends to obscure the moral aspect of this regulation, in this case by not examining the complex and often misconceived implications of giving birth to a child with a disability.\(^5\)

Popular women’s magazines direct pregnant women to eat healthily;\(^5\) be attentive to their levels of folate, calcium, and iron;\(^6\) cut down on coffee;\(^6\) 

\(^{56}\) Ibid at 149.


quit smoking; experts also warn of the dangers of mercury in fish in the same breath as extolling the benefits of the omega-3 fatty acids therein. 

Experts also warn pregnant women of the dangers of mercury in fish in the same breath as extolling the benefits of the omega-3 fatty acids therein. Other everyday, and often unavoidable, activities are described as risky and hazardous in the context of the pregnant woman. Pregnant women are generally encouraged to remain active; however, exercise is considered hazardous to the fetus under certain circumstances.

Experts also warn of the hazards of more benign activities such as lifting, pumping gas, painting the nursery, and even working. Similar advice can be found on the Ontario provincial government's health website. There are links to sites on fetal alcohol syndrome; "active living for moms"; "treating the mother, protecting the unborn"; and a link to the March of Dimes site "during your pregnancy", where women are advised to avoid alcohol, smoking marijuana, a variety of drugs and herbs, abuse, hazardous substances,

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61 See e.g. "Tips," supra note 58 (warning against the risks of first- and second-hand smoke).


64 See e.g. "Tips," supra note 58.

mercury, and rodents. Some of this advice is not just impractical, but insensitive: it ignores social location by treating alcohol use as if it is not caught up in addiction, abuse as if it is not related to power and isolation, and the avoidance of hazardous substances as if pregnant women have the bargaining power in an employment relationship.

The links between formal and informal governance of pregnancy are numerous and often result in a grid of regulation in which the origin of the norm (state or informal) is difficult to discern.6 The example of folate, or folic acid, serves to illustrate. Both direct and indirect means are employed from a public health perspective, aimed at reducing the incidence of neural tube defects. For example, direct state intervention has resulted in an increasing number of food products, such as flour, whole grain breads and pastas being fortified with folic acid. Health Canada states that, “[b]ecause of concern that public education campaigns alone would not be effective in achieving optimal periconceptional folic acid intake for the majority of women," food fortification with folic acid was implemented in December 1996. See Health Canada, “Evaluation of Food Fortification with Folic Acid for the Primary Prevention of Neural Tube Defects" (3 December 2004), online: Public Health Agency of Canada <http://www.phac-aspc.gc.ca/publicat/faaf/chap3-eng.php>. Indirect methods are also employed, with women “of child-bearing potential” repeatedly informed of their “obligations” to take folate supplements not only when pregnant, but also when contemplating pregnancy.
vite individuals to govern themselves, observing and monitoring their own
behaviour through the operation of disciplinary power. 67

This type of governance, which, as Alan Hunt notes, 68 may be regarded as
moral regulation, often does not originate from formal institutions of gov-
ernance but instead can be a bottom-up process which may later be reflected
in formal government policy and adjudication. Moral discourses are less ex-
explicit in contemporary times, functioning instead through their “proxies”:
appeals to avoid technical and supposedly “objective” hazards and harms. 69
Pregnant women are evaluated against a good mother/bad mother standard
by their own practices of harm reduction and risk avoidance, as these con-
cepts are commonly understood. In this way, ordinary lifestyle choices and
consumption of goods are moralized: Women eating junk-food, lifting gro-
cerries, or drinking a glass of wine, have these otherwise “normal” behaviours
transformed and moralized by the discourses of risk that surround their
pregnant bodies. Governance from “below” is ubiquitous. Whether through
chiding from friends, relatives, and strangers for engaging in particular activi-
ties, or through community health projects for expectant mothers, the dis-
course creates moralized subjects (the mother) and objects (the fetus) to be
acted upon with moralizing practices.

Public health projects are another means of governing bodies, with some
persons’ bodies, like those of pregnant women, for example, being more sus-
ceptible to regulation and surveillance attempts. 70 According to Green et al, a
“new psycho-socio-epidemiological model, based on population surveillance,
‘risk’ and healthy lifestyles” has been introduced in recent years. 71 Largely on

16:48 Critical Social Policy 33 at 47.

68 See Alan Hunt, Governing Morals: A Social History of Moral Regulation (Cambridge:
Cambridge University Press, 1999).

69 See Alan Hunt, “Risk and Moralization in Everyday Life” in Ericson & Doyle, supra note
30, 165 at 182.

70 See Alan R Petersen & Deborah Lupton, The New Public Health: Health and Self in the

71 Eileen E Green, Diane Thompson & Frances Griffiths, “Narratives of Risk: Women at
Midlife, Medical ‘Experts’ and Health Technologies” (2002) 4 Health, Risk & Society
273 at 277.
the basis of "health promotion," "we are being subjected to a form of social control based on 'normalizing' health narratives founded on self-regulation, self-monitoring and the avoidance of 'risk,' through developing healthy lifestyles and keeping well." This shift in health policy is thought to have "engendered new internal forms of self-surveillance" as well.

This risk-based social control of pregnant women may extend beyond the time of pregnancy and target all women of child-bearing potential. For example, one report of the United States Centers for Disease Control and Prevention attempts to promote the health of future children by making recommendations that are primarily aimed at all women from menarche to menopause, regardless of whether they intend to become pregnant or not.

The recommendations, which include maintaining a healthy weight and giving up alcohol, could involve a radical change in a woman's life for the benefit of a person that may or may not be born in the future. This policy strategy makes risk avoidance strategies the guiding ethical principle, and both problematically assumes a shared standard of what a "healthy" child is, and downplays health determinants that are not based on individual behaviour, such as poverty, inadequate housing, and lack of health insurance.

Much of the moral regulation of pregnant women materializes through the privileging of expert knowledge. Programs are established which set out exemplary practices for pregnant women—such as eating healthily, taking vitamin supplements, and going for prenatal diagnostic tests—in a reflexive process of establishing and reinforcing discourses of maternal/fetal health and maternal responsibility for minimizing risks. While these programs ap-

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72 Ibid. See also Nettleton, supra note 67.

73 Green, Thompson & Griffiths, supra note 71 at 277.


75 CDC, supra note 74 at 5, cited in Karpin, supra note 74 at 138.

76 See Karpin, ibid at 141, 148–49.
pear at first glance to be technical and based upon care for the health of pregnant women and their unborn children, "there is no neat line distinguishing power from care." Responsibility and blame for the increased possibility of disease or damage is assigned through the technique of risk: As harm is conceptualized as calculable and preventable, the mother becomes blameworthy if she does not engage in approved risk-reduction strategies. The pregnant woman must rely upon the expertise of others to have what is condoned as a "safe" and "responsible" pregnancy: "risk is the calculating concept that modulates the relations between fear and harm." Health promotion based on statistical probabilities in the context of pregnancy can thus be viewed as the imposition of a moral technology. By being made aware of risks, the expectant mother is expected to provide for and discipline the future. As Robertson notes, however, "this experience does not occur in a vacuum; such experience is always situated, located—socially, politically, and historically."

Since the advance of technologies for monitoring fetal development and health, such as ultrasound technologies, previously invisible and embodied processes become more public and open to inspection. Foucault believed that through practices of increasing visibility, the increasingly penetrating medical gaze becomes seen as natural and necessary: "What was fundamentally invisible is suddenly offered to the brightness of the gaze, in a movement of appearance so simple, so immediate that it seems to be the natural consequence of a more highly developed experience." As the physical processes of pregnancy become more visible, and the likelihood of harm more predict-

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78 Ian Hacking, "Risk and Dirt" in Ericson & Doyle, supra note 30, 22 at 27 [emphasis in original].
79 Robertson, supra note 36 at 231.
able, there has been an accompanying responsibilization⁸² upon women for the "riskiness" of their behaviours in pregnancy.

Prenatal screening and diagnostic practices such as amniocentesis, ultrasound tests, and maternal serum screening, among others, are discursive in their re-frames of pregnancy, and while designed to create relief and assurance of safety, also create anxiety.⁸³ The construction of these tests and screens as necessary reconfigures the experience of pregnancy: "[i]n late modernity not to engage in risk avoidance constitutes a failure to take care of the self"⁸⁴ and possible future selves.⁸⁵ Thus risk rationalities not only responsibilize, or create compliant, self-regulating pregnant women, but in the process and by default, they also define and "call into being" "risky" pregnancies.⁸⁶

The impulse to warn pregnant mothers about "risky" behaviours is based on an "assumption that knowledge and awareness of the danger of certain activities will result in avoidance of these activities."⁸⁷ But this view tends not to account for the influence of "sociocultural contexts within which risk perception takes place".⁸⁸ For example, when risk is believed to be imposed on a fetus because of the lack of willpower, addiction, carelessness, weakness, or laziness of the expectant mother, the moral blameworthiness of her act is increased.⁸⁹ As Lupton states:

Ironically, there has been an increasing emphasis upon apprising individuals of their own responsibility for engaging in risky [behaviours] at the same

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⁸² See Hunt, supra note 69.
⁸⁴ Hunt, supra note 69 at 182. See also Lupton, Risk, supra note 14.
⁸⁵ See Myktituik, supra note 14.
⁸⁶ Laurie Adkins, "Risk, Sexuality and Economy" (2002) 53 British Journal of Sociology 19 at 34. See also Weir (2006), supra note 7.
⁸⁷ Lupton (1993), supra note 36 at 426.
⁸⁸ Ibid at 427.
⁸⁹ Ibid at 429.
time as the control of individuals over the risks in their working and living environments has diminished.  

Focus on the individual lifestyle habits of a pregnant woman rather than on other factors, such as the known social determinants of health—a steady income, adequate housing, and social supports—is thought to reflect the general trend towards private responsibility for health. There is a shift from communal notions of health to an individualized or private locus of the problem: the woman's body and behaviour.  

This is characteristic of the project of neo-liberalism and its goals of enterprise and self-care. An “at-risk” consciousness “contributes to the emergence of a particular form of subjectivity—that is a particular way of thinking about, relating to and situating the self in terms of the broader social and political context within which the self is embedded/located.” In fact, the particular subjectivity activated by current discourses on health and risk has been characterized as the “entrepreneurial subject,” capturing the notion, as Robertson argues, that life is an enterprise.  

This consciousness thus demands that individuals, including expectant women, adopt a “calculative and prudent attitude with respect to risk and danger.” Likewise, Nikolas Rose suggests that under neo-liberal regimes of health, “individuals are to become . . . entrepreneurs of themselves, shaping their own lives through the choices they make.” Fault and blame, as we will demonstrate, are cast onto the woman, as the responsibility for the health of

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90 Ibid at 429.
91 See Mykitiuk, supra note 14.
92 Robertson, supra note 36 at 230.
94 Robertson, supra note 36 at 230. See also Petersen & Lupton, supra note 70.
96 Rose (1990), supra note 93 at 226.
her future child becomes privatized. The "duty to be well" that is implied by public health discourses, and the call on individuals to take up and act on risk information, are the conduits of the moral element. In other words, when risks are known, blame easily follows.

The informal translation of risk to blame is situated within the larger changing discourse of health at both a national and global level, reflecting neo-liberal agendas. Women with children harmed in utero may be blamed, as the injury can be conceptualized as the "fault" of the mother based on her own personal choices and her individual failure to protect the fetus. This move transforms health from a social good into a private commodity. However, it is also possible to look at the benefit-conferring properties of risk techniques, particularly those that employ insurance as the risk-pooling mechanism, as we will in Part V, and it is true that some benefits may be distributed through these techniques. Still, these trends towards an individualization and privatization of health reflect global economic trends towards a neo-liberal and risk-based society in which increasing focus is placed upon internal regulation and surveillance.

On the other hand, as Weir and Ruhl have made clear, efforts to enlist women in the governance of their own pregnancies cannot be said to derive solely from neo-liberal ideas about active citizenship, nor do they represent an "autonomous change in medical thought and practice". These efforts must, in part, be attributed to feminist resistance to subordination by "experts": to demands that pregnant women be informed and empowered to not only participate in, but to be in control of, to be made "agents" of, their own experiences with pregnancy and childbirth (as demonstrated by the increase in use of midwife-assisted births). And interestingly, it is concerns about women's autonomy, forwarded by feminists, that has led to the resistance in

97 Monica Greco, "Psychosomatic Subjects and the 'Duty to Be Well'" (1993) 22 Economy & Society 357. See also Polzer & Robertson, supra note 11.
98 Hannah-Moffat & O'Malley, supra note 10.
99 See Mykityuk, supra note 14 at 313.
100 See Weir (1996), supra note 28; Ruhl, supra note 47.
101 Hannah-Moffat & O'Malley, supra note 10 at 10.
the courts to the same translation between risk and blame that is so easily made in the context of medical and popular discourses. In the next section, we detail the trajectory of the Canadian jurisprudence on liability for prenatal injuries to demonstrate how and in what contexts this has happened.

B. RESISTANCE TO TRANSLATION: FORMAL STATE MECHANISMS

In contrast to medical and popular discourses that effectively regulate pregnant women's behaviour through the translation of risk to blame, the judiciary in Canada, in recent years, has been an ardent protector of women's bodily autonomy throughout pregnancy, even when women have not governed themselves in expected ways. The judicial branch, in particular, can be seen as a longstanding source of resistance to the spread of risk-based models in legal decision-making, even in political contexts that regularly employ techniques of risk in informal governance in creating attributions of fault and blame. Though at least one dated Canadian case sought to protect a fetus from the risk of harm by the pregnant woman, in general, Canadian courts at all levels have steadfastly refused to make or enforce the link between risk and blame.

This reluctance to hold a pregnant woman liable for a risk of harm to her fetus can be seen in a number of controversial cases. It is necessary here to distinguish cases where harm to a born alive child has occurred in utero, from cases where there is a risk that such harm may occur to an unborn child. Central to the approach taken by the courts is the fact that in Canadian law, a fetus is not a legal person and does not have a legal identity separate from

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102 O'Malley, supra note 11 at 304.
103 See Re Children's Aid Society of Belleville, Hastings County and T et al (1987), 59 OR (2d) 204, 7 RFL (3d) 191 (Prov Cr (Fam Div)), in which an unborn child was allowed to be apprehended as a ward of the state.
104 See e.g. Re A (in utero) (1990), 75 OR (2d) 82, 72 DLR (4th) 722 (Unified Fam Ct); NH v Children's Aid Society of Regional Municipality of Waterloo, [1996] OJ No 4788 (Ct J (Prov Div)) (QL). The courts will, however, find liability where the legislation specifically provides for it. See e.g. Dobson (Litigation Guardian of) v Dobson, [1999] 2 SCR 753, 174 DLR (4th) 1 [Dobson cited to SCR].
that of the woman carrying it. For example, in *Re Baby R*, the British Columbia Supreme Court held that the Family and Child Services Department could not apprehend a child prior to birth, as an unborn child did not meet the definition of “a child in need of protection” as required by the legislation. The court determined that the power to order apprehension of an unborn child would have serious consequences for the rights and autonomy of women. On the other hand, once a child has been born alive, courts have looked to events that occurred while the child was in utero in making a finding that the child is “in need of protection.”

Similar to *Re Baby R*, in *Winnipeg Child and Family Services (Northwest Area) v DFG*, the Supreme Court of Canada refused to grant a tort remedy, which would have amounted to an injunction in the form of physical detainment and forced treatment, against a pregnant Aboriginal woman who was addicted to glue sniffing. The majority of the court took the social circumstances of the pregnant woman into account, noting that she was doing her best in a situation of “inadequate facilities and the ravages of addiction.” The court also cited a number of policy arguments that mitigated against the imposition of liability, such as the fact that current medical research would become relevant to a court’s determination of risk; women in lower socio-economic groups would be more negatively impacted; women may come into conflict with friends and loved ones seeking to monitor and police her behaviour; and finally, the court was also concerned that the impo-
sition of liability could endanger women and babies by causing pregnant women to avoid seeking medical treatment.

The state of the law in Canada following DFG is that a tort action cannot succeed against a pregnant woman on behalf of her fetus. In Dobson (Litigation Guardian of) v Dobson, however, the Supreme Court of Canada faced a slightly different question: Should a child, once born, have the right to sue his mother for harms alleged to have occurred due to the mother’s negligent behaviour during pregnancy? The majority of the Court (consisting of a majority judgment and a concurring judgment endorsing the same result, but emphasizing different reasons), answered in the negative, refusing to find a mother liable for negligent driving that caused serious injury to her fetus. This was notwithstanding that the child would be able to recover in these circumstances had anyone but the mother been at fault. The majority judgment identified two main reasons why a pregnant woman should not owe a duty of care to her fetus: first, it would entail severe implications for the privacy and autonomy rights of women; and second, it would be difficult to articulate a sound standard for responsible conduct by pregnant women. A “reasonable pregnant woman” standard, it was held, would lead to too much scrutiny of pregnant women’s lives and would unfairly prejudice women who are poor, racialized, or abused. The concurring judgment emphasized Charter values, in particular that the liberty and equality rights of women would be violated by a finding of liability in these circumstances. Both the majority and concurring judgments were concerned with the implications of liability for pregnant women’s lives in many other circumstances. They also both stated that the common law was incapable of carving out a narrow, categorical exception to the absence of duty of a mother to her child for injuries sustained while in utero (the proposed exception of course covering situations involving negligent driving to the extent that third party insurance would cover the damages). However, both the majority and concurring judgments asserted that provincial legislatures could create such a regime through legislation.

110 Supra note 104.
The dissenting judgment held that a mother should be liable for injuries to her born alive child where those injuries resulted from the negligent actions of the woman when the child was a fetus. The duty of care would only apply, however, where a woman already owes a duty of care to other third parties (such as when operating a motor vehicle). This precise issue was revisited again in *Hall (Litigation Guardian of) v Kellar*, in which the infant, by its litigation guardian, brought a claim against his mother for injuries sustained in a motor vehicle accident while "en ventre sa mere." It was alleged that the child's injuries were a direct result of the accident, caused by the mother's negligence. She was eight months pregnant at the time. The Ontario Superior Court of Justice followed the majority in *Dobson*, holding that a legal duty of care cannot and should not be imposed upon a pregnant woman towards her fetus, but, as in the *Dobson* case, leaves open the possibility that legislation could carve out a narrow exception to this general rule.

Rosamund Scott emphasizes the role played in shaping the judgments in *Dobson* of "legal method" (or developing the law through jurisprudence versus legislation). She reviews the majority's attempts to describe driving as legally indistinguishable from other forms of parenting or lifestyle choices a pregnant woman may make, such as those concerning diet or "rollerblading, shopping in a crowded mall, spraying weedkiller on her crops, sailing, lighting fireworks for her children on Canada day, or any other activity where there is a risk of harm to the general public." Citing American and Austral-

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111 (2002), 23 CCLT (3d) 40 (Ont Sup Ct J).

112 In *Paxton v Ramji*, 2008 ONCA 697, 92 OR (3d) 401, a case involving the prescription of a teratogenic drug to a 25 year old woman and the obligations of a physician to his patient's possible future child, the Ontario Court of Appeal held that the physician did not owe a duty of care to the future child of the female patient. Recognizing a duty of care to the future child would result in conflicting duties on the physician, whose responsibility is to his female patient. For a discussion of the issue of conflicting duties owed to children and families in the child protection context, see also *Syl Appi Secure Treatment Centre v BD*, 2007 SCC 38, [2007] 3 SCR 83.


lian case law, she argues that the distinction is possible, and explains that the majority in Dobson was unwilling to engage in shaping the common law in an area involving “highly sensitive public policy and insurance issues”.115 Regarding insurance, Scott finds a contradiction between the majority’s public policy finding that a duty would threaten the interests of pregnant women, and the fact that accessing insurance funds would have been in the interest of both the child and the mother in this case.116 This accordingly is another reason the court suggested the legislature tackle the issue. Scott concludes her discussion of motor vehicle insurance and maternal-fetal duty by observing that because third party injury motor vehicle insurance is mandatory and widespread, it begins to look like a first-party insurance regime. She considers replacing the costly tort system with a formal system of first-party insurance, though she notes that this position has been held as impractical.117 In Part V we consider in detail how insurance relates to maternal tort liability and the imposition of blame in pregnancy.

The courts’ reluctance to make an easy translation from risk to blame cannot only be seen in limits to rights relating to fetuses and injuries sustained while in utero, but also in the judicial treatment of “risks.” Courts, in general, will not take judicial notice of risky behaviour or situations, preferring to rely on the evidence of those who have specific knowledge of the pregnant woman’s actions or medical situation, or who are experts in the field of fetal risks. For example, in AJ v Yukon Territory (Family and Children Services, Director),118 the Supreme Court of Yukon held that a law allowing a woman to be required to participate in supervision or counselling because of a risk that her unborn child could be affected by Fetal Alcohol Syndrome would unjustifiably infringe the woman’s Charter rights. In particular, the court found that the trial judge erred in taking judicial notice of the meaning of Fetal Alcohol Syndrome (which was mentioned in the statute but not defined). Although long accepted that alcohol can harm the fetus, the court

115 Scott (2002), supra note 113 at 328.
116 Ibid at 331–32.
117 Ibid at 339–40.
held that a precise definition of the syndrome must be established before it could be decided if the fetus was at serious risk of suffering from it.

In Re A (in utero),119 the Ontario Unified Family Court accepted evidence from a psychiatrist that the father fit within the diagnosis of Antisocial Personality Disorder, and from a psychologist that he was prone to temper outbursts and threats of violence. The court also accepted evidence that the mother had lied to authorities about her prenatal care, and expert evidence from a pediatrician about the need for highly supervised care in this case due to risks to both mother and child. In the end, however, the court did not order apprehension because the legislation did not extend protection to unborn children.

In New Brunswick (Minister of Health and Community Services) v NH (Litigation guardian of),120 the mother admitted to consuming drugs and alcohol in two prior pregnancies, but there was no evidence of substance abuse in this pregnancy. In the result, the New Brunswick Court of Queen’s Bench held that a legislative provision which gave the Minister of Health and Community Services power to grant a Supervisory Order over unborn children was an unjustified infringement of the Charter. In part, the court was concerned that the legislation set out no parameters for intervention with respect to unborn children. For example, the court wondered whether the Minister could take into account the woman’s past conduct, and how the Minister would judge her present conduct (for example, if a woman smoked, overate, was sedentary or was overactive). The court was also concerned that the legislation did not differentiate between the developing stages of the fetus. Could the Minister intervene at any time or only when the fetus is viable? Ultimately, the court was not satisfied with the statute’s imprecise terms, suggesting that there must be some clarity in the statute about the meaning of “risk to a fetus”. Further, recall that in DFG the court noted that a determination of risky behaviour must occur in a social context: there, one in which a pregnant Aboriginal woman was addicted to glue sniffing. The court held that the risk to the fetus must be considered in the context of the

119 Supra note 104.

120 (1996), 224 NBR (2d) 80 (QB (Fam Div)) [NH].
mother's personal struggle with addiction and inadequate social resources. The court also noted that using medical research and expertise to evaluate risk would be dangerous and would disproportionately affect certain groups of women.121

As Valverde et al demonstrated in 2005, contemporary risk-based governance “[does] not necessarily involve parachuting scientific or technical experts to make determinations of risk in legal contexts.”122 With respect to judicial hearings on whether community notification should occur upon the release of a sex offender, for example, Valverde et al found that consideration of the risks of recidivism often feature legally-trained personnel such as prosecutors or judges assuming the task of measuring or assessing risks on the basis of “common knowledge,” or, at least, a hybrid mix of expert and everyday knowledge. But with respect to the “risks” inherent in pregnancy, courts have not adopted the risk assessments embedded in the popular and medical discourses as “common sense.” Here again we see the law in the area of maternal tort liability, with few exceptions, as a site of resistance. While it is clear that the informal regulation of pregnant women invariably involves actors drawing on a “common fund”123 of knowledge, expert and everyday, to draw conclusions about “risky behaviours” and to pass judgment on pregnant bodies, the formal avenues of state law have steered clear of this.

In this way, one can view the jurisprudence reviewed above as maintaining separation between legal and health/medical knowledge.124 While the former maintains the legal fiction of birth as the commencement of personhood in order to protect the rights of women, the latter employs risk analysis to arrive at “[e]stimates of the probability of negative health outcomes from exposures”, and implies that women be held accountable for these.125 In turn, government bodies such as child welfare agencies, from the perspective of Foucauldian population power, attempt to “prevent perinatal risk even in the

121 DFG, supra note 105 at paras 38–43.
122 Valverde, Levi & Moore, supra note 26 at 116.
123 Ibid at 115.
124 See Weir (2006), supra note 7 at 164, 173.
125 Ibid at 172.
absence of individual harm in order to reduce the population of children who were its permanent wards.” In contrast, focusing on individual rights and equity, courts have recognized that because the physical location of the fetus is inside the woman’s body, and because as a consequence a woman can never be alone but may anytime affect the fetus through her actions, the protection of the bodily integrity of women requires that they not be treated as third party tort defendants whose lives are not constantly affected by the existence of the fetus. In addition, it is not just any pregnant women who are subject to informal risk-based regulation, but those in lower socioeconomic groups. Almost all of the women involved in the cases discussed here are Aboriginal.

In contrast with the efforts of branches of government such as child welfare agencies, as outlined in the cases above, other bodies of formal governance in Canada, such as the legislature and the judiciary, have been stalwart protectors of women’s autonomy over their own bodies throughout pregnancy. Until the recent extension of liability for fetal harm to mothers in cases of negligence in automobile accidents in Alberta, to be explored in the next section, pregnant women have been formally treated in law as not culpable for harm to their fetuses, even when other parties may be held responsible for such resulting harms. These high standards of protection for women have not been reflected in myriad other informal means of regulation of pregnant women’s behaviour: instead, the dominant discourse is one in which the behaviours of potential mothers, and in particular—their risk governance choices—are seen as directly and almost solely determinant of the health of the unborn.

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126 Ibid at 168.
127 See the discussion of the case law in Scott (2002), supra note 113 at 312.
128 Ibid at 335; Dobson, supra note 104 at paras 27–28.
129 DFG, supra note 105 at para 40.
130 See the discussion in Weir (2006), supra note 7 at 179–80.
IV. TRANSLATING RISK TO BLAME

Canadian law has traditionally and steadfastly refused to assign legal blame and responsibility to mothers for harms to the fetus before birth, even in situations of her negligence. A fairly recent legislative change in Alberta, however, may indicate a reversal of this trend. The *Maternal Tort Liability Act* came into force on 1 December 2005. It amends the law of maternal liability for harm to a fetus by permitting a child, once born, to sue its mother in cases of automobile accidents in which the pregnant mother was at fault and her fetus was injured. Importantly, the Act restricts liability to the extent of the motor vehicle insurance coverage. The current state of the common law, as the previous section detailed, allows the injured child, once born, to sue anyone except the mother, the rationale for this being that if the child is able to sue the mother for damages inflicted upon it while in the womb, this may open the door for claims against mothers for ‘risky’ lifestyle choices during pregnancy, leading to restrictions on her autonomy. The legislative change was prompted by the case of *Rewega*. In that case the pregnant woman was operating a vehicle when she lost control, causing it to roll. She was five months pregnant at the time. Her child was born prematurely with severe cognitive and physical injuries, including blindness. Following *Dobson*, the child had no cause of action against the mother.

In this part, we examine the Alberta legislation in context and ask: What are the implications of tightening the link between risk and blame in this situation? A weakness of the governmentality approach is that it often reduces risk governance “to a reflex of political ideology” which is thought to

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131 *MTLA*, supra note 9.

132 See *ibid*. Section 3 states that the Act establishes “a limited exception to the immunity that a mother has at common law from actions in tort by her child for injuries suffered by the child on or after birth as a result of the mother’s actions prior to the child’s birth”.

133 *Ibid*, s 5(1).

134 *BR v LR*, 2004 ABQB 93, 355 AR 50, aff’d *sub nom Rewega (next friend of) v Rewega*, 2005 ABCA 365, 380 AR 224 [*Rewega*]. The *MTLA* addresses the same policy area as a private bill called the *Brooklynn Hannah George Rewega Right of Civil Action Act*, first presented to the Alberta legislature in 2004.
compromise the capacity of the approach “to evaluate the benefits of different risk-based approaches.” Thus, by closely parsing the intentions and the expected effects of the legislation here, where it seems to facilitate the translation between risk and blame so far resisted by formal law, we can evaluate, rather than assume, the politics of the risk governance technique. Does the tie to insurance coverage, in this case, mitigate the individualizing effect? Is risk-based governance, in this case, more effective at delivering resources to the harmed? Does the “effect of the legislation”, as Ali states, simply amount to “providing financial assistance to women who have children with special needs”?136

A. IMPLICATIONS OF THE TRANSLATION FROM RISK TO BLAME IN THE MTLA IN THE CONTEXT OF CONCERNS ABOUT WOMEN’S AUTONOMY

In Dobson, the action was brought on the child’s behalf by his maternal grandfather, with the apparent support of the child’s mother. The action was defended by the mothers’ insurer. A finding of legal liability would have provided the child’s family with the resources required to provide him with services required as a result of his special needs. In the words of the court: “the material interests of the mother and child are aligned, notwithstanding the fact that their legal relationship is adversarial.”137 This situation has led many commentators to conclude that the Court in this case “upheld [the mother’s] abstract rights at the expense of the very real needs of herself and her child.”138

The Dobson case is controversial because it raises the tension between the potentially very dangerous consequences of imposing a general tort liability

135 O’Malley, supra note 11 at 302.
137 Dobson, supra note 104 at para 72.
on pregnant women with respect to their unborn children, and the desire to compensate and support injured children with special needs (and their families). The refusal to impose maternal tort liability for prenatal negligence—an "exception" carved out in tort law to protect women's autonomy over their bodies—leaves an injured child (and his or her family) without recourse to insurance, and thus often without resources. This is obviously not a desired result. But finding a duty of care, as several courts have concluded, would lead to increased surveillance of women and in particular, of pregnant bodies. Further, commentators have argued that state surveillance of pregnancy would do little to ensure that children are born healthy.\textsuperscript{139}

In justifying the exception, for example, the Supreme Court of Canada in \textit{Dobson} notes the "fundamental difference between a mother-to-be and a third-party defendant":

The unique relationship between a pregnant woman and her foetus is so very different from the relationship with third parties. Everything the pregnant woman does or fails to do may have a potentially detrimental impact on her foetus. Everything the pregnant woman eats or drinks, and every physical action she takes, may affect the foetus. Indeed, the foetus is entirely dependent upon its mother-to-be. Although the imposition of tort liability on a third party for prenatal negligence advances the interests of both mother and child, it does not significantly impair the right of third parties to control their own lives. In contrast to the third-party defendant, a pregnant woman's every waking and sleeping moment, in essence, her entire existence, is connected to the foetus she may potentially harm. If a mother were to be held liable for prenatal negligence, this could render the most mundane decision taken in the course of her daily life as a pregnant woman subject to the scrutiny of the courts.

Is she to be liable in tort for failing to regulate her diet to provide the best nutrients for the foetus? Is she to be required to abstain from smoking and all alcoholic beverages? Should she be found liable for failing to abstain from strenuous exercise or unprotected sexual activity to protect her foetus? Must she undertake frequent safety checks of her premises in order to avoid falling and causing injury to the foetus? There is no rational and principled limit to

\textsuperscript{139} \textit{Ibid} at 53, n 3.
the types of claims which may be brought if such a tortious duty of care were imposed upon pregnant women. ¹⁴⁰

Extending maternal liability poses additional threats to the autonomy of pregnant women. This is so, first, because it is difficult if not impossible to articulate a standard of conduct for pregnant women. Such a standard would, in the words of the majority judgment in Dobson, “involve an analysis of the risks associated with a given activity, the gravity of the possible injury, and the likelihood of that injury occurring.”¹⁴¹ Such a standard is inappropriate as it “raises the spectre of judicial scrutiny and potential liability imposed for ‘lifestyle choices’.”¹⁴² A court could, for example, find that a woman “should not smoke cigarettes or drink alcohol.”¹⁴³ Further, “the great disparities which exist in the financial situations, education, access to health services and ethnic backgrounds of pregnant women. . . . would inevitably lead to an unfair application of a uniform legal standard concerned with the reasonable pregnant woman.”¹⁴⁴

A second way in which extending liability would threaten the autonomy of pregnant women is in the potential imposition of tort remedies, namely the payment of damages and injunctions. Because the fetus is physically located inside the body of the pregnant woman,¹⁴⁵ indeed, it is part of the body of the pregnant woman, and because the pregnant woman can never be alone,¹⁴⁶ imposing a duty in tort would mean that “each choice made by the woman in relation to her body will affect the fetus and potentially attract tort liability.”¹⁴⁷ For these same reasons, an injunction could involve the involuntary physical detention of the pregnant woman. On this issue, the ma-

¹⁴⁰ Dobson, supra note 104 at paras 27–28. See also Morgan, supra note 2 at 373, n 6.
¹⁴¹ Dobson, supra note 104 at para 52.
¹⁴² Ibid at para 53.
¹⁴³ Ibid.
¹⁴⁴ Ibid at para 54.
¹⁴⁶ Ibid at 335.
¹⁴⁷ DFG, supra note 105 at para 37.
The majority in DFG stated that "the principles of tort law have never been used to justify the forcible detention and mandatory treatment of a person", and that "[t]he order at issue on this appeal can be upheld only by a radical extension of civil remedies into the most sacred sphere of personal liberty—the right of every person to live and move in freedom."148

What is the effect of the MTLA? Is it, as Ali states, simply to provide funds to women who have children with special needs?149 We argue that the legislation provides for compensation to flow to some women who have children with special needs, but only a narrowly circumscribed group. Whose child qualifies for compensation under the Act? A child born with special needs, as a result of a car accident in which her mother drove negligently and has car insurance, will recover. These mothers are excepted from the maternal tort immunity by the legislation. Who is still subject to the immunity? Non-negligent mothers who were drivers in an accident that injured their future child; non-negligent mothers who were not in car accidents and whose child was born with special needs; and negligent mothers who were in car accidents that injured their future child but are not insured. In all of these cases, the mother will not be excepted from the immunity and the child will not recover.

In other words, babies suffering harms that cannot be tied to negligence will not be candidates for compensation. Thus, a potential unfairness exists between children born injured due to a car accident in which their mother drove negligently while they were still in utero, and children injured in an accident not due to negligence. The needy child of the negligent mother would recover from her insurance company, and the needy child of the non-negligent mother would not.150 Nor would the needy child of the uninsured mother recover, whether she drove negligently or not. And perhaps most importantly, the child born with special needs that cannot be attributed to any accident at all, perhaps to any cause at all, will not be compensated. If the

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148 *Hibid* at para 46.
149 *Ali, supra* note 136.
150 Unless someone other than the mother negligently caused the accident, and thus the injury.
intent of the legislation is not to burden mothers or families financially (which was articulated as the rationale for limiting liability to the extent of the mother’s insurance coverage), it accomplishes this goal for only a narrow set of women. If the unfairness that the legislation aims to address is that between children born with special needs injured by negligent third parties prior to their births, and those injured by the negligent behaviour of their mothers before their births, the legislation addresses one inequity while leaving several others intact.

A further remaining unfairness arises from, as Ali acknowledges, the fact that compensation is restricted to the amount of the mother’s insurance coverage, which might differ drastically between families.\(^1\) Two children who suffer similar injuries, in identical circumstances, may receive vastly different compensation awards, and will thus have access to different levels of support and services where they are provided on the basis of an ability to pay. This issue also emerged in the legislative debates surrounding the passage of the MTLA. One member remarked, “If people have different levels of insurance, you know, is this the way by which we’re going to determine the care of someone who needs care as a disabled person?”\(^2\) Proponents of the Act, however, acknowledged that it was not meant to be a comprehensive solution, and asserted that it would create a narrow avenue for compensation or close a gap in the tort system in a small way. One member described the function of the Act as creating “a very narrow exception.”\(^3\)

As Hannah-Moffat and O’Malley have noted, analyses of risk governance techniques rarely pay adequate attention to “gender, racial and ethnic differences, or to the social, economic and political contexts in which these tools are deployed.”\(^4\) In this case, those most likely to be affected by infringement on their liberty and autonomy by further surveillance and judging of pregnant women’s behaviours—racialized and marginalized women, including

\(^1\) Ali, supra note 136 at 76.

\(^2\) Alberta, Legislative Assembly, H\(\text{ansard}\), 26th Leg, 1st Sess (16 November 2005) at 1684 (Mr Eggen).

\(^3\) Ibid (21 November 2005) at 1773 (Mr Stevens).

\(^4\) Hannah-Moffat & O’Malley, supra note 10 at 18.
Aboriginal women as the cases demonstrate, particularly those that are street-involved or who struggle with addiction—are the least likely to benefit from the extension of liability, i.e. they are the least likely to be insured. Not only are the discourses of risk governance "structured by class,"155 but the risk governance technique chosen to ameliorate the situation for women—the imposition of liability—takes class as its central organizing framework.

As Ali notes, "[a] solution that would advance the objective of providing compensation to families with children who have special needs would be the creation of a fund that would assist all families in this situation, and not just those who have automobile insurance whose children were injured from negligent driving."156 In fact, Cory J in Dobson suggested the creation of a fund to cover prenatal injuries:157

The Act may not provide the best solution to all families with children who sustain prenatal injuries, but it does allow some children to recover some compensation that would otherwise not be available because of the ruling in Dobson.158

A better solution, of course, would be to provide funding according to need. In a truly collective or socialized model, services would be provided instead of income or cash compensation to alleviate the consequences of adverse effects.159 Specifically, "[i]ncreasing state funding for social support services would contribute much more to the well-being of those with special needs than a legislatively-imposed standard of prenatal care would, and the pregnant woman's personal autonomy would not be violated."160 While opponents in the Alberta legislature of the MTLA argued that the state was in effect "trying to download the duty of care to insurance companies for chil-

155 Ruhl, supra note 47 at 96.
156 Ali, supra note 136 at 76.
157 Dobson, supra note 104 at para 48.
158 Ali, supra note 136 at 76.
160 Ali, supra note 136 at 80.
proponents countered that "[n]othing in this legislation extinguishes any other government program, infringes upon, or changes any assistance programs."\textsuperscript{162}

A second effect of the legislation is that it essentially forces families to turn to litigation (which is inherently adversarial and confrontational) for their remedy, rather than to look to the state for support based on their genuine needs.\textsuperscript{163} As Ali suggests and the case law illustrates, this tends to increase tension in the family unit, but it also inevitably imports notions of blame. The Act creates the possibility of finding the mother liable, negligent, and thus blameworthy in causing injuries to herself, as the carrier of the fetus, and the subsequently-born child. Opponents of the MTLA in the Alberta legislature noted a concern with a possible "new raft of lawsuits, perhaps spurious lawsuits, in regard to what might be perceived as an expansion of fetal rights here in this province."\textsuperscript{164} Those who supported the bill, however, noted that children are already able to sue for injuries sustained "prenatally against other third parties and against other family members" and that the only function of the Act would be to include the mother along with these others.\textsuperscript{165} One member also asserted that "this legislation doesn't assign any blame, determine any negligence or any liability",\textsuperscript{166} while another noted that the Act would not focus on "maternal responsibility" but on "the responsibility of a person driving a car".\textsuperscript{167} The dynamic of blaming in the context of liability and insurance is the topic of Part V.

\textsuperscript{161} \textit{Hansard, supra} note 152 (16 November 2005) at 1686 (Mr Bonko).

\textsuperscript{162} \textit{Ibid} (23 November 2005) at 1874 (Mr Oberle).

\textsuperscript{163} Ali, \textit{supra} note 136 at 80.

\textsuperscript{164} \textit{Hansard, supra} note 152 (16 November 2005) at 1684 (Mr Eggen).

\textsuperscript{165} \textit{Ibid} (16 November 2005) at 1682 (Mr Oberle).

\textsuperscript{166} \textit{Ibid}.

\textsuperscript{167} \textit{Ibid} (23 November 2005) at 1873 (Mr Oberle).
V. LIABILITY AND BLAME IN THE CONTEXT OF INSURANCE

As outlined in Part II, the technique of "risk governance," as it is treated in much of the current governmentality literature, is taken to be part of a neo-liberal political project that has the effect of "individualizing" risk. In this final part, we explore the connections between liability and insurance to analyze the possibility that, in the case of the MTLA, the linking of risk with blame may not necessarily be an "individualizing move." In making the connection to the mother's insurance policy, the strategy seeks to compensate the family by drawing on the collective resources of the insurance pool. How should we evaluate the politics of an insurance strategy as a way of managing the "risk" of injury in pregnancy?

On the one hand, as Deborah Stone says, "[i]nsurance is not only an institution of repair, but also of social progress." Stone explains that insurance is one of the primary means utilized by communities to make life better for individual members. Insurance fosters collaboration, provides security, and offers a mechanism to reinforce a sense of community and collective well being.

On the other hand, Armstrong notes, insurance is also "the paradigmatic form of risk management" within neo-liberal regimes. Neo-liberalism is said to be in pursuit of the "autonomization" of society; it seeks to achieve the unmediated government of individuals by individuals—and specifically by rational, responsible individuals. Thus while neo-liberalism's first choice of governance strategies may be self-reliance; its second choice is undoubtedly private insurance. And even as "[i]nsurance becomes the institution of governance," it remains governance-at-a-distance. Thus, instead of building

168 Stone, supra note 159 at 15.
169 Ibid.
171 Ibid at 453.
social solidarity and community, according to some scholars, the proliferation of private insurance can have the effect of fragmenting populations into separate risk-rated communities, each with a monetary value.173

But we must acknowledge that private insurance may also operate to spread risk amongst the community.174 Even while insurance is a technology of risk management, “it is also a technology of distribution, of risk sharing.”175 But the socializing of risk that happens through private insurance schemes is contained within tight boundaries, and it may serve, perversely, to ease the pressure on the state for genuine collective management and pooling of risk. It is the commodification of a form of social security that could alternatively be seen as the responsibility of the state—or the collective. Thus it is not surprising to see a contemporary government support a private insurance scheme as a way of managing risk, because it is simultaneously a way of reducing individual claims on collective resources, and it displaces state responsibility.

Also, in turning to insurance as a “collectivizing” strategy, the work of governing is displaced from political systems where legislation and policy are debated in public to administrative ones where regulations are issued in private by “insurer fiat”.176 In fact, as Heimer demonstrates, the regulation of driving is now influenced much more through the risk management practices of insurance companies than it is through the actions and decisions of legislatures.177 Still, as the debate around the MTLA illustrates, “questions about system design bring insurance back into the political realm”.178 Because insurance pools the savings of the community to pay for the losses of individuals,

173 Ibid.
174 Ibid at 534.
175 Carol A Heimer, “Insurers as Moral Actors” in Ericson & Doyle, supra note 30, 294 at 285 [Heimer (2003)].
177 Heimer (2003), supra note 175 at 301.
178 Ibid at 285.
“whenever insurance is discussed, questions of allocating responsibility between individuals and society are barely beneath the surface.”179 Thus the question of which individuals will be included or excluded from the risk pools that are produced by insurance becomes a key political question.180 It is essentially about the “boundaries of risk-sharing communities”181 and who is eligible to participate in the decisions about where those boundaries should be drawn.

Whether we accept a communal burden for adverse events, or treat them as appropriately individual burdens, is defining of a society. The primary foundation of insurance, according to Stone, “is collective responsibility for harms that befall individuals”.182 But how this plays out differs as between public and private schemes. In private, commercial insurance schemes, a premium is charged to each policyholder to create a “fund from which those who experience losses are compensated; recipients of compensation are those who contributed to the fund or their designated beneficiaries”.183 In public schemes, the fund is built through taxation rather than premiums, and eligible recipients may be smaller or larger than the group of contributors.184

Recent trends in private insurance in the neo-liberal era are towards risk “unpooling,” towards increasing segmentation of the pool of insured. In fact, according to Heimer, those “outside the system” now have more difficulty “gaining a toehold” in an effective insurance arrangement than they might have had when public schemes represented alternatives to commercial forms of insurance.185 Accordingly, Heimer concludes that private insurance schemes offer a safety net of “fine resilient mesh” for the rich, but there are much larger holes in the “loosely woven safety nets of the poor”.186 And yet,

179 Stone, supra note 159 at 16.
180 Heimer (2003), supra note 175 at 285.
181 Ibid at 307.
182 Stone, supra note 159 at 16.
183 Heimer (2003), supra note 175 at 289.
184 Ibid.
185 Heimer (2002), supra note 176 at 117.
186 Ibid at 118.
“political demands for equality in insurance challenge the fundamental principle of actuarial fairness upon which most insurance operates.”¹⁸⁷ That principle demands the classification of people according to the degree of “risk” they pose. Insurers argue that practices such as charging differential rates or precluding certain groups are merely products of objective economic realities. While there are certain groups who may appear to be the targets of discrimination, in reality they are simply treated differently as they pose an increased risk of loss.¹⁸⁸ “Those seeking insurance expansion”, as the families of children with special needs who are not “caught in the net” of the liability exception of the MTLA are in the context of this example, are “making the quintessential democratic claim”, according to Stone: “they are asserting their membership in a community, their right to representation in its collective decisions, and their right to equal treatment vis-à-vis other citizens.”¹⁸⁹

Part of an unpooling strategy by the insurers in response to this legislation might include the concentrating of women of child-bearing age in to their own, now uniquely “risky” category, on the basis that they objectively pose a greater risk of loss to the company. This raises the spectre of differential rates for women of child-bearing age.¹⁹⁰ According to Ali, “[w]hile increased insurance premiums are a problem, this legislation would create the larger problem of shifting what ought to be [a] state responsibility to the insurance industry, thus undermining the principle of social responsibility for those with special needs”.¹⁹¹ Whether the responsibility is shifted onto the insurance companies, or more likely, onto “drivers” as a class, if not women drivers, it undoubtedly raises the political question of the appropriate boundaries for the risk sharing community. From this analysis, we can confirm that insurance as risk governance has both individualizing and socializing elements, and that determining its politics is complicated. Importantly

¹⁸⁷ Stone, supra note 159 at 43.
¹⁸⁹ Stone, supra note 159 at 44.
¹⁹⁰ Ali, supra note 136.
¹⁹¹ Ibid at 80.
for us, a key complicating factor is the assignment of blame that comes with liability, and which is a prerequisite for recovery under the legislation, notwithstanding the limited socializing of the risk that comes from the link to insurance.

A. THE ASSIGNMENT OF BLAME

Blame is directed at women as mothers from the moment of conception, continuing throughout pregnancy, and the life of the child.192 This is where claims that regimes of risk governance can be said to be “amoral” fall short. As Hannah-Moffat and O’Malley state, “we are intruded upon and disciplined by risk regimes meant to protect us from future harms, and if we fail to buy in, we must suffer the consequences”193 If harm can be predicted through risk techniques, then to fall prey to harm is to be culpable.194

But the expectation that pregnant women and mothers will comply and conform to the risk regimes, whether they are delivered through formal or informal means, ignores the reality of the less than perfect circumstances in which many women are required to parent,195 or to be pregnant. In fact, criticism of pregnant women and mothers and the blame levelled against them does not acknowledge the progressive difficulty of conditions wherein women are forced to be mothers.196 It is meted out based on the woman’s success or failure with respect to achieving the singular goal: a “healthy” baby. It follows the birth without regard for the specific circumstances in which women become and are pregnant,197 without regard for social, econ-

193 Hannah-Moffat & O’Malley, supra note 10 at 1.
194 See ibid at 14.
195 See ibid at 239.
196 Jackson & Mannix, supra note 192 at 156.
nomic, or cultural constraints. As Samerski says of the pregnant woman, "all at once she is responsible even for things that she cannot influence".\footnote{Samerski, supra note 5 at 69. And perhaps this should be expected: It is easier to blame pregnant women for harms to unborn children than it is to consider the role played by the larger society and governments for policies that are not supportive of women as mothers. See Jaime Burrows, "The Parturient Woman: Can there be room for more than 'one person with full and equal rights inside a human skin'?" (2001) 33 J Adv Nurs 689.}

The easy translation of risk to blame that we observed in Part III with respect to the informal means of risk governance—the popular and medical discourses—was grounded in risk’s ability to predict future harms on the basis of probabilities, and on its related promise to project blame on the individual for not buying into the risk regime, should harm materialize. In the formal regime of risk governance enacted through the \textit{MTLA}, the mechanism for ensuring that blame falls squarely on the mother is more direct: proof of her negligence must be offered, and liability will follow. But in some respects, we might say that the legislation is not a \textit{risk} governance strategy at all. The cause of action only comes into play once the child is born injured. Harm is already evident; the notion of risk, of what \textit{might} have happened, is rendered irrelevant by the observation of what \textit{did} happen.

Thus we can see that focusing on the translation between risk and blame tends to obscure the link between risk and \textit{harm}. Harm, of course, is proven upon birth. At issue in \textit{Dobson} was only the question of whether the cause of action exists—left unexplored was the problematic question of whether it would have been possible to prove that the prenatal negligent act \textit{caused} the harm to the fetus. In tort law, a causal analysis is a necessary prerequisite to the assignment of responsibility.\footnote{See generally Ernest J Weinrib, \textit{Tort Law: Cases and Materials}, 3d ed (Toronto: Emond Montgomery, 2009). But the construction of a causal narrative is a lot more straightforward with respect to a single catastrophic event, such as a car accident, than it is with respect to "risky behaviours" like the consumption of drugs or alcohol, an "over-active" lifestyle, or the failure to take a prenatal vitamin supplement. In these situations, often the best that will be able to be argued is that the pregnant woman’s behaviour increased the risk of the harm to the fetus, and not that it \textit{caused} the harm. And so, allowing the...}
cause of action in a very limited circumstance, such as a car accident, and only once a child is born injured, is a much different endeavour than imposing restrictions on a woman's autonomy while she is still pregnant. Remember that risk can be forward-looking and predictive, but it is only once the feared outcome materializes—once we are faced with harm—that risk's capacity for retribution is engaged.

In fact, a key difference in the dynamics of the translation from risk to blame in the informal governance context versus in the litigation context exists around the question of timing. As Landsman makes clear, there is a difference between addressing the question of disabled infants hypothetically, within the framework of pregnancy, and addressing the question of “defective” [sic] children at birth, within the context of “pregnancy’s aftermath.” The legislation in fact avoids the very difficult aspects of prenatal “risk,” by taking as its focus the child, once born. According to Landsman an important part of the character of risk is its capacity for extending the reach of governance: while “actual harm” typically must be proven, or at least demonstrated, “risk of harm” can encompass almost anything. So, in situations where harm materializes, where a child is born with special needs, and a car accident occurred, tying the harm to the “risky” (and thus culpable) behaviour is relatively straightforward. More troubling are the situations left untouched by the legislation; namely, those in which harm materializes—a child is born with special needs—and yet, there is no obviously “risky” act to attribute it to.

In the neo-liberal order, to justify the logic that someone be held to blame for an adverse outcome, “risk must be construed as a product of human agency and therefore controllable through attributions of responsibility and

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201 Ibid at 71.

processes of accountability.”203 As Ericson et al note, “within a neo-liberal regime of responsible risk taking all differences, and the inequalities that result from it, is seen as a matter of choice.”204 And it is acknowledged that “a core element of neo-liberalism in practice is the portrayal of inequality as choice.”205 In this model, the eventuality of an “unhealthy” baby is transformed from a communal responsibility into a private responsibility based on the logic that it is an outcome that resulted from personal choices and actions.

There are many reasons to doubt that the outcome of an “unhealthy,” an injured, or a special needs baby, can in any real way be attributed to the personal choices and actions of its mother in the vast majority of cases. As one of the popular pregnancy guides tells women, “only a small minority of birth abnormalities . . . can be explained by known hazards.”206 For this reason, the state of pregnancy itself is not an easy fit with a model of governance based on insurance: there are too many potential risk factors operating at once.207 Fetal health depends on a complex array of interacting variables. Further, women do not “control” their pregnancies in any real sense:208 Economic factors influence access to prenatal care and its accessories, and social variables, such as housing, domestic abuse, and addiction, condition women’s relative capacities to create a nurturing environment for the fetus and baby.

And still, despite the fact that little effort is made at actually assessing the degree of agency women hold—the responsibility and blame for “abnormal” or “unsuccessful” outcomes in pregnancy is located squarely with the individual woman.209 In fact, middle class, educated women are among those who

203 Ericson & Doyle, supra note 33 at 7.
204 Ericson, Barry & Doyle, supra note 172 at 533.
205 Armstrong, supra note 170 at 454. See also Ericson, Barry & Doyle, supra note 172.
207 Ruhl, supra note 47.
208 Ibid.
209 Marshall & Woollett, supra note 197.
are most interested in appearing to be responsible, and it is with respect to these women that the discourses most effectively produce a "desire to conform". Nonetheless, all women subject to this disciplinary power inevitably gain the impression that being "responsible" during pregnancy will "guarantee" a desired outcome. In fact, the very premise of the legislation is in furtherance of this myth: "that the outcome of a pregnancy depends on the pregnant woman's responsible decision making."

Governance mechanisms that frame problems in terms of risk and emphasize accountability open up the door for the "possibility of blame if things go wrong". Lemke argues that it is the "recourse to 'risks' which makes it possible to call for autonomy and self-regulation". Early promoters of social insurance schemes, as Stone notes, understood that an individual should not be held responsible for risks that she could not mitigate against. But in a neo-liberal order, children have become "the embodiment of their parents' choices" with the result that "[m]others of children with disabilities make their way within a society that devalues their children and in which their motherhood has 'failed' to follow the culturally appropriate trajectory."

We also must remember that "insurers regulate behaviour at the same time as they spread risk." The term "moral hazard" is used to describe the effect of insurance contracts on the behaviour of policyholders. In other

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210 Ruhl, supra note 47 at 103.
212 Ruhl, supra note 47 at 105.
213 Samerski, supra note 5 at 71.
215 Lemke, supra note 23 at 551.
216 Stone, supra note 159 at 24.
217 Landsman, supra note 200 at 77.
218 Ibid.
219 Heimer (2003), supra note 175 at 284.
words, it is an acknowledgement of the fact that insurance contracts alter incentives. In the context of pregnancy risks, however, the concept falters. The basic idea is that “because they no longer bear the full burden of losses, policyholders have a diminished interest in preventing losses.”220 “The classic example is that those that have purchased theft or fire insurance are less vigilant in preventing theft or fire, because they have less at stake. To draw the parallel with the maternal tort liability scenario would require us to accept that women who know that they have car insurance will be less careful about injuring their fetus. This is clearly not the case, even if it is the case for car accidents in general, which is doubtful. The type of risk we are talking about in this case is very different from the prototypical insurance risk, such as theft or fire. As Baker and Simon show, the typical effect of insuring against a risk is often to completely eliminate it from the day-to-day concern of people who are exposed to it. Risks that are insured are experienced in a very different manner than those risks considered as beyond insurance.221 This may be true in the case of fire or theft where lost items are replaced but it is much more complicated in the case of an injured child. The fact of the injury is never altered through compensation; it is only the experience of coping, the material realities of support in its aftermath, that is changed. And of course, parents understand that “insurance compensation covers only the monetary losses experienced by policyholders, and often only a portion of those”.222 The loss itself is not compensable.

More importantly, there are the lingering effects of blame. The consequence of placing the focus on the woman to guard against “risks” is that the location of blame for any adverse outcomes with respect to the pregnancy, whether they can be conceived of as harms related to the “risks” or not, is directly on the mother. In Landsman’s 1998 study of mothers of children with disabilities, all of the women indicated that they had either “struggled to determine what they might have done wrong to bring about a disability or felt that they were being wrongfully judged by others as having done some-

220 Ibid at 289.
221 Baker & Simon, supra note 13 at 12.
222 Heimer (2003), supra note 175 at 293 [emphasis added].
thing improper". Further, the women’s narratives demonstrated that reproduction is publicly represented, and often accepted, as subject to the individual control of the mother. A common theme in the stories of mothers with disabled infants was the severe unfairness of feeling as though they had done everything right, of having followed all of the experts’ advice, and still having suffered the trauma of dashed expectations.

That blame falls almost exclusively on individual mothers is true despite the recognition that many of the “risks” associated with adverse outcomes in pregnancy are objectively beyond individual women’s control. After all, the model essentially amounts to women taking responsibility not only for their own actions, but for their “environments” as well. In this sense, the state of “perpetual anxiety” that characterizes pregnancy has much in common with the experience of living with the risks of toxic chemical pollution. As Ruhl states, “the things most feared . . . are mostly invisible until their effects are [finally] manifested”.

What more is the mother expected to take responsibility for? As Ruhl notes, “when the health of a fetus is discovered, prior to birth, to be ‘compromised in some way’, women are increasingly expected to assume responsibility for that, too”, usually with a decision to terminate the pregnancy. In this situation, what Duden calls the “interiorization of eugenics”, women shoulder the bulk of the guilt and the blame. Now, with the imposition of liability, we further target women and make them the locus of responsibility for the health of the child.

Further, pregnancy risks as we have conceptualized them, might differ from more conventional insurance risks, “by dint of the fact that they obey less a logic of compensation and capitalization and more an imperative of

223 Landsman, supra note 200 at 80.
224 Ibid at 81.
225 Marshall & Woollet, supra note 197.
226 Ruhl, supra note 47.
227 Ibid at 201.
228 Ibid at 112. See also Mykitiuk, supra note 14.
prevention and prevision."229 But even the discourse of prevention and precaution perpetuates this "illusion" that by following the risk-based script it is possible for women to "seize hold of the future."230 As Ruhl notes, one consequence of the informal means of risk governance on mothers is that it leads to "a proliferation of guilt by assuming responsibility everywhere."231 Instead of relieving mothers of guilt and responsibility, the insurance scheme potentially exacerbates this effect. It "makes the woman complicit in any birth defect [sic] her child may possess,"232 regardless of her degree of control over that outcome. And furthermore, adopting the script as one's own and behaving according to its edicts in no way assures a woman the "healthy baby" she desires.

VI. CONCLUSION: COMPLICATING THE POLITICS OF RISK GOVERNANCE

This article explores the body of the pregnant woman as the object of regulation—both formal and informal—in the context of techniques of risk governance and the assignment of blame and responsibility. The question of how risk governance affects the apportionment of responsibility and the assignment of blame is an emerging priority in the socio-legal studies of risk. Where the governmentality literature on risk tends to view the translation from risk to blame as a technique of risk governance—a mechanism for "individualizing" risk—the case of Alberta's Maternal Tort Liability Act reveals that the situation can be considerably more complex. Because of the explicit link to the mother's insurance coverage, the connection between the pregnant woman's risky behaviour, and her "blameworthiness" (and thus legal liability), can in some respects be considered a "collectivist" response to risk. That is, it serves to share or spread the financial burden of dealing with the consequences of the risk materializing—the care of the injured child—among a "risk pool" instead of imposing it on the mother or the family of the

229 Lemke, supra note 23 at 552 (referring to "genetic risks").
230 Samerski, supra note 5 at 56
231 Ruhl, supra note 47 at 106.
232 Ibid at 110.
child alone. Resisting the move to impose liability on the mother, as Canadian law has done in the context of insurance, would mean maintaining the "individual" responsibility for the risk as per Dobson.

But liability and, consequently, blame, in this example, is determined according to the law of negligence. Tort law generally, and negligence law specifically, emerged to govern the field of accidental harms.233 In fact, the central doctrine of negligence, according to O'Malley, ensured that legal subjects would bear the responsibility for any harm they inflicted carelessly on others.234 "[I]n a sense, torts legislated risk awareness."235 But tort law eventually developed into a form of "social insurance": that is, it sought to distribute loss in a socially effective manner to those best able to bear the financial burden, not necessarily those at fault.236 It became a mechanism for the collectivizing of risk. The welfare state governed largely through these social insurance technologies.

As explored, neo-liberalism is thought to be replacing these "social" risk technologies "with complex techniques of risk management based on market models, private insurance and increased individual responsibility for risk management".237 The private insurance industry is becoming recognized as a central social institution of risk distribution and moral regulation.238 Thus, while allowing maternal tort liability (as the Alberta legislation does) can be considered a collectivizing move (because of the tie to the mothers' insurance plan)—it should be noted that it remains essentially "privatizing." It is a "solution" that requires families to turn to litigation and to attempt to gain compensation from a private insurance scheme, instead of imposing a social and collective responsibility to care for children born with special needs—such as through universal, publicly-funded services. The risk is not fully collectivized, or shared by society as a whole, but is confined to a narrow risk

233 O'Malley, supra note 11 at 298.
234 Ibid.
235 Ibid at 299.
236 Ibid.
237 Ibid at 301.
238 Ericson & Doyle, supra note 33.
pool, which in fact, may be circumscribed further as insurance companies respond to the legislation.

The withdrawal of the state from "welfare state" initiatives of the type that would deliver universal publicly-funded services to all children born with special needs goes hand in hand with an appeal to personal responsibility and self-care, as well as the establishment of self-regulatory competencies among individual and collective subjects.239 Further, it must be stressed that litigation necessarily relies on a fault-based model. The assignment of blame to the mother comes with emotional and social consequences, notwithstanding the fact that it may be in her material best interests. As Balsamo demonstrates, the female body is constantly being evaluated, even when not pregnant. It is judged for its maternal "potential," and "evaluated in terms of its physiological and moral status as a potential container for the embryo or fetus."240 Pregnant women are judged by their peers and by themselves.

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239 Lemke, supra note 23 at 555.