

INTRODUCTION

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This special torts issue of the *Alberta Law Review* is in honour of Professor Lewis Klar. It is a recognition and a celebration of the far-reaching and lasting contribution which he has made to tort law scholarship over the last 40 years. Without question, Lewis Klar is one of the leading tort scholars not only in Canada but also internationally, and this is reflected in the quality of the authors who have kindly agreed to contribute to this special issue in his honour.

Professor Klar's long and distinguished career is traced in the first article in this special issue, written by his friend and former colleague, the Honourable Ellen Picard, who recently retired from the Court of Appeal of Alberta.¹ Justice Picard's very personal account highlights many facets of Professor Klar's career; in particular, it emphasizes his commitment and dedication to the law school which was his professional home for 40 years, and the immense impact of his scholarship, including his leading textbook *Tort Law*, now in its 5th edition.²

The second article in this issue is written by Professor Klar's friend and collaborator of many years, the Honourable Allen Linden.³ Their casebook *Canadian Tort Law* (co-authored with another contributor to this issue, Professor Bruce Feldthusen) is now in its 14th edition.⁴ In a lively and provocative article entitled "Toward Tort Liability for Bad Samaritans" Justice Linden discusses the common law "no duty to rescue" rule, and argues strongly in favour of it being replaced by a general affirmative duty to rescue.

It is fitting that Professor Klar himself should contribute to this special issue, and he does so in an article co-authored with James Goudkamp of Oxford University, in which they assess the merits of including a causal potency criterion (in addition to comparative blameworthiness) in apportioning damages in contributory negligence cases.⁵ This was recently recommended by the Manitoba Law Reform Commission.⁶ Professors Klar and Goudkamp argue strongly against this recommendation.

Apportionment is also the focus of the next two articles, but this time in the context of contribution between tortfeasors. Elizabeth Adjin-Tetty, of the University of Victoria, identifies a number of problems with the existing law with respect to contribution between joint concurrent tortfeasors, and makes detailed recommendations for reform.⁷ In the other

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¹ Ellen Picard, "Reflections on the Career of Professor Lewis Klar" (2016) 53:4 *Alta L Rev* 827.

² Lewis N Klar, *Tort Law*, 5th ed (Toronto, Ont: Carswell, 2012).

³ Allen Linden, "Toward Tort Liability for Bad Samaritans" (2016) 53:4 *Alta L Rev* 837.

⁴ Allen M Linden, Lewis N Klar & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Toronto: LexisNexis Canada, 2014).

⁵ James Goudkamp & Lewis Klar, "Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion" (2016) 53:4 *Alta L Rev* 849.

⁶ Manitoba Law Reform Commission, *Contributory Fault: The Tortfeasors and Contributory Negligence Act*, Report No 128 (Winnipeg: Manitoba Law Reform Commission, 2013).

⁷ Elizabeth Adjin-Tetty, "Multi-Party Disputes: Equities Between Concurrent Tortfeasors" (2016) 53:4 *Alta L Rev* 863.

article, David Cheifetz (a barrister in private practice and a frequent contributor to tort law scholarship) examines the interesting situation in which a claim for contribution is made against a joint tortfeasor who has derived no benefit from the settlement or resolution of the original case (for example, because of immunity conferred after the tort), a particularly interesting issue in light of the unjust enrichment principles underlying the claim for contribution.⁸

Following this is a series of three articles in the area of duty of care. Joost Blom (University of British Columbia) provides a detailed reassessment of the value of the *Anns* test,⁹ and identifies two particular problems with its application.¹⁰ Then, Stephen Sugarman (Roger J. Traynor Professor of Law at University of California, Berkeley) discusses (and criticizes) the recent decision of the Supreme Court of California in *Verdugo v. Target Corp.*,¹¹ which held that Target had no duty to provide automated external defibrillators in its stores.¹² The third article on duty of care is by my colleague and fellow health law scholar, Erin Nelson.¹³ Building on her work in the area of reproductive autonomy,¹⁴ Professor Nelson examines duty of care in the context of the tort of wrongful life, and argues that the rulings of the Ontario Court of Appeal in *Paxton v. Ramji*¹⁵ and *Bovingdon v. Hergott*¹⁶ were wrongly decided.

The next group of articles deals with duty of care in the “public” context. Professor Bruce Feldthusen, a collaborator with Professor Klar in their torts casebook,¹⁷ compares recent decisions of the Supreme Courts of Canada and the UK in the area of public authority liability, and argues for greater transparency in the use of policy factors in determining the duty of care owed by public authorities.¹⁸ In a related article, Professor Erika Chamberlain, of Western University, discusses duty of care in the context of police failure to protect potential victims of crime.¹⁹ Like Professor Feldthusen, she argues that the proximity analysis is often driven by policy factors that are not always fully explained. Lastly, Professor Margaret Isabel Hall of Thompson Rivers University, in her article “Theorizing the Institutional Tortfeasor,” argues that institutions — such as police forces, prisons, schools, care facilities, and religious bodies — create a certain “culture” and “character” in their members, and that this should be taken into consideration in determining institutional liability.²⁰

⁸ David Cheifetz, “Contribution Between Negligent Tortfeasors and Unjust Enrichment: An Outline of a Solution to the ‘No Benefit to B’ Issue” (2016) 53:4 Alta L Rev 879.

⁹ *Anns v Merton London Borough Council* (1977), [1978] AC 728 (HL (Eng)).

¹⁰ Joost Blom, “Do We Really Need the *Anns* Test for Duty of Care in Negligence?” (2016) 53:4 Alta L Rev 895.

¹¹ 327 P 3d 774 (Cal 2014).

¹² Stephen D Sugarman, “Misusing the ‘No Duty’ Doctrine in Tort Decisions: Following the *Restatement (Third) of Torts* Would Yield Better Decisions” (2016) 53:4 Alta L Rev 913.

¹³ Erin L Nelson, “Prenatal Harm and the Duty of Care” (2016) 53:4 Alta L Rev 933.

¹⁴ See in particular Erin Nelson, *Law, Policy and Reproductive Autonomy* (Oxford: Hart, 2013).

¹⁵ 2008 ONCA 697, 92 OR (3d) 401, leave to appeal to SCC refused, 32929 (23 April 2009).

¹⁶ 2008 ONCA 2, 88 OR (3d) 641, leave to appeal to SCC refused, 32510 (7 January 2008).

¹⁷ See *supra* note 4.

¹⁸ Bruce Feldthusen, “Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada” (2016) 53:4 Alta L Rev 955.

¹⁹ Erika Chamberlain, “To Serve and Protect Whom? Proximity in Cases of Police Failure to Protect” (2016) 53:4 Alta L Rev 977.

²⁰ Margaret Isabel Hall, “Theorizing the Institutional Tortfeasor” (2016) 53:4 Alta L Rev 995.

No special issue on the law of tort would be complete without a discussion of causation, a topic which continues to attract the attention of the Supreme Court of Canada.²¹ Professor Vaughan Black (Dalhousie University) traces the evolution, and possible demise, of “plaintiff-friendly” causation in Canada.²²

Our last article is by Professors Neyers and Botterell from Western University,²³ who examine claims for pure economic loss in the context of the tort of public nuisance, with specific reference to the decision of the House of Lords in *Tate & Lyle Industries Ltd. v. Greater London Council*.²⁴ They argue that the tort of public nuisance deserves greater recognition in Canadian law.

This special issue is a fitting tribute to the outstanding career and scholarship of Professor Lewis Klar. I am grateful to all the contributors for their dedication in making this project a reality. I am also grateful to Lewis for his friendship and collegiality over many years. This is a special issue, and it honours a very special person.

²¹ See e.g. *British Columbia (Workers' Compensation Appeal Tribunal) v Fraser Health Authority*, 2016 SCC 25, 2016 SCC 25 (CanLII); *Ediger v Johnston*, 2013 SCC 18, [2013] 2 SCR 98; *Clements v Clements*, 2012 SCC 32, [2012] 2 SCR 181; *Resurface Corp v Hanke*, 2007 SCC 7, [2007] 1 SCR 333.

²² Vaughan Black, “The Rise and Fall of Plaintiff-Friendly Causation” (2016) 53:4 *Alta L Rev* 1013.

²³ JW Neyers & Andrew Botterell, “*Tate & Lyle*: Pure Economic Loss and the Modern Tort of Public Nuisance” (2016) 53:4 *Alta L Rev* 1031.

²⁴ [1983] 2 AC 509 (HL (Eng)).

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