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FOR WHOM THE BELL TOLLED:

*An Examination Of Some Consequences Of HSBC Securities v. Davies, Ward & Beck
And The Repeal of The Ontario Negligence Act, s. 8*

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Abstract

This article examines significant changes in Ontario contribution law, since January 1, 2004, that result or may result from the combination of the repeal of section 8 of the Ontario *Negligence Act*, the interpretation given that section by *HSBC Securities*, and the enactment of the Ontario *Limitations Act, 2002*. The *Negligence Act, s. 8* was repealed effective January 1, 2004 and was not re-enacted in any form. *The Limitations Act, 2002*, took effect on January 1, 2004. The Ontario Court of Appeal decision in *HSBC Securities* was released in 2005.

The article examines whether the combination of the repeal of s. 8 and *HSBC Securities* settles or at least provides some guidance as to what the law governing one of the substantive requirements for contribution under the *Negligence Act* will be from January 1, 2004 onwards. The focus of this article is the potential-liability requirement: whether it is still sufficient that the person from whom contribution is claimed was once potentially liable to the injured person, or whether the person from whom contribution is claimed must still be potentially liable to the injured person at the time the contribution claim was commenced; that is, whether it is now a complete defence to the contribution claim that the contribution defendant is no longer potentially liable to the injured person because of an expired limitation period barring an action by the injured person against the contribution defendant for the damages in respect of which contribution is claimed. For Ontario law prior to 2004, once-existing liability was the potential-liability requirement for Negligence Act contribution, in this situation, so long as the contribution claimant could shelter under section 8. *HSBC Securities* established that section 8 meant: if the injured person's action was started, or the claim settled, within the applicable statutory limitation period, no proceedings for contribution under the Negligence Act are defeated by any other limitation period of any kind whatsoever, so long as the contribution claim is commenced within the contribution limitation period.

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The repeal of section 8, by itself, necessarily made some change in Ontario law, because that section governed that the issue – completely, according to *HSBC Securities* – and there is no statutory replacement. The question is: “what is the effect of the repeal”? There are no reported decisions, yet. *HSBC Securities* does not contain any express comments by any of the judges on the consequences of the repeal. Nonetheless, I argue that both the overall tenor and aspects of the decisions are more consistent with the “still-existing potential-liability is required” position than the “once-existing potential-liability is enough” position, even though the latter is the better answer and had been held to be one of the purposes of section 8. In any case, the interpretation given to section 8 by the Court of Appeal in *HSBC Securities* will certainly influence the decisions that will establish what the new law will be, even if *HSBC Securities* is ultimately held to have concluded only that section 8 was a self-contained code saying nothing whatsoever about pre-existing law (“old law”) so that the old law (whatever that was) now resumes its long-suspended course. However, it is a poignant difficulty that we will not know what the old law was until a judge decides what the old law was, because there are no decisions declaring what it was, and *HSBC Securities* specifically refrained from deciding what it was. Another “however” is that whatever the old law was need *not* be, and may well not be, what the new law is. The article also points out that any decision on the *Negligence Act* contribution requirements has the potential to affect contribution on other jurisprudential bases.

In addition, the article touches briefly on some procedural problems relating to contribution actions and some problems in the interpretation of the contribution-related limitation provisions of the *Limitations Act, 2002*.