SUPREME COURT OF QUEENSLAND

CITATION:	*Brown v Logan City Council* [2019] QSC 46
PARTIES:	**LORRAINE MARGARET BROWN** (plaintiff) **v** **LOGAN CITY COUNCIL** (defendant)
FILE NO/S:	No 203 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	8 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2018
JUDGE:	Davis J
ORDER:	**1. Leave is granted pursuant to r 420 to bring the application.** **2. Application dismissed.** **3. The parties are to be heard on the question of costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – STATUTES, REGULATIONS, ETC – APPLICABILITY AND EFFECT IN ACTIONS FOR NEGLIGENCE – GENERALLY – where the plaintiff suffered injury in a motor vehicle collision – where the plaintiff was charged and found guilty of dangerous operation of a vehicle in respect of the collision – where the plaintiff commenced proceedings against the defendant in respect of the collision – whether the plaintiff is entitled to commence proceedings against the respondent for injuries suffered in the commission of an indictable offence – whether the offence is an indictable offence STATUTES – ACTS OF PARLIAMENT – REPEAL – IMPLIED REPEAL – BY INCONSISTENT ACT – whether s 6 of the *Criminal Code Act* is repealed by s 45 of the *Civil Liability Act* *Civil Liability Act* 2003 (Qld), s 45, s 7 *Criminal Code* (Qld), s 2, s 3, s 6, s 328A, s 552D, s 552BA, s 552H, s 648, s 659, s 702 *Criminal Code Act* (Qld), s 6 *Criminal Law Amendment Act* 1997 (Qld), s 4 *Penalties and Sentences Act* 1992 (Qld), s 12

Uniform Civil Procedure Rules 1999 (Qld), r 171, r 470

Butler v Attorney-General (Vic) (1961) 106 CLR 268, cited
Corliss v Gibbings-Johns [2010] QCA 233, considered
Dey v Victorian Railways Commissioners (1949) 78 CLR 62, cited
Ferdinands v Commissioner for Public Employment (2006) 225 CLR 131, cited
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125, cited
Harrison v Melhem (2008) 72 NSWLR 380, cited
Jiminez v The Queen (1993) 173 CLR 573, cited
Kartinyeri v The Commonwealth (1998) 195 CLR 337, cited
Maritime Union of Australia v Minister for Immigration and Border Protection (2016) 259 CLR 431, cited
Maxwell v The Queen (1995) 184 CLR 501, considered
McBride v The Queen (1966) 115 CLR 44, cited
Military Rehabilitation and Compensation Commission v May (2016) 257 CLR 468, cited
Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 335, cited
R v Barlow (1996) 188 CLR 1, considered
R v Lowrie & Ross [2000] 2 Qd R 529, cited
R v Shillingsworth [1985] 1 Qd R 537, cited
R v Verrall [2013] 1 Qd R 587, cited
Ross v The Queen (1979) 141 CLR 432, cited
Saraswati v The Queen (1991) 172 CLR 1, considered
Shergold v Tanner (2002) 209 CLR 126, cited
South Australia v Tanner (1999) 166 CLR 161, cited
SZTAL v Minister for Immigration and Border Protection; SZTGM v Same (2017) 91 ALJR 936, cited

COUNSEL: K N Wilson QC, with A K Maher, for the plaintiff
D L K Atkinson for the defendant

SOLICITORS: Carter Capner Law for the plaintiff
King & Company Solicitors for the defendant

[1] On 30 January 2012, the plaintiff was injured when the motor vehicle she was driving on Pioneer Drive, Logan Village collided with another vehicle. When she sued the defendant for damages arising from her injures, the defendant pleaded that her claim was defeated by the operation of s 6(2) of the *Criminal Code Act* 1899 (Qld). The plaintiff has applied to strike out that plea.

[2] The application raises questions as to the proper construction of s 6 of the *Criminal Code Act* ('section 6'), s 45 of the *Civil Liability Act* 2003 (Qld) ('section 45') and whether the former section has been impliedly repealed by the latter.

History

[3] The section of Pioneer Drive where the accident occurred contains a sweeping bend. The plaintiff and the driver of a van were both driving in the bend. The plaintiff's vehicle passed across the middle part of the road, that is, on to the "wrong" side of the road and collided with the van which was approaching from the opposite direction.

[4] Police investigated the accident and the plaintiff was charged on complaint and summons.[1] The charge was; "That on the 30th day of January 2012 at Logan Village in the State of Queensland one Lorraine Margaret Brown dangerously operated a vehicle namely, a Mitsubishi Lancer in a place namely, Pioneer Drive, Logan Village."[2] The summons required the plaintiff's appearance before the Magistrates Court at Beenleigh on 18 December 2012.

[5] The plaintiff subsequently filed an application pursuant to ss 552D(2) and 552D(3) of the *Criminal Code* seeking orders, the effect of which was to have the prosecution proceed on indictment rather than summarily.

[6] In due course, an indictment was presented in the District Court at Beenleigh. On that indictment the plaintiff was charged with one count; "That on the thirtieth day of January 2012 at Logan Village in the state of Queensland, Lorraine Margaret Brown dangerously operated a vehicle in Pioneer Drive, Logan Village."[3]

[7] When the matter was called on for trial on 18 March 2014 in the District Court at Beenleigh, the plaintiff entered a plea of guilty. She was sentenced by Koppenol DCJ on 19 March 2014.[4]

[8] The bases upon which Koppenol DCJ sentenced the plaintiff were:

> "On January 30, 2012 you were driving your car along a road in the Logan Village area. The road was a narrow rural road. It was bitumen. The road did not have any marked centre line. As you drove around a bend with very limited visibility, you collided with a van which was coming towards you. The point of the collision was in about the centre of the road. That means that you drove your vehicle such that it did not stay on the correct left-hand side of the road, but drifted towards the centre of the road. Both vehicles collided violently and were written off.[5]

[9] And a little later:

> "Since this accident, the local council has installed a centre line and various reflectorised devices in the area of the bend. I think that is an acknowledgment by the local authority that the state of the road at the time was not as it should have been.

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1 *Justices Act* 1886 (Qld) ss 42 and 53.

2 Affidavit of Daraius Ludovic Isaacs CKI 16, exhibit "DLI-2".

3 Affidavit of Daraius Ludovic Isaacs CKI 16, exhibit "DLI-7".

4 Transcript 19 March 2014, Beenleigh District Court page 2.

5 Transcript 19 March 2014, Beenleigh District Court pages 1-2.

> Nevertheless, as a driver of a vehicle, albeit in the 60 kilometre an hour zone, you have a responsibility to drive safely and that responsibility is towards any other drivers who may be on the road and any pedestrians who may be nearby. You drifted onto the wrong side of the road effectively towards the centre, onto the wrong side of the – of a narrow road and that was a significant breach of that responsibility."[6]

[10] His Honour fined the plaintiff $750.00, disqualified her from holding or obtaining a driver's license for a period of six months from 19 March 2014 and recorded a conviction.[7]

[11] On 9 January 2017, the plaintiff commenced proceedings by way of a Claim and Statement of Claim. In her Statement of Claim, the plaintiff pleads (in summary):

(i) the defendant is a local government under the *Local Government Act 2009* (Qld);[8] and

(ii) was responsible for the construction, design and maintenance of Pioneer Drive;[9] and

(iii) owed duties to road users to maintain the road and fulfil certain statutory functions;[10] and

(iv) the accident was caused by the plaintiff misunderstanding where she was on the roadway so that her vehicle was driven by her on a collision path with the oncoming vehicle.[11]

[12] By paragraph 7 of the Statement of Claim:

> "7. In the premises of the facts pleaded in paragraphs 3, 4, 5 and 6[12] herein, the accident was caused by the negligence of the Defendant, by its servants or agents, who:
>
> a. Failed to mark a centreline on the road, subsequent to the re-surfacing undertaken;
>
> b. Failed to take any, or any adequate, interim measure to mark the centre of the carriageway by the use of such devices as reflective markers;
>
> c. Created a hazard by resealing the road and failing to mark a centreline;

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6 Transcript 19 March 2014, Beenleigh District Court page 2.

7 *Penalties and Sentences Act* 1992 (Qld) s 12.

8 Paragraph 2(a).

9 Paragraph 2(g).

10 Paragraph 2(i); includes an allegation of more general duties.

11 Paragraphs 3-5 and 6(h).

12 Those paragraphs contain the allegations broadly summarised in the preceding paragraph of these reasons.

d. Failed to adequately inspect or otherwise monitor the condition of the road to avoid hazards to road users;

e. Failed to curb or channel the roadway;

f. Failed to install any, or any sufficient, guide posts to delineate the edges;

g. Failed to mark the intersection of Benjamin Road and Pioneer Drive;

h. Failed to modify the V drain;

i. Failed to ensure that it complied with the designs and standards in MUTCD[13] and RPDM,[14] in the premises of a. to h. herein.

j. Failed to reduce the speed limit until such time as the road complied with the MUTCH[15] and RPDM."

[13] The plaintiff's case then is that the collision was caused because she drove on the wrong side of the road as a consequence of the failure of the defendant to mark the centreline and take other steps.

[14] The defendant pleads various things in defence of the claim but importantly here:

"…

8. As to paragraph 8 of the Statement of Claim,[16] the Defendant:

(a) admits that the Plaintiff has complied with the *Personal Injuries Proceedings Act 2002*;

(b) admits that the Plaintiff has complied with the order of the Court dated 20 January 2015;

(c) denies that the Plaintiff is entitled to commence the subject proceedings or is entitled to any relief, and says that:

(i) section 6 of the *Criminal Code Act* 1899 provides that:

"A person who suffers loss or injury in, or in connection with, the commission of an indictable offence of which the person is found guilty has no right of action against another person for the loss or injury"

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[13] A reference to the Queensland Manual of Uniform Traffic Control Devices.

[14] A reference to the Road Planning and Design Manual.

[15] This should read "MUTCD" in the Statement of Claim.

[16] Which pleads compliance with the *Personal Injuries Act* 2002 (Qld) and an earlier order of the Court.

(ii) in fact the Plaintiff was found guilty, on her own plea, of dangerous driving as a result of the facts and circumstances giving rise to the collision;

(iii) any loss or injury sustained by the Plaintiff was suffered in, or in connection with, the commission of the said offence;

(iv) in the circumstances, the Plaintiff has no right of action for the alleged loss or injury.

9. In the alternative, the Defendant says that:

(a) the occurrence of the collision was the result of dangerous driving by the Plaintiff;

(b) the Plaintiff's conduct amounted to an indictable offence;

(c) on her own plea, the Plaintiff was found guilty of dangerous driving as a result of the facts and circumstances giving rise to the collision;

(d) in the circumstances, the Plaintiff is not entitled to be awarded damages for any harm sustained in the collision; and

(e) the Defendant relies on section 45 of the *Civil Liability Act 2003* (Qld).

…"

[15] In her Further Reply, the plaintiff pleads:

"…

8. As to paragraph 8 of the Defence, the Plaintiff denies that s6 of the *Criminal Code Act* 1899 applies to this claim because:

(a) Section 328A(i) of the *Code* provides that the offence of dangerous driving is a misdemeanour;

(b) Pursuant to s552BA of the *Code*, an offence under the provision must ordinarily be tried summarily;

(c) An indictable offence normally determined summarily is, pursuant to s659 of the Code, a summary offence;

(d) An application under s552D of the Code does not alter the nature of the offence;

(e) The Plaintiff was fined $750 for the offence, a penalty which was relatively minor and which did not exceed the penalty which could have been imposed by the Magistrates Court in summary jurisdiction;

(f) In any event, s6 is subject to the operation of s45 of the *Civil Liability Act* (2003), which was enacted subsequently, and the provisions therein.

..."[17]

The present application

[16] By the present application, the plaintiff seeks to strike out paragraph 8(c) of the defendant's defence.

[17] Rule 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR) provides:

> "**171 Striking out pleadings**
>
> (1) This rule applies if a pleading or part of a pleading—
>
> (a) discloses no reasonable cause of action or defence; or
>
> (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
>
> (c) is unnecessary or scandalous; or
>
> (d) is frivolous or vexatious; or
>
> (e) is otherwise an abuse of the process of the court.
>
> (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
>
> (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

[18] Rule 470 of the *UCPR* provides as follows:

> "**470 Leave required for steps after request for trial date**
>
> After the filing of the request for trial date, a party may do the following only with the court's leave—
>
> (a) amend a pleading;
>
> (b) request particulars;
>
> (c) make an application in the proceeding."

[19] Two issues arise under the UCPR. Firstly, leave is required by the plaintiff to bring the application because it was filed after the request for trial date was filed. Secondly, an order striking out a pleading should only be made in the clearest of cases.[18]

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[17] Plaintiff's Further Reply paragraph 8.

[18] *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 130; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62, 84 and 91.

[20] The defendant does not though seek to defend the application on discretionary grounds. It takes no point under r 470 of the *UCPR* and accepts that the application raises a point of law which should be determined. Even though there is no cross-application for summary judgment for the defendant, the parties seem to agree that if the point is determined in the defendant's favour then the claim cannot succeed. There are no facts in issue. It is therefore clearly appropriate to determine the point.

The point of law

[21] From the argument advanced by the plaintiff on the application, only one point arises; whether the enactment of s 45 of the *Civil Liability Act* impliedly repealed s 6 of the *Criminal Code Act*. The plaintiff's Further Reply raises another issue namely, whether the plaintiff was, in the circumstances found guilty of an indicatable offence. There is nothing in that point for the reasons which emerge in the necessary analysis of s 6 which follows.

[22] The appropriate approach is to analyse each of s 6 and s 45 and then determine whether the latter has repealed the former.

Section 6 of *Criminal Code Act* 1899 (Qld)

[23] The *Criminal Code Act* established the Griffith's code ('the *Code*').[19] The *Code* in its original form was the first schedule to the *Criminal Code Act*. Apart from establishing the *Code*, the Act contains various miscellaneous provisions including s 6 which in its original form was as follows:

> "**6. Civil remedies.** When by the Code any act is declared to be lawful, no action can be brought in respect thereof.
>
> Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed; nor shall the omission from the Code of any penal provision in respect of any act or omission which before the time of the coming into operation of the Code constituted an actionable wrong affect any right of action in respect thereof."

[24] By the *Criminal Law Amendment Act* 1997,[20] s 6 was amended so it now reads:

> "**6 Civil remedies**
>
> (1) When by the Code any act is declared to be lawful, no action can be brought in respect thereof.
>
> (2) A person who suffers loss or injury in, or in connection with, the commission of an indictable offence of which the person is found guilty has no right of action against another person for the loss or injury.

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[19] Section 2.

[20] Section 4.

(3) Subsection (2) applies whether or not a conviction is recorded for the offence.

(4) Except as aforesaid, the provisions of this Act shall not affect any right of action which any person would have had against another if this Act had not been passed, nor shall the omission from the Code of any penal provision in respect of any act or omission which before the time of the coming into operation of the Code constituted an actionable wrong affect any right of action in respect thereof."

[25] The explanatory memorandum to the bill is not particularly useful but is in these terms:

> "*Clause 4* amends section 6 (Civil remedies) by inserting a new subsection to provide that if a person has been found guilty, whether or a not a conviction has been recorded, of an indictable offence and that person suffered loss or injury in or in connection with the commission of the offence, that person shall have no right of action against another person in respect of the loss or injury."

[26] The bill was read for the second time in the House on 4 December 1996. On that occasion this was said:

> "An amendment to section 6 of the Criminal Code Act 1899 (clause 4) will directly reflect the coalition policy which calls for an amendment "to prohibit civil actions by criminals who have suffered personal injuries where they have suffered those injuries during illegal activities". Section 6 will now provide that if a person has been found guilty, whether or a not a conviction has been recorded, of an indictable offence and that person suffered loss or injury in or in connection with the commission of the offence, that person shall have no right of action against another person in respect of the loss or injury."[21]

[27] Section 702 of the *Code* provides as follows:

> "**702 Saving of civil remedies**
>
> Except when expressly so provided, the prosecution or conviction of a person for an offence does not affect any civil remedy which any person aggrieved by the offence may have against the offender."

[28] Therefore, s 6 of the *Criminal Code Act* extinguishes the right of recovery of an offender against the *Code* and s 702 preserves the remedies of victims of an offence.

[29] There is no definition in the *Criminal Code Act* of the term "offence" or of the term "indictable offence." However, the purpose of the *Criminal Code Act* is to establish the *Code,* so it is must be that in the absence of some clear indication to the contrary, the terms "offence" and "indictable offence" have the same meaning in the *Criminal Code Act* as in the *Code*.

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[21] Hansard 4 December 1996 page 4872.

[30] Section 2 of the *Code* defines "offence" as:

> "**2 Offence**
>
> An act or omission which renders the person doing the act or making the omission liable to punishment is called an "offence"."

[31] The offence to which the plaintiff pleaded guilty is the offence of dangerous operation of a vehicle. That offence is created by s 328A of the *Code* which, relevantly here, is in these terms:

> "**328A Dangerous operation of a vehicle**
>
> (1) A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place commits a misdemeanour.
>
> Penalty: Maximum penalty—200 penalty units or 3 years imprisonment.
>
> (2) If the offender—
>
> (a) at the time of committing the offence is adversely affected by an intoxicating substance; or
>
> (b) at the time of committing the offence is excessively speeding or taking part in an unlawful race or unlawful speed trial; or
>
> (c) has been previously convicted either upon indictment or summarily of an offence against this section;
>
> the person commits a crime.
>
> Penalty: Maximum penalty—400 penalty units or 5 years imprisonment …."[22]

[32] Dangerous operation of a vehicle under s 328A(1) is a "misdemeanour." By s 3 of the *Code*:

> "**3 Division of offences**
>
> (1) Offences are of 2 kinds, namely, criminal offences and regulatory offences.
>
> (2) Criminal offences comprise crimes, misdemeanours and simple offences.
>
> (3) Crimes and misdemeanours are indictable offences; that is to say, the offenders can not, unless otherwise expressly stated, be prosecuted or convicted except upon indictment.

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[22] There is no need here to consider the circumstances of aggravation provided by sub section (3) and following.

(4) A person guilty of a regulatory offence or a simple offence may be summarily convicted by a Magistrates Court.

(5) An offence not otherwise designated is a simple offence."

[33] Therefore, the offence created by s 328A(1) is an "indictable offence."

[34] By s 552BA some indictable offences must be dealt with summarily rather than by judge and jury on indictment. That section provides:

"**552BA Charges of indictable offences that must be heard and decided summarily**

(1) This section applies to a charge before a Magistrates Court of any indictable offence against this Code if the offence is a relevant offence.

(2) A charge to which this section applies must be heard and decided summarily.

(3) This section is subject to section 552D.

(4) In this section—

relevant offence means—

(a) an offence against this Code, if the maximum term of imprisonment for which the defendant is liable is not more than 3 years; or

(b) an offence against part 6, other than—

(i) an offence mentioned in paragraph (a); or

(ii) an offence against chapter 42A; or

(iii) an offence that, under section 552BB, is an excluded offence."

[35] Section 552BB then list various offences which are "excluded offences." Many of these attract a sentence of imprisonment in excess of three years.

[36] Section 552H then provides:

"**552H Maximum penalty for indictable offences dealt with summarily**

(1) A person is liable on summary conviction under section 552A, 552B or 552BA to a maximum penalty of—

(a) if the Magistrates Court is a court constituted by a magistrate imposing a drug and alcohol treatment order under the *Penalties and Sentences Act 1992*, part 8A—100 penalty units or 4 years imprisonment; or

(b) if the Magistrates Court is constituted by a magistrate other than a magistrate mentioned in paragraph (a)—100 penalty units or 3 years imprisonment; or

(c) if the Magistrates Court is constituted by justices under section 552C(1)(b)—100 penalty units or 6 months imprisonment.

(2) However, in no case may the person be punished more than if the offence had been dealt with on indictment."

[37] An offence of dangerous operation of a vehicle under s 328A(1), where there are no circumstances of aggravation, attracts a maximum sentence of three years imprisonment. Therefore, by s 552BA the charge must not be heard on indictment unless s 552D is engaged. That section provides, relevantly here:

"**552DWhen Magistrates Court must abstain from jurisdiction**

(1) A Magistrates Court must abstain from dealing summarily with a charge under section 552A, 552B or 552BA if satisfied, at any stage, and after hearing any submissions by the prosecution and defence, that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction.

(2) A Magistrates Court must abstain from dealing summarily with a charge under section 552BA if satisfied, on an application made by the defence, that because of exceptional circumstances the charge should not be heard and decided summarily.

Examples of exceptional circumstances—

1 There is sufficient connection between the offence the subject of the charge, and other offences allegedly committed by the defendant and to be tried on indictment, to allow all the offences to be tried together.

2 There is an important issue of law involved.

3 An issue of general community importance or public interest is involved, or the holding of a trial by jury is justified in order to establish contemporary community standards.

[38] It was s 552D(2) upon which the plaintiff relied to make the application to the Magistrates Court which resulted in the charge against her being dealt with on indictment in the District Court.

[39] Section 659 of the *Code* provides as follows:

> "**659 Effect of summary conviction for indictable offences**
>
> When a person has been summarily convicted of an indictable offence, the conviction is to be deemed a conviction of a simple offence only, and not of an indictable offence."

[40] Section 659 operates so that if an indictable offence is dealt with summarily, the conviction for the indictable offence is deemed to be a conviction of a simple offence. In *Corliss v Gibbings-Johns*[23] the Court of Appeal held that in such a case, s 6 of the *Criminal Code Act* was not engaged so as to exclude the plaintiff's cause of action. It seemed not to have been argued in that case that the plaintiff could be deemed to be "convicted" summarily but still be "found guilty" of an indictable offence.

[41] Here however, the plaintiff was convicted on indictment of the charge of dangerous operation of a vehicle and was clearly therefore convicted of an indictable offence.

[42] The term in s 6 though is not "convicted" but "found guilty". The use of that term is explained in the context of established principles of the criminal law and its procedures.

[43] In *Maxwell v The Queen*[24] an indictment charging murder was presented to the New South Wales Supreme Court. Upon arraignment, the accused pleaded guilty to manslaughter based on diminished responsibility and the plea was accepted in discharge of the murder count. The trial judge accepted the plea and then received submissions on sentence. During the sentencing hearing his Honour formed the view that there was no basis for the reliance by the prisoner upon diminished responsibility and his Honour vacated the plea. Questions arose as to whether the accused had been "convicted" so that a plea of *autrefois convict* could be raised to the murder charge.

[44] Relevantly here, the High Court explained that the criminal process involved firstly a finding of guilt, whether by a verdict or plea followed by some judgment of the court constituting an acceptance of the plea, often by passing sentence. Depending upon the context, "conviction" occurred at some point along that process.[25]

[45] In Queensland s 648 of the *Code* provides:

> "**648 Convicted person to be called on to show cause**
>
> When an accused person pleads that the person is guilty of any offence, and when, upon trial, an accused person is convicted of any offence, the proper officer is required to ask the person whether the person has anything to say why sentence should not be passed upon the person, but an omission to do so does not invalidate the judgment."

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[23] [2010] QCA 233 at [28], following *Ross v The Queen* (1979) 141 CLR 432.

[24] (1995) 184 CLR 501.

[25] At pages 507-510; 520-522 and 529-530.

[46] The administration of the *allocutus*, as the procedure in s 648 is known constitutes the acceptance by the court of the plea or verdict[26] and at that point, an accused is convicted.[27] Section 6 applies where a person has been "found guilty". That must, in context, mean "found guilty" in a criminal proceeding which is one step towards conviction. Whether "found guilty" equates to "conviction" or is something less need not be considered. Here, the plaintiff pleaded guilty, the *allocutus* presumably was administered and Koppenol DCJ proceeded and imposed a sentence. His Honour ordered that a conviction be recorded.[28]. The plaintiff has clearly therefore been "found guilty".

[47] The plaintiff was "found guilty" of "an offence". The term "offence" may have different meanings. In *R v Barlow*[29] the High Court explained:

> "Offence' is a term that is used sometimes to denote what the law proscribes under penalty and sometimes to describe the facts the existence of which render an actual offender liable to punishment. When the term is used to denote what the law proscribes, it may be used to describe that concatenation of elements which constitute a particular offence (as when it is said that the Code defines the offence of murder) or it may be used to describe the element of conduct (an act or omission) which attracts criminal liability if it be accompanied by prescribed circumstances or if it causes a prescribed result or if it be engaged in with a prescribed state of mind (as when it is said that a person who *strikes another a blow* is guilty of the offence of murder if the blow was unjustified or was not excused, if death results and if the blow is struck with the intention of causing death)."[30]

[48] As to the understanding of the term "offence" in the context of the *Code*, it was said in *R v Barlow*:

> Section 2 of the Code makes it clear that "offence" is used in the Code to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment."[31]

[49] The plaintiff was by her plea "found guilty" of "an offence" and the act constituting the "offence" was driving in a manner that is objectively dangerous,[32] namely driving the motor vehicle on the wrong side of Pioneer Drive. By her Statement of Claim, the plaintiff alleges that the defendant was negligent, which negligence caused her to drive on the wrong side of

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[26] *R v Lowrie & Ross* [2000] 2 Qd R 529 at 593; *R v Shillingsworth* [1985] 1 Qd R 537 at 543.

[27] *R v Verrall* [2013] 1 Qd R 587 at 590.

[28] *Penalties and Sentences Act* 1992 (Qld) s 12.

[29] (1996) 188 CLR 1.

[30] Brennan CJ, Dawson and Toohey JJ at page 9.

[31] *R v Barlow* (1996) 188 CLR 1.at 9.

[32] *McBride v The Queen* (1966) 115 CLR 44 at 50-51; *Jiminez v The Queen* (1993) 173 CLR 573 at 583.

the road. Her driving on the wrong side of the road caused the collision which caused her injuries for which she now claims compensation by way of damages.

[50] The plaintiff therefore in the current proceedings:

(i) has suffered loss and injury; and

(ii) the claim arises from the driving which was particularised as dangerous in the prosecution of her and therefore the injuries were suffered "in connection with";

(iii) the commission of an indictable offence; namely the dangerous operation of the vehicle for which she was convicted on indictment.

[51] It follows then that s 6 operates, (subject to the argument that the section is repealed) to deny the plaintiff a right of action against the defendant.

Section 45 of the *Civil Liability Act* 2003 (Qld)

[52] Section 45 is in these terms:

> "**45 Criminals not to be awarded damages**
>
> (1) A person does not incur civil liability if the court is satisfied on the balance of probabilities that—
>
> (a) the breach of duty from which civil liability would arise, apart from this section, happened while the person who suffered harm was engaged in conduct that is an indictable offence; and
>
> (b) the person's conduct contributed materially to the risk of the harm.
>
> (2) Despite *subsection (1)*, the court may award damages in a particular case if satisfied that in the circumstances of the case, *subsection (1)* would operate harshly and unjustly.
>
> (3) If the court decides to award damages under *subsection (2)*, the court must assess damages on the basis that the damages to which the injured person would be entitled, apart from this section, are to be reduced, on account of the injured person's conduct, by 25% or a greater percentage decided by the court to be appropriate in the circumstances of the case.
>
> (4) It does not matter whether the person whose conduct is alleged to constitute an indictable offence has been, will be or is or was capable of being proceeded against or convicted of an indictable offence.
>
> (5) If the person has been dealt with for the offence, it does not matter whether the person was dealt with on indictment or summarily."

[53] In the second reading speech for the bill this was said:

> "The bill removes the right of people to claim damages if they are injured whilst committing an indictable offence. This aspect was highlighted in the consultation draft previously tabled. The court will be able to award damages where it considers the bill will result in a harsh and unjust result, but in those circumstances the court will still be required to reduce any damages by a minimum of 25 per cent. Further, if a person is intoxicated at the time of the incident, the bill creates the presumption that the person has contributed to their injury unless that person can prove otherwise. If the person cannot rebut the presumption, any damages they would be entitled to are reduced by a minimum of 25 per cent. This figure increases to 50 per cent if the incident involves a motor vehicle accident."[33]

[54] The limitation on civil liability under s 45 arises where three elements are present:

(i) the person who suffered harm is engaged in conduct that is an indictable offence;

(ii) the breach of duty giving rise to the cause of action "happened" while the person was so engaged: and

(iii) the person's conduct contributed materially to the risk of harm.

[55] By s 45(4), prosecution or otherwise is irrelevant and by s 45(5), it is irrelevant whether any prosecution was on indictment or the charge was disposed of summarily. In other words, the Court looks not to the procedure which led to the conviction but rather one looks at the nature of the offence itself; is it by definition an "indictable offence."[34]

[56] In the present case, the "breach of duty" alleged by the plaintiff is the failure to mark the road etc as pleaded in the Statement of Claim. The "conduct that is an indictable offence" is driving on the incorrect side of the road (i.e. objectively dangerously). Whether the "breach of duty" in this case "happened" during the plaintiff's dangerous driving is perhaps a difficult point. Undoubtedly, the dangerous driving of the car is "an indictable offence" and the dangerous driving "contributed materially to the risk of the harm." Therefore, subject to the reservation as to whether the breach of duty of the defendant "happened" when the plaintiff was driving dangerously, s 45 is engaged.

[57] With that reservation then and subject to the discretion in s 45(2) as regulated by s 45(3), s 45 applies to limit the civil liability of the defendant.

The arguments of the parties

[58] The plaintiff seems to accept that she is caught by the terms of s 6, so if that section is still in force she has no right of action against the defendant. She also concedes that she is caught by

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[33] Hansard 11 March 2003, page 368.

[34] Hansard 11 March 2003, page 368.

s 45 so that no civil liability falls upon the defendant, but that concession is subject, of course, to ss 45(2) and 45(3) which confer a discretion upon which she will seek to rely.

[59] The proposition that s 6 was repealed by s 45 has not been previously considered. In *Corliss v Gibbings-Johns*[35] both sections were considered but no submission was put to the Court of Appeal that s 6 had been impliedly repealed.

[60] In support of the submission that the enactment of s 45 impliedly repealed s 6, the plaintiff points to the following;

(i) section 45 "covers the field" where a plaintiff has suffered injury during the commission of an indictable offence;

(ii) other jurisdictions have enacted similar provisions to s 45. These sections are intended to cover the field because in no other jurisdiction is there an equivalent section to s 6;

(iii) as offences against s 328A(1) can be dealt with either on indictment or summarily, if s 6 continues to remain in force an anomaly exists because the right to recover damages depends on whether the prosecution was conducted summarily or on indictment;

(iv) if s 6 remains in force then s 45(1) has no real legal effect;

(v) having regard to the second reading speech to the *Civil Liability Bill*;

A. the legislature has overlooked s 6; there being no mention of s 6 in the explanatory memoranda or the second reading speech; and

B. the legislature intended the *Civil Liability Act* to deal exclusively with the liability of a defendant to a plaintiff who was injured while committing a crime.

(vi) the two sections cannot stand together and work cumulatively.

[61] It is unnecessary to set out the detailed submissions of the defendant. Suffice to say that the defendant submits that on a proper construction of the two sections they are not relevantly inconsistent and can stand together.

Determination

[62] A statutory provision, upon enactment, may impliedly repeal an earlier enacted provision. In such a case, the earlier provision will cease to be a law even though not expressly repealed. However, such an implied repeal will only occur where an intention to effect the repeal is "necessarily to be implied."[36] "There must be very strong grounds to support the implication of repeal."[37] The general presumption is that both provisions continue to operate.[38]

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[35] [2010] QCA 233.

[36] *Saraswati v The Queen* (1991) 172 CLR 1 at 17.

[37] *Saraswati v The Queen* (1991) 172 CLR 1 at 17.

[63] What is required to effect implied repeal is inconsistency between the two provisions so that they cannot stand together.[39] The earlier enacted provision then yields to the later enacted provision to the extent of the inconsistency.

[64] The determination whether there is inconsistency between the two provisions involves the construction of the provisions[40] which of course, requires consideration of the whole of each statute in which the provisions appear.[41] The intention of the legislature is clearly to be drawn from the words of the statute rather than from speculation, as the plaintiff invites, on whether the legislature overlooked the earlier provision.

[65] The two provisions here operate quite differently:

(i) section 6 of the *Criminal Code Act* applies only where a person has been "found guilty" on an indictment, whereas s 45 of the *Civil Liability Act* requires either:

(a) a finding of conduct constituting an indictable offence;

(b) in civil or criminal proceedings;

(c) obviously only to the civil standard in a civil case; and

(d) whether or not there has been a prosecution, being on indictment or otherwise.

(ii) section 45 only applies where the breach of duty for which compensation is claimed happened while the offence was being committed, while s 6 only requires that the loss or damage be suffered "in connection with" the conduct which constitutes the offence; and

(iii) section 45 only applies when the conduct constituting the offence "contributed materially to the risk of the harm." There is no such restriction in s 6.

[66] There are clearly circumstances caught by s 6 of the *Criminal Code Act* which will not be caught by s 45 of the *Civil Liability Act* and vice versa.

[67] There is no anomaly caused by the fact that by s 6 the right of the plaintiff to damages might depend on whether an indictable offence is prosecuted summarily or on indictment. That is

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[38] *Saraswati v The Queen* (1991) 172 CLR 1 at 17; *Butler v Attorney-General* (Vic) (1961) 106 CLR 268 at 275, 276; *South Australia v Tanner* (1999) 166 CLR 161 at 171 all followed in *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 131 at 138; see also *Shergold v Tanner* (2002) 209 CLR 126 at [34]-[39].

[39] *Butler v Attorney-General* (Vic) (1961) 106 CLR 268 at 275, 280, 290; *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 131 at 138; *South Australia v Tanner* (1999) 166 CLR 161 at 171; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.

[40] *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 131 at 138.

[41] *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 131 at 139, and the general principles of statutory construction explained in *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 335 at [60], [69].

how s 6 operates[42] and did so before the *Civil Liability Act* was enacted. While the maximum sentence for dangerous operation of a vehicle[43] is three years, many other indictable offences which may be heard summarily have much higher maximum penalties. If dealt with summarily though, the maximum sentence which can be imposed by a Magistrate for those offences is three years imprisonment.[44] Therefore, there is a general expectation that the more serious examples will be tried on indictment. That is no doubt the policy which explains why s 6 excludes liability where the offence is prosecuted on indictment but not when it is disposed of summarily.

[68] I also reject the plaintiff's submission that if s 6 is not repealed, s 45 has no legal effect. The submission really is, that if s 6 continues in force then, in cases which fall within both s 6 and s 45, the discretion to relieve against hardship in s 45(3) doesn't save a claimant from loss of the cause of action. Section 45 though operates even when there has been no criminal proceeding and the plaintiff has not been "found guilty." In those circumstances the discretion in s 45 (3) may be exercised to moderate the operation of s 45(1) even though s 6 is not engaged.

[69] The inconsistency between the two sections is not such as to effect a repeal of s 6 of the *Criminal Code Act*.

[70] There is another obstacle to the plaintiff's arguments. Section 7 of the *Civil Liability Act* provides as follows:

> "**7 Provisions relating to operation of Act**
>
> (1) Subject to sections 5(3) and 59A, this Act does not create or confer any cause of civil action for the recovery of damages.
>
> (2) A provision of this Act that gives protection from civil liability does not limit the protection from liability given by another provision of this Act or by another Act or law.
>
> *Note—*
>
> See, for example, the following provisions giving protection from civil liability to particular persons—
>
> - the *Forestry Act 1959*, sections 96E, 96F and 96G
> - the *Marine Parks Act 2004*, section 147
> - the *Nature Conservation Act 1992*, section 142
> - the *Recreation Areas Management Act 2006*, section 228."
>
> (3) This Act, other than chapter 2, part 2 and chapter 3, does not prevent the parties to a contract from making express provision for

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[42] *Corliss v Gibbings-John* (2010) QCA 233 at [28].

[43] Absent circumstances of aggravation.

[44] *Criminal Code Act* 1899 s 552H, subject to s 552H(1)(a).

their rights, obligations and liabilities under the contract (the ***express provision***) in relation to any matter to which this Act applies and does not limit or otherwise affect the operation of the express provision.

(4) Subsection (3) extends to any provision of this Act even if the provision applies to liability in contract.

(5) This Act is not a codification of the law relating to civil claims for damages for harm.

[71] Section 45 of the *Civil Liability Act* is obviously a provision which "gives protection from civil liability." Section 6 of the *Criminal Code Act* is "another act or law" so if it, like s 45 of the *Civil Liability Act*, gives "protection from liability" then s 7(2) is a complete answer to the plaintiff's application. It would follow that s 6 is not impliedly repealed, but is expressly preserved.

[72] Section 6 and s 45 are structurally very different. Section 45 expressly and directly limits the liability of a potential defendant. The opening words are "a person does not incur civil liability if …". Section 6 does not expressly limit a potential defendant's liability, but it indirectly does so by removing the potential plaintiff's cause of action. A section which removes a cause of action is surely a provision which "gives [to a potential defendant] protection from civil liability." The point does not seem to have been considered although in *Harrison v Melhem*[45] Mason P was prepared to assume that a section which limited recovery of damages for gratuitous assistance was a provision which gave the defendant "protection from liability".[46]

[73] Section 7 must be construed in its legislative context and by reference to the purpose and objects of the *Civil Liability Act.*[47] Consideration of the purpose and context of the *Civil Liability Act* reinforces the view that s 6 is a section which "gives [to a potential defendant] protection from civil liability".

[74] There are no legislative objects expressly stated in the *Civil Liability Act*. However, various provisions limit the civil liability of potential defendants in the sense that, but for the provisions, a claimant would achieve a more favourable monetary outcome. The sections operate in a variety of ways:

(i) section 45 itself prevents civil liability from arising in favour of a potential plaintiff injured while committing an indictable offence;

(ii) section 15 operates so to remove a duty of care that might otherwise be owed;

(iii) section 21 provides that there will be no breach of duty in circumstances where but for the section there may be;

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[45] (2008) 72 NSWLR 380.

[46] *Civil Liability Act* 2002 (NSW) ss 3A(1) and 15(3) and paragraph [211] in the judgment of Mason P.

[47] *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468 at [10]; *SZTAL v Minister for Immigration and Border Protection; SZTGM v Same* (2017) 91 ALJR 936 at [14], [35]-[40], [81], [92].

(iv) Part 2 provides that concurrent wrongdoers are not all jointly and severally liable for the total loss but their liability is limited to their proportionate contribution to the cause of the loss;

(v) section 47 presumes contributory negligence by a plaintiff who has suffered harm whilst being intoxicated; and

(vi) various provisions in Chapter 3 limit damages recoverable by a potential plaintiff.

[75] One purpose of the *Civil Liability Act* is to limit the damages to which defendant may be liable in certain circumstances. This identification of purpose is confirmed by the extrinsic evidence[48]. In the second reading speech in support of the bill the Minister said:

> "During the past 18 months, the rapid escalation of insurance premiums has brought into sharp focus the need for reform of the law of negligence and damages awards for personal injuries under that law. Our government has responded quickly and decisively to the insurance crisis. In June last year we introduced the Personal Injuries Proceedings Act—the first stage of historic reforms to the law of negligence and claims made under it. Subsequently, we have been working to create a circuit-breaker to continuing increases in insurance premiums by bringing a rationale approach to personal injury damages awards."[49]

[76] The provisions set out in [74], in different ways "give protection from civil liability" within the meaning of s 7. Section 7 when referring to provisions which "give protection from civil liability" is referring to any provision which operates so as to limit the damages to which a potential defendant may otherwise be liable to pay. Section 6 of the *Criminal Code Act* is such a provision.

[77] It follows then that to the extent of any inconsistency between s 45 of the *Civil Liability Act* and s 6 of the *Criminal Code Act* it is not s 45 which prevails because it is later in time. Section 6 prevails by force of s 7 of the *Civil Liability Act.* Section 7 also answers the plaintiff's submissions that s 45 "covers the field". In fact it expressly preserves other provisions.

Conclusions

[78] It is not seriously in contest that s 6, on its terms, applies to the present case as so to deprive the plaintiff of her right of action against the defendant.

[79] Given that s 6 is a valid statutory provision and remains in force it follows that the plea made in paragraph 8 of the defence is a valid one. In fact, it is a complete answer to the plaintiff's claim.

[80] The present application must be dismissed. I make the following orders:

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[48] *Maritime Union of Australia v Minister for Immigration and Border Protection* (2016) 259 CLR 431 at [23], [25]. [28], [30], [34].

[49] Hansard 11 March 2003, pages 366-7.

1. Leave is granted pursuant to r 420 to bring the application.

2. Application dismissed.

3. The parties are to be heard on the question of costs.