

Dangerous Operation of a Motor Vehicle: s 328A

Legislation

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.

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.

Maximum penalty—400 penalty units or 5 years imprisonment.

- (3) If the offender has been—

- (a) previously convicted either upon indictment or summarily of an offence against this section committed while the offender was adversely affected by an intoxicating substance; or
- (b) twice previously convicted either upon indictment or summarily (or once upon indictment and once summarily) of the same prescribed offence or different prescribed offences;

the court or justices shall, upon conviction, impose as the whole or part of the punishment, imprisonment.

- (4) A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime and is liable on conviction on indictment—

- (a) to imprisonment for 10 years, if neither paragraph (b) nor (c) applies; or
- (b) to imprisonment for 14 years if, at the time of committing the offence, the offender is—
 - (i) adversely affected by an intoxicating substance; or

- (ii) excessively speeding; or
 - (iii) taking part in an unlawful race or unlawful speed trial; or
- (c) to imprisonment for 14 years, if the offender knows, or ought reasonably know, the other person has been killed or injured, and the offender leaves the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrives.
- (5) The offender may be arrested without warrant.
- (6) In this section—

excessively speeding means driving or operating a vehicle at a speed more than 40km/h over the speed limit applying to the driver under the *Transport Operations (Road Use Management) Act 1995*.

operates, or in any way interferes with the operation of, a vehicle dangerously means operate, or in any way interfere with the operation of, a vehicle at a speed or in a way that is dangerous to the public, having regard to all the circumstances, including—

- (a) the nature, condition and use of the place; and
- (b) the nature and condition of the vehicle; and
- (c) the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and
- (d) the concentration of alcohol in the operator's blood or breath; and
- (e) the presence of any other substance in the operator's body.

place does not include a place being lawfully used to race or test vehicles under a licence or another authority under an Act and from which other traffic is excluded at the time.

prescribed offence means—

- (a) an offence against this section; or
- (b) an offence charged on indictment involving the driving or operation of a vehicle at a speed causing or likely to cause injury to anyone; or
- (c) an offence against the *Transport Operations (Road Use Management) Act 1995*, section 79(1), (1F), (2), (2AA), (2A), (2B), (2D) or (2J).

the public includes passengers in a vehicle whether in a public or private place.

unlawful race means a race involving a vehicle in contravention of the *Transport Operations (Road Use Management) Act 1995*, section 85.

unlawful speed trial mean a trial of the speed of a vehicle in contravention of the *Transport Operations (Road Use Management) Act 1995*, section 85.

Commentary

Meaning of ‘operated, or in any way interfered with the operation of, a vehicle’

‘Operated’ is not defined in the *Code*. The Macquarie Dictionary defines the term as ‘to work or use a machine’.

If it is alleged that the defendant was not the driver, then the prosecution would have to plead that the defendant ‘dangerously interfered with the operation of a vehicle’. If it is alleged that the defendant was the driver, then proof of that fact will be sufficient to satisfy the requirement that the defendant ‘operated’ a motor vehicle.

Meaning of ‘dangerously’

The word ‘dangerously’ has its ordinary meaning. The ordinary meaning of ‘dangerous’ is ‘fraught with or causing danger; involving risk; perilous; hazardous; unsafe’. It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver’s own passengers: *King v The Queen* [\(2012\) 245 CLR 588](#).

The prosecution must prove that there was a situation which, viewed objectively, was dangerous. *R v Jiminez* [\(1992\) 173 CLR 572](#) at 583; *R v McBride* [\(1966\) 115 CLR 44](#) at 50-51. For the driving to be dangerous, there must be some feature which is identified not as a mere want of care, but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by a person who may, on occasions, drive with less than due care and attention: *R v Jiminez* [\(1992\) 173 CLR 572](#) at 579.

The jury do not need to be told that fault is an element of the offence. That is not to say that in establishing the offence a consideration of the offender’s mental state must necessarily be disregarded; the provisions of Ch 5 *Criminal Code*, e.g. ss 23,24,25, and 31 may be raised: see *R v Wilson* [\[2009\] 1 Qd R 476](#) at [15]. See also *R v Grimaldi* [\[2011\] QCA 114](#). In relation to the defence of mistake of fact in s 24 see also *R v Plath* [\[2003\] QCA 567](#) at [7] and *R v Perham* [\[2016\] QCA 123](#) at [34].

The prosecution must prove that there was some serious breach of the proper conduct of the vehicle upon the roadway, so serious as to be in reality, and not speculatively, potentially dangerous to others: see *McBride* [\(1966\) 115 CLR 44](#) at 49-50.

When it is alleged that the manner of operation was dangerous because the defendant was tired or drowsy, regard should be had to *Jiminez* (at 579 – 580) where it was held that the issue is not whether there was or was not a warning as to the onset of sleep, but as to whether the driver was so tired that, in all the circumstances, the driving was dangerous to the public. ‘If the jury is satisfied beyond reasonable doubt that the driving was objectively dangerous to the public, then they must consider whether they were satisfied beyond reasonable doubt that the accused when doing so was not

momentarily and suddenly asleep. If so [his or her] actions whilst asleep would be involuntary and could not amount to dangerous operation of a motor vehicle': *R v Kuruvinakunnel* [\[2012\] QCA 330](#).

Whilst the immediate result of driving may afford evidence from which the quality of the driving may be inferred, it is not the result which determines whether driving was dangerous: *McBride v The Queen* [\(1966\) 115 CLR 44](#) at 50.

Meaning of in 'any place'

The 1997 amendments provide that the offence can occur in 'any place' (other than a place being used to test vehicles from which other traffic is excluded at the time), whereas previously the offence was confined to 'on a road or in a public place'.

Aggravation

Meaning of 'whilst adversely affected by intoxicating substance'

In *R v Anderson* [\[2006\] 1 Qd R 250](#), Keane JA, with whose reasons Williams JA agreed, approved at [70] a direction to the jury which explained 'adversely affected by alcohol' as meaning some material influence upon the person from the consumption of alcohol; Keane JA added at [71] that the trial judge was referring to a material detraction in the driver's ability to control a vehicle in consequence of the driver's consumption of alcohol, and that that was a correct understanding of the words.

Offence under s 328A(2)

The offence under s 328A(2) has an additional element that the defendant caused the death of or grievous bodily harm to another person. There is also an additional aggravating circumstance if the defendant knowing, or ought reasonably to have known, the other person had been killed or injured, left the scene of the incident other than to obtain medical or other help for the person before a police officer arrives.

Suggested Direction

The prosecution must prove that the defendant:

- 1. Operated, or in any way interfered with the operation of, a motor vehicle.**
- 2. In a place, namely [place name].**
- 3. Dangerously.**
- 4. [The defendant was adversely affected by an intoxicating substance].**
- 5. [At the time of committing the offence the defendant was excessively speeding or taking part in an unlawful race or unlawful speed trial].**

6. [If it has been alleged that the defendant has been previously convicted of any of the offences referred to in s 328A(3) this circumstance of aggravation must be pleaded and proved.]

The term ‘operates a motor vehicle dangerously’ means ‘operates a vehicle at a speed or in a way that is dangerous to the public having regard to all the circumstances’ including:

1. **‘the nature, condition and use of the place; and**
2. **the nature and condition of the vehicle; and**
3. **the number of persons, vehicles or other objects that are, or might reasonably be expected to be, in the place; and**
4. **the concentration of alcohol in the operator’s blood; and**
5. **the presence of any other substance in the operator’s body.’**

The operation of a vehicle includes the speed at which the vehicle is driven and all matters connected with the management and control of the vehicle by the driver, such as keeping a lookout, turning, slowing down and stopping.

The expression ‘operates a vehicle dangerously’ in general does not require any given state of mind on the part of the driver as an essential element of the offence. A motorist may believe he or she is driving carefully yet be guilty of operating a vehicle dangerously. ‘Dangerously’ is to be given its ordinary meaning of something that presents a real risk of injury or damage. The ordinary meaning of ‘dangerous’ is ‘fraught with or causing danger; involving risk; perilous; hazardous; unsafe’. It describes, when applied to driving, a manner or speed of driving which gives rise to a risk to others, including motorists, cyclists, pedestrians and the driver’s own passengers.

The prosecution must prove that there was a situation which, viewed objectively, was dangerous. For the driving to be dangerous, there must be some feature which is identified not as a mere want of care, but which subjects the public to some risk over and above the risk ordinarily associated with the driving of a motor vehicle, including driving by a person who may, on occasions, drive with less than due care and attention.

Momentary lapses of attention on the part of the driver, if they result in danger to the public, are not outside the ambit of the offence of dangerous operation of a motor vehicle merely because they are brief or momentary. If a driver adopts a manner of driving which is dangerous in all the circumstances of the case to other road users it does not matter whether they are deliberately reckless, careless, momentarily inattentive or even doing their incompetent best. However, the prosecution must prove that there was some serious breach of the proper conduct of the vehicle upon

the roadway, so serious as to be in reality, and not speculatively, potentially dangerous to others.

The consequences of the defendant's acts or omissions cannot add to the criminality of his or her driving. The quality of being dangerous to the public does not depend on the resultant damage. Whilst the immediate result of driving may afford evidence from which the quality of the driving may be inferred, it is not the result which gives that quality.

If the defendant was adversely affected by alcohol, that fact is a circumstance relevant to the issue as to whether the defendant operated the vehicle dangerously.

Circumstances of aggravation:

A. Adversely affected by an intoxicating substance

The law provides that the certificate blood alcohol analysis is conclusive evidence as to the blood alcohol concentration of the defendant at the time the sample blood was taken and at the time the offence is said to have occurred.

Where the certificate indicates a blood alcohol concentration equal to or exceeding .150 it shall be conclusive evidence that the person was adversely affected by liquor at the relevant time.

Whilst the fact that a person is adversely affected by alcohol is a circumstance relevant to the issue as to whether a person was operating a vehicle dangerously, the evidence concerning his or her blood alcohol concentration is not conclusive proof that he or she was driving dangerously.

B. Excessively speeding or taking part in an unlawful race or unlawful speed trial

See subsection (6) for the meaning of 'excessively speeding'.

See subsection (6) for the meanings of 'unlawful race' and 'unlawful speed trial'.

Dangerous Operation of a Motor Vehicle causing Death or Grievous Bodily Harm: s 328A(4)

Legislation

328A Dangerous operation of a vehicle

...

- (4) A person who operates, or in any way interferes with the operation of, a vehicle dangerously in any place and causes the death of or grievous bodily harm to another person commits a crime and is liable on conviction on indictment—
- (a) to imprisonment for 10 years, if neither paragraph (b) nor (c) applies; or
 - (b) to imprisonment for 14 years if, at the time of committing the offence, the offender is—
 - (i) adversely affected by an intoxicating substance; or
 - (ii) excessively speeding; or
 - (iii) taking part in an unlawful race or unlawful speed trial; or
 - (c) to imprisonment for 14 years, if the offender knows, or ought reasonably know, the other person has been killed or injured, and the offender leaves the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrives.

...

Commentary

It is not necessary for the prosecution to prove that the dangerous operation of the motor vehicle was the sole cause of the deceased's death or complainant's grievous bodily harm. It is sufficient for it to show that the dangerous driving was a substantial or significant cause of that result. *R v Cheshire* [1991] 3 All ER 670: 'It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the [defendant]'s acts can fairly be said to have made a significant contribution to the [complainant]'s death.' See also *Royall v The Queen* ([1991](#)) [172 CLR 378](#).

Suggested Direction

The prosecution must prove that the defendant:

1. **Operated, or in any way interfered with the operation of, a motor vehicle;**
2. **In a place, namely [place name];**
3. **Dangerously; and**
4. **That the defendant thereby caused the death of the deceased, or grievous bodily harm to the complainant.**
5. [At the time of committing the offence the defendant was:
 - (a) adversely affected by an intoxicating substance; or
 - (b) excessively speeding; or
 - (c) taking part in an unlawful race or unlawful speed trial].
6. [The defendant left the scene of the incident, other than to obtain medical or other help for the other person, before a police officer arrived, knowing or that he or she ought reasonably to have known that the other person had been killed or injured].

It is not necessary for the prosecution to prove that the dangerous operation of the motor vehicle was the sole cause of the deceased's death or complainant's grievous bodily harm. It is sufficient for it to show that the dangerous driving was a substantial or significant cause of that result.