SUPREME COURT OF QUEENSLAND

CITATION:	*R v Grimaldi* [2011] QCA 114
PARTIES:	**R** **v** **GRIMALDI, Mathew John** (appellant)
FILE NO/S:	CA No 236 of 2010 DC No 121 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	3 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	3 May 2011
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal against conviction dismissed**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARTICULAR GROUNDS OF APPEAL – MISDIRECTION AND NON-DIRECTION – EFFECT OF MISDIRECTION OR NON-DIRECTION – where the appellant was charged with one count of dangerous operation of a vehicle causing grievous bodily harm with a circumstance of aggravation – where the appellant was adversely affected by an intoxicating substance – where the concentration of alcohol was 0.125 grams in 210 litres of breath – where the appellant admitted he was the driver of the vehicle and that his passenger had suffered grievous bodily harm – where the appellant argued the trial judge misdirected the jury by failing to adequately present the appellant's case to the jury and incorrectly instructing the jury in relation to the elements of the offence – where the appellant argued the charge to the jury was unbalance and unfair – where the appellant argued the trial judge wrongly instructed the jury that it was necessary to find fault in the manner in which the appellant operated the vehicle – where the appellant argued the expert witness was not satisfactorily qualified – whether the misdirections amounted to a substantial miscarriage of justice – whether the verdict was unsafe or unsatisfactory having regard to the evidence

Criminal Code 1899 (Qld), s 328A, 668E(1A)
Transport Operations (Road Use Management) Act 1995 (Qld), s 80(15G)
Transport Operations (Road Use Management – Road Rules) Regulation 2009 (Qld), s 25

B v The Queen (1992) 175 CLR 599; [1992] HCA 68, considered
Broadhurst v The Queen [1964] AC 441; [1964] 1 All ER 111, considered
CC v Regina [2010] NSWCCA 337, considered
Domican v The Queen (1992) 173 CLR 555; [1992] HCA 13, considered
Gassy v The Queen (2008) 236 CLR 293; [2008] HCA 18, considered
Green v The Queen (1971) 126 CLR 28; [1971] HCA 55, considered
McBride v The Queen (1966) 115 CLR 44; [1966] HCA 22, cited
Murphy v The Queen (1989) 167 CLR 94; [1989] HCA 28, considered
Pemble v The Queen (1971) 124 CLR 107; [1971] HCA 20, considered
R v Bathe [2006] QCA 201, cited
R v Courtney-Smith (No 2) (1990) 48 A Crim R 49, considered
R v Wilson [2009] 1 Qd R 476; [2008] QCA 349, considered
RPS v The Queen (2000) 199 CLR 620; [2000] HCA 3, considered
Stokes v The Queen (1960) 105 CLR 279; [1960] HCA 95, considered
The King v Coventry (1938) 59 CLR 633; [1938] HCA 31, cited
Werry v R [2010] VSCA 314, considered

COUNSEL: A Kimmins for the appellant
M J Copley SC for the respondent

SOLICITORS: Potts Lawyers for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** For the reasons given by Chesterman JA I agree that the appeal should be dismissed.

[2] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree with those reasons and with the order proposed by his Honour.

[3] **CHESTERMAN JA:** On 16 September 2010 the appellant was convicted of the dangerous operation of a vehicle at Townson Avenue, Palm Beach on 30 March 2009, causing grievous bodily harm to one Jai Lowe, with a circumstance of

aggravation, that at the time of committing the offence he was adversely affected by an intoxicating substance. He was sentenced to imprisonment for three years, suspended after 15 months with an operational period of three years. He was also disqualified from holding or obtaining a driver license for five years.

[4] The principal witness for the prosecution was Mr Wayne Wyatt. He lived in Townson Avenue and on the afternoon of 30 March 2009 was driving home. His route took him along Fifteenth Avenue towards a roundabout from which he could exit onto Townson Avenue. As he approached the roundabout he noticed a green utility coming "pretty quick" from behind until it was only "three or four metres" from the back of his vehicle. He slowed from about 55 km/h to about 35 km/h to negotiate the roundabout. Mr Wyatt's house was on the right hand side of Townson Avenue only about 10 metres from the roundabout. As Mr Wyatt turned into Townson Avenue he pulled to his left, "in a hurry", off the carriageway because he thought the utility "was going to hit" him. The utility drove past and when it was about 150 metres in front he "saw it fishtail to the right, then to the left" after which he heard a noise as of a collision.

[5] As the utility passed his car Mr Wyatt heard its engine noise increase from which he concluded that the driver had changed down a gear. It accelerated, as it passed, "going faster for sure". As the utility drove past Mr Wyatt heard its wheels "screeching".

[6] Having heard "a big bang" Mr Wyatt drove along Townson Avenue for "about 150 metres … probably" to where he saw the utility "in someone else's front yard." A telegraph pole had been "cut in half" and was lying on the ground. There were "cables everywhere … sparking up."

[7] According to Mr Wyatt the road surface was wet as it had been raining for half an hour or so before the collision. Photographs tendered showed the broken telegraph pole, the damaged utility and damage to a Land Cruiser which had been parked in the driveway of the house outside which the utility came to rest. As well a brick letterbox that formed part of the fence of the property had been knocked over.

[8] Mr Lowe was a passenger in the utility. He was called as a witness but could give no relevant evidence. He had suffered a head injury in the collision and had no memory of the event.

[9] A senior constable of police, Marcus Duroux who attended the scene not long after the collision noticed that the appellant's breath smelt of alcohol and his eyes were bloodshot. He requested the appellant to undertake a roadside breath test after which he drove him to Palm Beach Police Station where a breath analysis was done within two hours of the collision. The Analyst's Certificate was tendered. It showed that the concentration of alcohol present in the appellant's breath was 0.125 grams in 210 litres of breath. Expressed as a percentage the concentration of alcohol in the appellant's blood was .125 per cent.

[10] The appellant admitted that he was the driver of the green utility, that it was in a satisfactory mechanical condition and that Mr Lowe had suffered grievous bodily harm in the collision. By s 80(15G) of the *Transport Operations (Road Use Management) Act* 1995 the Analyst's Certificate was conclusive evidence of the concentration of alcohol present in the appellant's blood at the time his breath was analysed, and for the two hours preceding the analysis.

[11] To prove the circumstance of aggravation the prosecutor called Dr Purton, a registered medical practitioner, who had worked as a general medical practitioner for 21 years and since 2008 had been employed in the Forensic Medicine Unit of Queensland Health. He gave hearsay evidence, without objection, that the appellant had drunk six to eight cans of pre-mixed Bourbon and Cola before the collision. His evidence was:

> "Alcohol causes impairment of motor coordination. The ability to engage in coordinated purposeful movement is essential to driving. Deficits in motor coordination may begin at blood alcohol concentrations above .03 percent. Blood alcohol concentration above 0.9 percent can impair balance and these deficits become most obvious at blood alcohol concentrations above .1 percent. … Alcohol can cause impairment of judgment and information processing. Drivers need to make appropriate responses to external stimuli and exercise suitable restraint. Alcohol interferes with the ability to accurately judge speed and distance. Alcohol affected drivers are less concerned by the consequences of their actions and may take excessive risks. … Alcohol causes impairment of visual functions. … the impairment is seen at blood alcohol concentration levels as low as .02 percent. … Alcohol causes impairment of alertness. …"

Dr Purton expressed the opinion that the measured level of alcohol in the appellant's bloodstream would have "impaired his ability to drive safety" whether or not he was accustomed to consuming alcohol.

[12] The appellant did not give evidence but called two Fire and Rescue Service officers who had attended the scene. They both said that they did not observe the appellant to exhibit signs of intoxication. He appeared upset that Mr Lowe had been injured and did what he could to assist him.

[13] The appellant has appealed against his conviction on a number of grounds, the most substantial of which are that the trial judge misdirected the jury in two respects. The first is that his Honour did not adequately put the appellant's case to the jury so that the charge to the jury was unbalanced and unfair. The second is that the summing up was confusing because the jury was wrongly instructed that fault was an element of the offence.

[14] It is a part of a trial judge's obligation, when summing up in a criminal trial, to put the case for the defence fairly. An imbalance or partiality in the presentation of the respective cases may make the trial unfair with the consequence that a conviction will be quashed. The cases contain many general statements to that effect. A more particular understanding of the obligation comes from a consideration of the facts in the cases.

[15] *Broadhurst v The Queen* [1964] AC 441 was a case in which the trial judge misdirected the jury on a question of law (which turned out to be irrelevant) but also misstated some aspects of the evidence and forcefully expressed his own view of the facts which was adverse to the accused. The opinion of the Privy Council was given by Lord Devlin who said (463-4):

> "Accordingly, the result of this appeal must turn solely on the weight to be given to the misdirections of fact which their Lordships have

> detailed. One further complaint of a general character should be noticed. The Chief Justice indicated his opinions very freely during his summing-up, and they were usually, if not invariably, against the accused. The opinions of the presiding judge on issues of fact can often be of great assistance to the jury. But it is very important that the jury should be told that they are not bound by them nor relieved thereby of the responsibility for forming their own view. Nevertheless, a jury is likely to pay great attention to them: and even in a case where a proper warning is given, an appellate court may still intervene if it considers them far stronger than the facts warrant. … Fundamentally, it was the Chief Justice's view of the case as a whole and of the way in which the issues should be left to the jury that threw the summing-up out of a fair balance. This basic defect might well of itself be sufficient to invalidate the verdict. But there were also the other defects … and the cumulative effect of all those substantiated was beyond any doubt such that the summing-up as a whole cannot be accepted as a fair presentation of the case to the jury. A fair presentation is essential to a fair trial by jury. The appellant has thus been deprived of the substance of a fair trial … ."

[16] In *Pemble v The Queen* (1971) 124 CLR 107 at 118 Barwick CJ spoke of the duty of the trial judge:

> "… to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused."

The context of the observation was quite different to the present. That was a case in which a defence was open on the evidence but counsel for the accused had not urged it on the jury and had, indeed, expressly disavowed reliance on it. In accordance with longstanding authority the trial judge was held to be required to instruct the jury about the possible defence.

[17] The point of present interest was addressed by the High Court in *Green v The Queen* (1971) 126 CLR 28 at 34. Barwick CJ, McTiernan and Owen JJ said at 34:

> "The second ground of appeal … is the submission that the summing up was unbalanced, unfair and considerably slanted against the accused. We have studied the whole summing up anxiously and very carefully. The admitted facts of the case, even if the young woman had consented to the successive activities of the four young men, were most likely to cause revulsion and disgust in the minds of decent men. Consequently the risk of prejudice against the accused was high. One might have expected the trial judge to have been sensible of this risk and to have taken pains to ensure that the jury appreciated the need to consider the vital issue of consent or no consent calmly and objectively … . But … the trial judge himself betrayed an emotional approach to the facts … . He presented his own view which was frequently, though not always, unfavourable to the accused. He was of course entitled to express his opinion of the facts as long as he made it clear to the jury that they were not bound by his views. But, although at several points the jury were reminded that the facts were for them, we have come to the conclusion that this

> summing up transcends anything that a trial judge was entitled to do in the circumstances. In reading and re-reading the whole summing up we have been driven to conclude it was unfair, lacking in judicial balance and so partaking of partiality as to render this trial a miscarriage of justice."

[18] In *B v The Queen* (1992) 175 CLR 599 at 605-6 Brennan J (with whom Mason CJ and Deane J agreed) said:

> "A trial judge has a broad discretion in commenting on the facts and in choosing the strength of the language employed in commenting on the facts, but the comment must stop short of overawing the jury. It must exhibit a judicial balance so that the jury is not deprived "of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence". I agree with the observations of the Full Court of the Supreme Court of South Australia in *Reg v Hulse*:
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> > "[T]o use the words of the Privy Council in *Broadhurst's Case*, there is a danger of the jury being overawed by the judge's views, where, even though the jury are told that the decision on the facts is for them, the language of the judge is so forceful that they may be under the impression that there is really nothing for them to decide or that they would be fatuous or disrespectful if they disagreed with the judge's views."
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> Whether his Honour went too far in deprecating the defence case depends on the impression gained by reading the summing up as a whole." (footnotes omitted)

[19] Brennan J referred to *Broadhurst*, *Green*, and *Stokes v R* (1960) 105 CLR 279 at 284. In the last mentioned case Dixon CJ, Fullagar and Kitto JJ said in a passage from which Brennan J quoted:

> "The third complaint is that the learned judge's charge to the jury does not adequately present the case of the accused and the evidence or considerations which might be thought to tend in favour of the defence. Subject to an observation to be made with reference to one matter, no more need be said … than that after consideration we think that, adverse as the charge was to the accused, its effect was not to deprive the jury of an adequate opportunity of understanding and giving effect to the defence and the matters relied upon in support of the defence."

The observation was that the trial judge had misstated one aspect of the evidence in a manner adverse to the accused. An appeal against conviction was dismissed because of:

> "… the general rule that if … a misdirection … occurring at the trial is of such a nature that it could not reasonably be supposed to have influenced the result a new trial need not be ordered."

[20] In *RPS v The Queen* (2000) 199 CLR 620 Gaudron ACJ, Gummow, Kirby and Hayne JJ described the task of a trial judge when summing up (637):

> "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. *It will require the judge to put fairly before the jury the case which the accused makes.* In some cases it will require the judge to warn the jury about how they should *not* reason or about particular care that must be shown before accepting certain kinds of evidence." (footnotes omitted) (emphasis added)

[21] *Gassy v The Queen* (2008) 236 CLR 293 concerned directions given to a jury who had been unable to reach a verdict after 10 hours' deliberation and who then asked the judge for advice "as to how they might move forward". After an additional direction the jury promptly convicted. A new trial was ordered because the additional direction had been unbalanced. Gummow and Hayne JJ said (306):

> "While it is true that the trial judge then told the jury that what she had said were "merely suggestions for [their] consideration", the fact is that nowhere in the impugned instructions was anything said about the nature or content of any of the arguments the applicant had sought to advance at the trial. It is the lack of *any* but the most passing reference to competing arguments and evidence that constitutes the central deficiency in the impugned instructions."

[22] The effect of the authorities was summarised in *Werry v R* [2010] VSCA 314 by Weinberg and Bongiorno JJA who said:

> "[52] A judge's summing up must be balanced and fair, but ought not be the place 'for the compulsory recitation of formulae.' The judge must instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. That means that the judge must identify the issues in the case, and relate the evidence to those issues. It also means the judge must put fairly before the jury the case which the accused makes.
>
> [53] There is, however, clear authority for the proposition that a trial judge is not bound to discuss all of the evidence, or summarise all of the arguments put by both sides." (footnotes omitted)

RPS v The Queen was cited as authority for the last proposition in para [52].

[23] In *CC v Regina* [2010] NSWCCA 337 it was remarked (at [18]) that:

> "It has long been the law that an accused is entitled to have his case presented to the jury."

Pemble was cited as authority.

[24] To complete the citation of authority reference should be made to *Domican v The Queen* (1992) 173 CLR 555 in which it was said (at 561):

> "… fairness means that ordinarily the respective cases for the prosecution and the accused must be accurately and fairly put to the jury. But that requirement does not oblige the judge to put to the jury every argument put forward by counsel for the accused. … Whether the trial judge is bound to refer to an evidentiary matter or argument ultimately depends upon whether a reference to that matter or argument is necessary to ensure that the jurors have sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence." (footnotes omitted)

[25] The appellant does not complain that the trial judge misdirected the jury on any matter of fact, nor that he imposed his view of the facts on the jury. The complaint is that the judge did not himself recount the appellant's arguments against a finding that he had driven dangerously, in particular by speeding. This was said to make the summing up unbalanced and unfair.

[26] The passage particularly complained of was this:

> "Now, submissions were made to you by counsel (for the appellant) … that you could not be satisfied beyond reasonable doubt that the accused drove the vehicle dangerously and he gave detailed reasons as to why you should reach that conclusion."

The trial judge did not himself refer to any of those "detailed reasons" or rehearse the arguments advanced by defence counsel.

[27] Defence counsel said:

> "1. … (Mr Wyatt) did not say anywhere … that he thought (the appellant's) driving was dangerous or erratic.
> 2. He also stated … that … when (the appellant) was behind him, Mr Wyatt was going maybe 50 or 55 kilometres an hour. … You may draw an inference from that that (the appellant) was doing the same speed at [sic] Mr Wyatt.
> 3. He also said that he pulled over after this roundabout and (the appellant) accelerated past him. It's my submission to you … that the actions of (the appellant) are consistent with an average driver accelerating past a vehicle that has just slowed down, pulled off the roadway and … stopped.
> 4. … it had been raining … the road was wet. He mentioned that … there was a squeal of [tyres] when (the appellant) went past him. A squeal of [tyres] does not make driving erratic or dangerous. Remember the road was wet.
> 5. … he saw the car fishtail … . …But importantly, in relation to this fishtailing, he … said he could not say why the car fishtailed … .
> 6. He didn't give evidence as to the speed at the time of the fishtailing. He did not give evidence of the manner of driving at about this time of the fishtailing.

> 7. …Mr White [sic] also said … it was some 10 seconds then he heard this bang, from when he was up at the corner, (the appellant) had passed him and then some 10 seconds or so later, then he observed the [fishtailing] and the … collision … the distance was given in evidence, 150, 200, 300 metres … . Ten seconds, … if you can apply your commonsense to this … it's taken somebody to travel 150 metres, 200 metres, or 300 metres in say around 10 seconds, it could very well be another very strong inference … that he wasn't speeding.
> 8. … I put to him some of his evidence … at committal … and he … said there was nobody around … it was very quiet around that time on that road.
> 9. Just because there has been a collision, serious or otherwise, doesn't … say that (the appellant) was driving dangerously … . Resultant damage to … property is not an indication that anybody was driving dangerously." (numbering added)

[28] On analysis the arguments come down to four factual bases for concluding that the appellant was not driving fast, two reminders that there was no direct (opinion) evidence that the appellant had driven dangerously, a reference to the lack of pedestrians or other vehicles who might be affected by bad driving (to use a neutral term) and an argument that damage was an inadequate basis for concluding that the cause of the damage was dangerous driving, and a suggested explanation other than speed for why tyres might have squealed.

[29] The trial judge was equally sparse in his treatment of the prosecution address. He said:

> "(The prosecutor), on the other hand, said that there is more than enough evidence which would permit you to be satisfied beyond reasonable doubt that the accused was driving the vehicle dangerously and was adversely affected by alcohol"

and that he did not intend "to comment on the submissions made … by counsel".

[30] The trial judge said this about the facts:

> "The evidence is silent as to the condition of the road other than it was wet. … The only evidence we have about the road condition is that the road was wet. … Now, it is necessary in this case for you to draw certain inferences from certain facts … . Mr Wyatt is the only witness who saw certain things. Now as a result of what he saw, if you are satisfied that the facts that he recounted have been proved by his evidence, you are then asked to draw certain conclusions … . For example, you are asked to conclude that he … had to pull over to avoid a collision with the utility coming up behind him. … You were then asked to accept as a fact, his evidence that he heard a revving of the vehicle's engine as it passed him and that it accelerated away from him. … You were then asked to conclude on the basis of his observations that the vehicle fishtailed, that it went left, right, off the road into the lamp post. That's a fact you are asked to find.

> Now, you are asked to infer or conclude from those facts, in particular the fishtailing, that the accused lost control of the vehicle. … So on the basis of Mr Wyatt's evidence you are asked to conclude that, … one, the accused lost control. Why may he have lost control? Reason one, he was speeding. Two, the road was wet. Three, he was adversely affected by alcohol or one or all of those matters. So, they're conclusions you're asked to draw from these other facts if you find those facts proved. I mean, and it may be a matter of commonsense that vehicles just don't normally run off the road. You know, something causes that to happen. … you cannot look at the facts of a collision and say, "Oh, well, the vehicle must have been driven dangerously for there to be a collision". You can't do that, but you can have a look at the facts surrounding the collision from these photographs. … you can see from these photographs … damage to the vehicle, the utility … the power pole, which is cut in half … the letter box … and … some damage to the Toyota Landcruiser in the driveway. … and you are asked to infer from those facts, that the vehicle must have been travelling very fast for it to have caused that damage."

[31] The directions which followed were not the subject of any criticism and appear to be uncontroversial. There was an adequate instruction on the law as it related to the offence charged. The trial judge commented on some facts relevant to whether the driving alleged might have been dangerous: the wet road surface and the location and improvements along Townson Avenue in the vicinity of the collision. It was said to be "a normal residential area … on a late afternoon in overcast conditions with a wet roadway where the speed limit was either 50 or 60." His Honour continued:

> "Now operation of a vehicle … includes the speed at which the vehicle was being driven, and as I said, the Crown asks you to infer here from the facts I have referred to if you find those to be facts that the vehicle was being driven at speed. It asks you to conclude that it was being driven too fast and that as a result of that the (appellant) lost control, the vehicle fishtailed, went off the road on the wrong side of the road with the consequences which are shown in the photographs."

[32] It is helpful to bear in mind the remarks of the Court of Criminal Appeal (Gleeson CJ, Kirby P, Lusher AJ) in *R v Courtney-Smith (No 2)* (1990) 48 A Crim R 49 at 55, 56. The court said:

> "(1) The summing up must not be considered in isolation. It must be read in the light of the conduct of the trial. Its place in the trial, following the final addresses of counsel, must also be kept in mind. If the arguments of counsel are still vivid, it is unnecessary for the judge to repeat them tediously … .
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> …
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> (4) The assessment of the overall balance requires a consideration of the whole of the summing up. Isolated

> phrases taken from here and there are no substitute for a consideration of the entire charge, looked at as a whole and in its context in the trial. In many cases the summary of the Crown's case on the facts will necessarily take somewhat longer than the summary of the case for the accused. Often, the accused may give no evidence or may call only character evidence. The Crown's case being circumstantial may require some little elaboration. It is not the length of time devoted to the case of the Crown or the accused which is in issue. It is the fairness, balance and impartiality of the summing up which the appellate court must review and safeguard."

[33] The case against the appellant was short and circumstantial. The only evidence against the appellant in relation to the manner of driving came from Mr Wyatt and the depiction of the extent of damage caused when the appellant's utility left the road and collided with the telegraph pole, the Land Cruiser and the brick letterbox. There was no direct evidence of the speed at which the appellant drove at the relevant time. The case was circumstantial but was nevertheless substantial.

[34] The trial was short. The prosecution called its witnesses on the first day after which the court adjourned a little earlier than the usual hour. The next morning there was a view of Townson Avenue. When the court resumed the defence called its two witnesses immediately after which counsel addressed. There was then the luncheon adjournment after which the trial judge summed up. The jury retired at 3.30 pm. They returned a verdict the next morning.

[35] There is, I think, no basis for concluding that the summing up was unfair or unbalanced when read as a whole. It did not rehearse the arguments of defence counsel but nor did it repeat those of the prosecutor. The facts were few in number and had been the subject of two addresses. There is no reason to think that the jury did not comprehend the facts or appreciate the arguments made on them. The trial judge identified the circumstances which were said to give rise to the inference that the appellant's driving was dangerous. The case against the appellant was put without elaboration and without expressing any particular view.

[36] Whether a summing up is unfair because it is unbalanced is to be determined from an impression of the whole of the directions. The summing up did not emphasise the Crown case nor forcefully assert a particular view of the facts. The jury was adequately instructed that it was their responsibility to determine, by reference to correctly stated legal principles, whether the appellant had operated his vehicle dangerously.

[37] This conclusion is subject to the reservation that the next ground, which is another complaint about the summing up, overlaps with the first complaint so that a final conclusion on whether the summing up was unbalanced must await a consideration of the next complaint.

[38] The trial judge instructed the jury on the necessity of finding fault in the manner in which the appellant operated his utility before they could convict. His Honour said:

> "… fault is required too, on the part of the (appellant). So, in order to justify a conviction there must not only be a situation which viewed objectively was dangerous, but there must also have been

> some fault on the part of the driver causing that situation. … fault certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving, nor does it necessarily involve moral blame. There is fault if the driver falls below the standard of a competent and careful driver. Fault involves a failure, falling below the care or skill of a competent and experienced driver in relation to the manner of driving and to the relevant circumstances of the case, including the area.
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> A fault in that sense, even though it might be slight, even thought it might be a momentary lapse, is sufficient."

[39] The direction was completely wrong. It is nothing short of astonishing that the trial judge should have made such an error and that both counsel (neither of whom appeared on the appeal) should have failed to appreciate the mistake and drawn it to the judge's attention. Fault is no part of the offence created by s 328A of the *Criminal Code*. That was authoritatively pointed out by this Court in *R v Wilson* [2009] 1 Qd R 476 at 479-480. The offence of dangerous operation of a motor vehicle is established by proof that, objectively viewed, the manner of driving was dangerous to the public: *The King v Coventry* (1938) 59 CLR 633 at 637-8 and *McBride v The Queen* (1966) 115 CLR 44 at 49-50. See also *R v Bathe* [2006] QCA 201 at [37] to [50].

[40] Counsel for the appellant relied on *Bathe* to submit that the trial judge's introduction of *fault* as an element in the offence of dangerously operating a motor vehicle was likely to give rise to confusion in the minds of the jury by introducing notions of negligence or moral blameworthiness which form no part of the offence. The conviction was therefore said to be unreasonable, or consequent upon the wrong direction of law.

[41] The consequence of the misdirection is that there must be a new trial unless the court is satisfied that no substantial miscarriage of justice has actually occurred (s 668 E(1A) of the *Code*).

[42] The misdirection added an obstacle to the appellant's conviction. The jury was told that not only must they be satisfied beyond reasonable doubt that the appellant's driving was objectively dangerous but that as well they had to be satisfied that he was at fault in the manner explained. The second requirement is unnecessary and is not part of the offence. But to convict the jury must have been satisfied of both requirements, importantly that objectively ascertained the appellant had driven dangerously. The misdirection that he must also have been at fault cannot have detracted from the jury's satisfaction as to the first requirement, and cannot therefore have caused a miscarriage of justice. Satisfaction of that requirement was all that was necessary for the conviction.

[43] There remains the question whether what the judge said about the facts relevant to the existence of fault may have made the summing up unbalanced and unfair.

[44] His Honour reminded the jury that they could not conclude from the fact of the collision that the appellant was guilty of dangerous driving, and returned to the central contention advanced by the prosecution:

> "… that the vehicle driven by the (appellant) must've been speeding."

His Honour continued:

> "You're asked to conclude that … it occurred on a wet suburban residential road, that the vehicle left the road on the wrong side … collided with these various objects and caused significant damage … the Crown says that as a result of those facts you can conclude that the vehicle was being driven at an excessive speed … and that the (appellant) either deliberately fishtailed the vehicle or allowed the vehicle to fishtail because he wasn't properly controlling it … . And in doing so, the Crown says he was driving dangerously. And the Crown says that fault on the part of the (appellant) caused that situation, the fault being deliberately driving at … speed … whilst adversely affected by alcohol, failing to maintain control of the vehicle in that he drove it at a speed and in such a way that it fishtailed and left the road and failing to bring the vehicle under control once it started to fishtail.
>
> I mean, vehicles don't drive at speed by themselves. I mean, somebody decides to make the vehicle go faster. Somebody decides to put their foot on the accelerator. Someone decides to hold the steering wheel. Someone decides where the vehicle is going to go and how it's going to move about on the road. Those are the fault issues that you have to be satisfied about. … nobody says that the vehicle travelled at the speed at which it was, if you find it did, by itself. Somebody made it go at that speed. And the Crown says if the (appellant) made it go at that speed, there is fault there on his part, which caused the situation. So, that's what is meant by fault in the circumstances."

[45] It is this passage which the appellant submits made the summing up unfair, because it repeated and drew attention to the prosecution argument that the appellant was "at fault" because he deliberately drove at a speed which the jury was invited to infer was excessive, whilst intoxicated, and that he failed "to maintain control of the vehicle". The judge's own comments were forcefully expressed and emphasised the need for some human agency to operate the utility. The passage rehearses the prosecution argument, amplified by the judge's comments, that the appellant had deliberately driven at an excessive speed which was sufficient to constitute fault.

[46] The argument does give rise to concern but I have concluded, after anxious consideration, that the passage does not have the effect contended for, even when considered with the other parts of the summing up said to indicate imbalance.

[47] The only opinion adamantly expressed by the judge was that it was the appellant who controlled the operation of his utility. This, I think, is the point of his Honour's remark:

> "Somebody decides to put their foot on the accelerator. Someone decides to hold the steering wheel. Someone decides where the vehicle is going to go and how it's going to move about on the road … nobody says that the vehicle travelled at the speed at which it was, if you find it did, by itself. Somebody made it go at that speed. "

[48] Although forthrightly expressly the point was obvious and not in contention. The appellant had admitted as much by admitting he was the driver of the utility, and the human agency of the manner of driving. The judge made the point in the context of a direction on fault and by way of an explanation of what the prosecution case on fault was.

[49] Importantly the trial judge did not express any opinion on the question whether the appellant had driven at an excessive speed. The impugned passage made it sufficiently clear that there was a separate question to be addressed, whether the appellant had driven too fast in the circumstances. The jury was then told if they were satisfied on that point there could be little if any doubt that the appellant was responsible for the manner of driving. This was irrelevant as a matter of law but was undoubtedly true as a matter of fact and caused the appellant no prejudice. For the reasons given earlier the question of fault was irrelevant, even if the trial judge too earnestly helped the jury to conclude there had been fault.

[50] The summing up as a whole sufficiently directed the jury on the issues they had to determine and that those issues of fact were for them. In particular the question of speed was put before them with reference to the circumstances from which it might or might not be inferred that the speed was excessive. The judge did not express his own opinion nor, on that aspect of the case, misdirect the jury, or recite one counsel's submissions but not the other's. The case was simple and readily comprehensible by the jury.

[51] The trial judge correctly directed the jury that the case against the appellant was circumstantial and explained how they should approach such a case in the process of drawing inferences. The instruction to the jury included the identification of the circumstances relied upon by the prosecutor for the conclusion that the appellant had operated his motor vehicle dangerously. There were proper directions as to the elements of the offence and what needed to be proved both with regard to the offence and the circumstance of aggravation before the appellant could be convicted. The jury was told of their unique responsibility with respect to findings of fact and how they should regard any comments made by the trial judge on questions of fact. As I read the summing up the judge did not in fact make any comment other than with respect to the question of the appellant's responsibility for the operation of the motor vehicle which his Honour thought was relevant to the question of fault.

[52] The appellant has not made good his ground that the summing up was unfair and unbalanced.

[53] The appellant's other grounds can be disposed of relatively briefly. Despite the earnestness with which they were pressed they should not be accepted.

[54] It was submitted that the verdict was against the weight of the evidence, but Mr Wyatt testified that the utility driven by the appellant approached his car from behind so abruptly that he feared a collision. Having turned into Townson Avenue he immediately pulled to the left off the carriageway to remove the risk of collision. As he did so the appellant overtook, accelerating as he did so, changing down a gear and inferentially causing the wheels of his vehicle to spin and screech on the wet road surface. When about 150 metres along the road he lost control of his vehicle which swerved first to the left and then to the right and then spun off the roadway colliding with a telegraph pole with such force as to break it in two, also damaging a parked vehicle and a brick fence.

[55] The evidence was more than sufficient to allow a jury to draw the inference that the appellant had operated his vehicle dangerously.

[56] The next ground of appeal is that Dr Purton had not been satisfactorily qualified as an expert in the area of forensic medicine and was not shown to be qualified to express the opinions he did as to the effect of alcohol on the appellant's capacity to drive safely. A second point is taken that Dr Purton expressed an opinion on the very fact to be determined by the jury. This was said to be impermissible with the result inadmissible evidence on a critical issue had been put before the jury.

[57] On the first complaint it was said that Dr Purton's 21 years in general practice did not qualify him as an expert in forensic medicine in which he had been employed for only three years. It was also said that his opinion was not based upon his personal knowledge of forensic medicine but by reference to a review of publications on the effects of alcohol on drivers in scientific journals.

[58] The appellant's submissions run into the immediate difficulty that Dr Purton was examined on a *voir dire* to allow counsel for the appellant to explore the doctor's qualifications. Having questioned him counsel considered that he was an expert in the relevant field. When Dr Purton was called on the trial there was no objection to his evidence.

[59] As to the point that Dr Purton "swore the issue" that evidence, too, was given without objection. As well the legal basis for the objection is doubtful. Mason CJ and Toohey J in *Murphy v R* (1989) 167 CLR 94 noted (110):

> "It is doubtful that there is now an absolute rule precluding an expert witness from expressing a view as to the ultimate issue … ."

Deane J said (127) that the assertion that expert evidence is not admissible on the very question which a jury is required to decide "is plainly unacceptable as a general rule of the law of evidence."

[60] The appellant next complains that the conviction of the aggravated offence, that the appellant was adversely affected by alcohol, was unsafe and unsatisfactory on the evidence. The appellant points to evidence from senior constable Duroux who said that the appellant spoke coherently at the scene, comforted Mr Lowe and attempted as best he could to assist the Fire and Rescue officers and the Ambulance officers who got him out of the damaged utility. It appears the appellant held a saline drip attached to Mr Lowe for some time while the rescue was underway. The senior constable said, as well, that the appellant was emotional because of the injury to his friend but behaved rationally at all times. The appellant focuses on the evidence of the two officers, Smith and Richards, both of whom thought he showed no signs of intoxication and was able to assist Mr Lowe.

[61] It was a question for the jury what to make of the evidence. In addition to that emphasised by the appellant there was the result of the breath analysis showing a relatively high concentration of alcohol in the appellant's blood, senior constable Duroux's testimony that his breath smelt of alcohol and his eyes were bloodshot and the admission that he consumed a substantial quantity of spirits before the collision. There was, as well, Dr Purton's evidence of the effect of the measured amount of alcohol in the appellant's bloodstream on his capacity to drive a motor vehicle.

[62] Given the evidence the verdict is not at all surprising. More relevantly there was evidence on which the jury could act as they did, to convict the appellant of the

aggravated offence. The evidence was more than sufficient to support the conviction.

[63] There is also a submission that the trial judge misstated the evidence. The point is that his Honour told the jury the speed limit in Townson Avenue was:

> "… either 50 or 60. One witness 60 and the other 50."

The submission was that by making that observation the trial judge:

> "… directed the jury that there was inconsistent evidence on the factual matter of substance (and) (e)ffectively, … misstated the evidence and made a finding adversarial to the Appellant's case in the absence of evidence to substantiate it."

[64] The submission is without substance. The direction was factually accurate. One witness did say that the speed limit was 50km/h and another said it was 60km/h. It was probably the lower figure. Townson Avenue was a built up area and by s 25 of the *Transport Operations (Road Use Management – Road Rules) Regulation* 2009 the speed limit was 50km/h unless a speed limit sign indicated a different speed limit. There was no evidence of such a sign.

[65] There is another ground that the trial judge misdirected the jury on the use they could make of the photographic evidence. The appellant's argument is that the jury might have been invited to infer from the depiction of damage that the appellant must have driven excessively fast. The photographs are said to be an insufficient basis for such an inference so that the jury was invited to speculate about speed. It was submitted that the judge invited the jury to consider the damage depicted in the photographs, conclude from that the appellant had been driving too fast and conclude from that that the driving was dangerous.

[66] What the trial judge said in relation to the photographic evidence was:

> "… you cannot look at the facts of a collision and say, "Oh, well, the vehicle must have been driven dangerously for there to be a collision". You can't do that, but you can have a look at the facts surrounding the collision from these photographs. And there are … a number of things you can see from these photographs. You can see the damage to the … utility. You can see the damage to the power pole, which is cut in half. … You can see the damage to the letter box and you can see some damage to the Toyota Landcruiser in the driveway. … you can also see … damage to the vehicle to the utility. Now, you are asked to find … (o)ne, that damage was caused by this vehicle as it left the road. And you're asked to find that not only was the damage to the property caused but the damage to the vehicle was caused that way, and you are asked to infer from those facts, that the vehicle must have been travelling very fast for it to have caused that damage. So, you step back a little and say, "Well, can I conclude that from that evidence once I find that to be the case"? And it would be difficult for you not to find that the power pole was broken in half … (i)t would be difficult for you to conclude that the letterbox wasn't damaged. It'd be difficult for you to conclude that the utility wasn't damaged. So, once you reach those

> conclusions, it's a matter for you as to whether you do or not, once you reach those conclusions, … infer or conclude … that the vehicle must have been travelling pretty fast for that to happen."

[67] The summing up on this point is, I think, beyond criticism. It drew attention to the uncontroversial fact of damage revealed in the photographs and put to the jury the question on the answer to which the prosecution case depended. The extent of damage was a fact from which an inference of speed excessive in the circumstances, could be drawn. The direction did no more than identify the evidence relevant to the inference and tell the jury it was a matter for them to make the conclusion or not, as their judgment dictated.

[68] The last grounds can be considered together. They were that the trial judge failed adequately to direct the jury on how to assess expert evidence, that of Dr Purton, and what was meant by "adversely affected" as a circumstance of aggravation.

[69] In particular it was a ground of complaint that the trial judge had not addressed the jury in the terms found in the Benchbook:

> "However the fact that we refer to such witnesses as expert does not mean that their evidence has automatically to be accepted. You are the sole judges of the facts and you are entitled to assess and accept and reject any such opinion evidence as you see fit. It is up to you to give such weight to the opinions of the expert witnesses as you think they should be given, having regard in each case to the qualifications of the witness and whether you thought them impartial or partial … and the extent to which their opinion accords with whatever other facts you find proved. … it is up to you to decide what weight or importance you give to their opinions or indeed whether you accept their opinion at all."

[70] In fact that trial judge gave the essence of that direction. His Honour said:

> "…you may accept everything a witness tells you or reject everything a witness tells you. And in this case (counsel for the appellant) has asked you to pay little attention – place little weight on the evidence of Dr Purton. Well, that's a matter for you. I mean, you can accept everything the doctor says or you can reject everything the doctor says, or you can accept part of what the doctor says and reject the rest."

[71] That was adequate given the fact that counsel for the appellant had accepted Dr Purton's status as an expert and had not challenged the basis for his opinions save to question him about the detail of some of the published studies on which he relied in part for his opinion. It is not a case in which there was a conflict of expert opinion. Dr Purton was the only expert called to testify. In truth there was no controversy about his evidence and the direction was adequate.

[72] Likewise the complaint that the jury was not adequately informed how they should understand the term "adversely affected" is groundless. Dr Purton's evidence clearly explained the deleterious effect alcohol has on a driver's capacity to observe and react. He distinctly described the impairment alcohol causes to those perceptual and motor skills necessary for safe driving. The concepts are not difficult to

understand and there is no reason to think the jury did not comprehend them. The term "adversely affected" is one readily comprehensible. The words have their ordinary, everyday meaning. The evidence told how the amount of alcohol measured in the appellant's bloodstream might have adversely affected his capacity to drive.

[73] The appellant has not demonstrated any sufficient reason to set aside the verdict of the jury. The appeal should be dismissed.