Majority, minority, dissent, and the basics of Criminal law/procedure

* Can’t be charged for anything that’s not in a statute
* Majority = judges who agree on the outcome for the same reason
* Minority = judges who agree on the outcome, but for different reasons
* Dissent = judges who disagree with the outcome
* Indictment: the formal accusation of a crime, written, formal document charging the individual
* Can appeal a trial decision at BC Court of Appeal. Can appeal that decision to the SCC, but that’s not a right. Decision of the CoA is authoritative and binding on courts below it in the province, not binding outside the province but can be persuasive
* Important idea of statutory interpretation, that the first thing you do in understanding what an offence means is to read the words with attention to particular things
* Purposes of Criminal law: denounce criminal activity, deter individual (specific) and others (general) from engaging in such activities, protect society from individuals who are dangerous.
* The federal government has jurisdiction over crimes, always. A crime can only be enacted by the federal parliament. Most of crimes are found in the Criminal Code. However, they are not exclusively in code. Federal parliament can enact crimes in other pieces of legislation over which it has jurisdiction (criminal law exists in federal statutes). Controlled Drugs and Substances Act is an example
* Provincial can impose penalties over things that are in their jurisdiction, but they cannot make those criminal.
* There must be a statute for a crime to exist. There are no common law crimes, but common law defences are available to the accused.
* Courts are responsible for interpretation of statutes. The people who we’ve elected to be in parliament pass laws, create crimes, write things down that go in criminal code, but it is the judiciary that interprets what those words mean and what the significance is of particular words that have been used in the creation of a particular crime
* Role of the constitution/charter: overarching framework. Should parliament pass a law inconsistent with any aspect of the Charter, it is the courts’ role to determine that

Division of Powers

* Supreme law of Canada set by the Constitution, most significant here is the Charter. Meaning of the words of the legislation and the words of the Charter are interpreted by the courts
* Section 52 – any law inconsistent with the charter is of no force and effect.
Section 32 – Charter applies to all state action (includes police)
* The constitution sets out division of powers
 -section 91(27) Criminal Law is a federal responsibility
 -section 91(28) Penitentiaries a federal responsibility
 -section 92(14) Administration of Justice a provincial responsibility
 -section 92 (14) province can attach penalties to provincial offences.
* There are parts of criminal law picture that fall under provincial responsibilities. Administration of Justice: the court houses in which the federal criminal law is enacted are the responsibility of the province, for example. This can create tensions. Cases where charter guarantee of no significant delay in trial ran into budget closures of court houses.
* Province can attach penalties to provincial offences. Note these are “OFFENCES” and not “crimes.” These are things related to municipal laws, driving, various property matters, etc. Province can legislate in penalties to infractions.

Underlying Ideas In Criminal Law

* Underlying ideas in criminal law: presumption of innocence, public nature of criminal law, blameworthiness, scope of criminal law
* The person brought before the court is presumed innocent until the Crown proves guilt beyond a reasonable doubt. We ask the Crown to convince us, if we’re the decision-makers, to convince us beyond a reasonable doubt that the person is guilty, otherwise that person is acquitted.
* Judge has to explain the presumption of innocence in his charge to the jury. Presumption of innocence is due to the significant consequences of a conviction, including a criminal record. Recognition that the Crown has the resources of the state on its side to do its job, while the accused does not.
* Presumption of innocence reflects the job given to the Crown, job of justice. We don’t give the job of conviction.
* This is s11(d) of the Charter, which constitutionalizes the presumption of innocence, person has constitutional right to be innocent until proven guilty. Shifting a crime to balance of probability would thus go against the constitution.
* Criminal law is public as opposed to private. The contest in court is between the state and the accused. The victim, if there is one, is simply another witness. Crown is to seek justice on behalf of the public, not on behalf of the complainant or victim.
* we criminalise because of the blame and the intent that the individual has had in creating that harm. Blameworthiness. Sometimes, in defence, we will say that a person intended to do harm but had an excuse that will make that behaviour justifiable or make that crime not blameworthy.

**Class 4**

What a Crime is

* For it to be a crime, the possible penalty is a lengthy imprisonment. Province can give imprisonment penalties, but not length, crimes that result in lengthy prison sentences is ultra vires of the provincial gov, it’s outside their scope.

Charter Issues

* When you have a law that is challenged as a violation of one of the Charter rights, first step is to make argument about why that law is inconsistent with the charter right. Here (Oakes) would be that the law is inconsistent with the presumption of innocence (s.11b).
* If judge agreed, Crown would try to convince the court that this was a reasonable limitation that was demonstrably justifiable in a free, democratic society
* If the police attain evidence by an unreasonable search and seizure and that evidence comes to court, person can make constitutional argument that their right of unreasonable search or seizure was violated and so the evidence should be excluded under s.24.
* Everyone has the right not to be arbitrarily detained or imprisoned, can’t be held forever on arbitrary basis (suspicion), there are principles about what constitutes an appropriate detention in appropriate circumstances.
* Everyone in arrest or detention has right to be told why, promptly, and have right to an attorney. S.10b used a lot for legal aid system, you have right to attorney but if you can’[t afford one, it’s often useless.

Charter

* s.11 – any person charged with an offence has the right to be presumed innocent until proven guilty.
* s.12 – right not to be subjected to torture
* s. 13 – a witness who testifies has the right to not have any evidence used against him
* s. 14 - right to interpreter
* s. 15 – right to equitable trial, no discrimination
* s. 24 – right to get remedy from the court if your Charter rights have been violated, right to have

evidence excluded if they obtained it in a way that violated your rights.

Trial process

* the adversary system. Judge remains passive and receives the evidence. Evidence called by the two parties – the state and the accused individual or corporation. Parties have stake in outcome, present evidence that will benefit their position. Evidence must be relevant and material to determine past events.
* Jury is the “trier of fact,” expected to figure out, from the evidence, what happened as well as who to believe.
* Judge is the trier of law (eg is evidence admissible). Jury doesn’t decide these issues of law and may even be out of the room when judge is deciding whether evidence is admissible.
* Very rare that one of the parties can appeal a decision if it doesn’t like the finding of fact.
* Decisions about law may be appealed. There are rules about that, not every decision about the law that someone thinks is wrong can be appealed.
* Judge has to give the jury instruction on the law, judge has to explain the presumption of innocence, has to explain that the jury has to be convinced beyond reasonable doubt and that to convict, for instance, someone of murder, Crown has to prove a very specific set of intentions. Judge has to instruct jury about what the framework is that they need to consider. Jury instructions go on for days and it is a big source of material for grounds of appeal.

What happens in criminal trial

* Arraignment, then plea is taken, then opening statements, then crown case, then defence case, then closing statements, then charge to the jury, then ruling

Crown case

* crown calls witnesses to give evidence on each of the element of the offence. Crown must offer evidence for each and every element of the evidence, crown must prove each element (physical part and the mental part/intentionality) of the offence to get a conviction.
* Defence may cross examine the witness, idea is to raise doubt as to whether the trier of fact should believe the witness or put stock. Shedding doubt on the evidence of this witness, purpose is to suggest that either the credibility of the witness is an issue, or that there’s something else that means evidence should be given less weight.
* Crown has to prove beyond reasonable doubt, all defence has to do is raise a doubt.

Following the Crown case (after it calls all the witnesses it wants)

The defence may

* Make a “no evidence motion” (ie crown has not met evidentiary burden), Asking the judge to find, in law, that the Crown has failed to present any evidence on an essential element of the offence
* Not call evidence (ie argue Crown has not met legal burden), defence is saying they don’t think Crown has proven offence beyond reasonable doubt. There is evidence on every point, but they’ve not met the standard of criminal trial: guilt beyond reasonable doubt. Question at the end of the Crown case as to whether defence is going to lead witnesses or not.
* Call witnesses that may or may not include the accused.
* Assuming defence does go forward and calls witness, witness called and examined by defence counsel (in chief/direct).
* Examination in chief: you’re asked the questions by the lawyer who has called you. Witness may be cross-examined by Crown counsel (or defence counsel for co-accused.
* Defence may call the accused as witness, though Crown cannot.
* If the accused is called, the accused becomes a witness and can be cross examined. He loses some of the protections of the accused, as he’s just another witness. Crown can raise the criminal record of the accused, which couldn’t be done otherwise.

Summary Convictions, Indictable Offences, and Hybrid Offences

* Crown decides how to prosecute hybrids on the basis of whether the facts as they seem make it more or less serious of an offence and possibly also the basis of what the past record is of the accused.
* Summary convictions take place in provincial court and the maximum penalty is 6 months in jail and $5000 fine, unless there’s a different penalty prescribed in the offence. There are no juries in provincial court, so no juries for summary convictions.
* Indictable offences are more serious and the maximum penalty varies greatly, as does the mode of trial. There are certain offence that are listed in s. 553 of Criminal Code under indictable offences and those offences are also tried in provincial court with no jury. Some of these are historical or strange, these are indictable offences within absolute jurisdiction of provincial. These tend to be less serious indictable offences.
* offences listed in s.469 of code are more serious offences, and those are in the absolute jurisdiction of the Superior Court. Almost always, the accused would have a preliminary hearing in provincial court before provincial court judge to find out whether there’s enough evidence to go on to the next stage. If not, accused is discharged/acquitted. If the accused is tried under these offences, accused stands trial in Supreme Court in BC before a judge and jury, unless there is an agreement by the accused and the crown that the trial can take place before a judge.

**Class 5**

Indictable Offences

* Indictable offences have several different kinds. First kind is covered under s. 553 and those are tried in provincial court under a judge alone, always.
* Other end of the spectrum are those indictable offences listed under s. 469 and they are tried under superior court under judge and jury unless both sides agree on judge alone. S.469 offences have preliminary inquiries, hearing to determine whether there is enough evidence to go to trial. This is in provincial court, before it goes to superior court.
* every indictable offence presents a choice or election to the accused. If it’s not 469 or 553 and it’s an indictable offence, defence can choose to have a trial in provincial court, or superior court with judge alone, or superior court with judge and jury. This is entirely about strategy, not law.

Hybrid Offences

* Hybrid offences can be prosecuted either by way of summary conviction or by way of indictment. Crown decides that, on the basis of how serious the background of that situation is, whether the individual has done it before, etc.

**Class 6**

Sources of Evidence:

* Oral testimony of witnesses
* Documentary/real evidence either through witnesses or statutory provision
* Evidence must be relevant, material, admissible
* Evidence is assessed by the trier of fact regarding credibility

Evidence

* most common form of evidence, when people get up in front of court and say what they saw, heard, noticed, or know about a matter. These are live persons who the jury or judge listen to in determining if a person is guilty or not and their evidence goes to the questions of the legal requirements of the offence the person is charged with.
* there can be documentary/real evidence that is put before the court. Real evidence is something that is concrete, physical, material. It is an object, a document, a test result, a photograph, etc. Most often, those pieces of evidence are entered into the trial process through a live person. A person who completed a report, etc.
* Statutory provisions may allow for a particular kind of evidence to be entered into a trial proceeding without the person who is responsible for having collected or completed it

Requirements of Evidence

* The first characteristic of evidence that is important is that it has to be relevant in the sense that it has to help in making it more likely that a fact exists than doesn’t exist. If irrelevant, it has nothing to do with the establishment of that fact
* Evidence can be problematic if it’s prejudicial to the accused and/or has little to no probative value, doesn’t help to solve the question at hand but it has a great effect on the perception of the individual/the case.
* If a point is an issue, than evidence to lead the finder of fact on that issue is material. If it’s not an issue in the trial, then there’s no necessity to lead evidence. You don’t need more and more evidence on a point that has been settled and is no longer an issue. Material evidence is on an unsolved part of the offence, not evidence on a point upon which there is no dispute.
* Evidence must also be admissible. Admissible evidence is more of a question of law. Confessions, for instance, cannot be coerced or induced, has to be voluntary. A previous statement can only be entered into the trial and be inculpatory (hurts the accused) if it’s voluntary.

Voir-dire

* This is a hearing during the trial to determine questions of law. The jury is excused while the crown lawyers would try to convince the judge that the confession was voluntary and defence argue the opposite, judge would make a decision in the voir-dire, then the jury brought back in. They hear the confession if it was ruled as voluntary, won’t hear it if involuntary.
* Voir-dires about admissibility are often over possible charter violations. For instance, material gathered by illegal search and seizure, a violation of s.9 of the charter.

Assessing Evidence (Credibility, Relevance, Materiality, Admissibility)

* trier of fact then has the job of determining the credibility of that evidence.
* Credibility: is it trustworthy, or believable. Liars will give evidence, just because he’s lying doesn’t mean it’s immaterial or inadmissible, it’s up to the jury/judge to look at the testimony and presentation of the witnesses (tone of voice, pauses, inconsistencies).
* It is the judge who decides whether evidence is in or out as a matter of law and the jury decides how much weight to give it. Jury determines whether it’s believable, strong, or whether it convinces them as a whole.
* Relevance assists with determining whether a fact is more or less likely
* Materiality is evidence about a matter in issue, evidence about something that is in question or at issue in the trial.
* Admissibility is whether evidence can be considered in law, whether it can be considered at all or if it violates some principle of law.

Presumption of Innocence

* Crown holds a legal burden, a burden in law to persuade the trier of fact that the accused is guilty beyond a reasonable doubt, otherwise not guilty

 R v. Lifchus

* Main grounds of appeal was that judge made an error in his manner of instructing the jury about the nature of reasonable doubt.
* Always should be room for individual variations, hence why individual judges give instructions as opposed to just reading a universal instruction. Lifchus: general requirements for jury charge
* Reasonable doubt shouldn’t be likened to decisions in everyday life. It’s true people are used to dealing with risk and doubt, but it’s dangerous to suggest that this is like that or any particular part of that. People don’t often make life decisions according to reasonable doubt, usually probabilities.
* Keep it separate from moral certainty, the case also has to be based on reason and evidence, not empathy, or concern and not anything frivolous or imaginary.
* Jurors need to know that reasonable doubt is not an ordinary concept, despite the fact that we have doubts or think we’re reasonable. It’s not ordinary in the definition of the words
* Court is not supposed to give synonyms, don’t try to say what reasonable is like by using words that might be thought to be similar.
* Juries told that it doesn’t have to be an absolute certainty.
* It shouldn’t be stated as a probability statement. Jurors are probably better acquainted with the civil standard of proof where someone has to be more convinced than not.
* Judge has to explain the presumption of innocence and the connection to this high standard.
* The judge is not, from Lifchus, bound by particular words, despite what’s being said. Even if there’s something not quite right, there’s a more global or holistic question of when a matter is reversible. This is only when the jury was reasonably likely to misunderstand the burden or standard that was explained. Assessment of whole of the charge is accessed. A technical flaw somewhere is not enough for there to be reason to reverse the whole thing.

Starr

* Key difficulty with this instruction is that it wasn’t clear that the jury had to do more than balance of probability. He said it was less than absolute certainty, but didn’t say how much less, but did say that “reasonable doubt” words had no special meaning.
* Needs to be made clear that while not absolute certainty, falls much closer to absolute certainty than balance of probability. Failure to explain this made the jury instruction insufficient
* Dissenting judge questions how big of a flaw this really is. Dissent says we have intelligent jurors and we ought to be able to put some trust in their abilities and judgment to understand the law. There was enough there and besides, Lifchus said no necessity for “magic incantation” in the description of the charge of the jury. If there was a mistake, not sufficient.

**Class 7**

Basic Fact Presumptions

* if the Crown proves a basic fact, another fact can be presumed. If Crown proves fact one, then the jury can presume fact two.
* Despite the fact that one of the rules of criminal law is that the Crown has to prove each and every element of an offence beyond a reasonable doubt, if a crime is set up with this kind of presumption, then what the Crown does is prove fact one and then finder of fact gets to infer from the proof of the first thing, the second thing. Both of which are necessary to convict.
* Those kinds of basic fact presumptions are specified in the statutory provision, unless the accused does something rebut the presumption. If the Crown proves fact one, then the finder of fact can presume fact 2, unless the accused proves otherwise on balance of probabilities
* Basic fact presumptions are often enacted in situations where there is something difficult for the Crown to prove. For instance, where the offence says if this element of the physical act of the crime is proven by the Crown, you can infer that the mental element is there.
* Examples of basic fact presumptions: s.348 (1)(a) and (2). Breaking and entering – prove the crime, don’t have to prove intent, it’s inferred. Person broke into the place with the intention of committing an indictable offence.
* Quite possible and often the case where accused will just listen to Crown’s case, offer no defence, no evidence, but can still make motion of no evidence. With these presumptions, it at least forces the accused to raise a case.
* Basic fact presumptions are problematic because they violate the common law presumption of innocence even pre-charter, and now violate s. 11(d) of Charter which constiutionalizes that
* Before the Charter, this was consistent with the supremacy of parliament. Today, Charter right specifically protecting presumption of innocence in s. 11(d). This is subject to state limiting rights under Section 1 of the Charter, which is the heart of the arguments in most of these cases.

**Class 8**

Legal Presumptions

* When parliament creates a presumption that we call a legal presumption, if the Crown proves fact one, that second fact will be presumed unless the accused convinces the trier of fact otherwise. The accused is given the legal burden, there is a reversal of the usual rules. Accused must disprove presumed fact (here really putting the burden on the accused to prove innocence on one element of the offence).

Evidentiary Burden

* Not as heavy as a legal burden
* raise some evidence which can be believed by a properly instructed jury. Some evidence has to be raised that can be believed by a properly instructed jury.
* Defence can make a no-evidence motion. This motion is that the Crown hasn’t entered evidence that can be believed by the jury for each and every essential element of the evidence, that evidence is an evidentiary burden. Doesn’t have to convince anyone beyond reasonable doubt or balance of probabilities, there just has to be evidence in the trial that’s relevant to each and every essential legal element of the offence.
* Another evidentiary burden: a preliminary hearing with respect to committal for trial. With an election by the accused on an indictable offence to go to supreme court, one of the benefits he gets is a preliminary inquiry in provincial court first, where judge determines whether the Crown has satisfied evidentiary burden.
* evidentiary burden: defences. We only put defences to the jury when there is an air of reality to them. That means we don’t put every possible defence to the jury to decide whether that’s an appropriate defence to the charge. If there is evidence in the course of the trial that a defence is possible, then the jury is instructed about that defence. Question of when a defence is put a jury, it becomes a question as to whether there is evidence for each and every element of the defence that can be reasonably believed and understood by a jury.

Evidentiary Presumption

* a statutorially created deviation from normal rules of criminal law. If Crown proves basic fact, presumed fact will be presumed to exist unless the accused provides some evidence capable of being believed by a properly instructed jury.
* Accused must raise evidence to rebut presumed fact. Just has to be relevant evidence, that is just capable of being believed, less than a balance of probabilities, though shouldn’t even be thought of in those terms. It’s just evidence that is capable of being believed by a properly instructed jury.

Regina v. Oakes

* Offence of Possession for the Purpose of Trafficking , s.8 of former Narcotic Control Act (made before Charter). Presumption that was enacted said that if a person had possession of the drugs, it would be presumed that the possession was for the purposes of trafficking unless the accused proved to the contrary.
* This is a legal presumption, very clear that the accused has to prove to the contrary.
* Oakes’ argument is that s.8 of NCA violates s.11(d) of the Charter, his rights under s.11(d) are violated by the existence of the presumption. Not a challenge of the possession or the whole NCA or the offence of possession for trafficking, it’s a challenge of the presumption and the way the Crown is assisted in prosecuting here, not to the substantive part of the crime.
* Courts are going to conclude that both legal and evidentiary burdens violate s.11(d), but not s.1, which depends on the offence. Presumptions must be considered individually so that even though they all violate s.11(d), whether they can be saved by s.1 as being justifiable.

Oakes – types of presumptions

* characterizes presumptions as rebuttable or non-rebuttable. Rebuttable presumptions are those that can be challenged. Yes, a presumption can be created, fact 1 leads to fact 2, but fact 2 can be rebutted either by convincing the trier of fact on a balance of probabilities if it’s a legal presumption, or by raising evidence that a properly instructed jury could believe if evidentiary burden. Some presumptions, however, are non-rebuttable
* There are also mandatory presumptions: fact 1 leads to fact 2, unless. The trier of fact MUST go to fact 2 unless something happens
* There also permissive presumptions (uncommon): if a fact that exists, the trier of fact MAY infer fact 2. It’s a bit of guidance for the jury, but it’s not that helpful and not very common.
* Presumptions can be either evidentiary or legal. Legal presumption is where persuasive burden is shifted from Crown to defence to is prove on a balance of probabilities the presumed fact, Evidentiary burden is where the accused has to just raise evidence to rebut the presumption.

Content of the presumption of innocence.

* Accused must be p[roven guilty beyond a reasonable doubt
* It is the State that bears the burden of proof
* Criminal prosecutions must be carried out in accordance with lawful procedures & fairness

Oakes Test

* Used to determine if s.1 will justify an infringement by presumption.
* Court says in order to approach a rights infringement, there has to be a good reason, there has to be a goal/objective in doing this that is pressing and substantial. Has to be something that is important that is demonstrably justifiable in a free and democratic society.
* first question is regarding the ends. “what is the reason for parliament choosing to enact a statutory presumption which makes it easier to prosecute in these circumstances, despite importance of presumption of innocence?”
* In Oakes, this is the conception of drug trafficking as a large problem in society, one that creates danger and many negative impacts on society, and it’s hard to prosecute drug traffickers. So that’s the first thing to decide, whether or not that objective is pressing and substantial.
* Second part is related to the means, 3 parts.
* The Rational Connection: is there a rational connection between what’s been done and what the aim is? Is there a rational connection between the part of the legislation that is at issue and what the legislators are trying to accomplish? Court says there is not a rational connection between assisting the Crown in going from possession to possession for trafficking that is connected to the pressing and substantial aim of trying to eradicate drug trafficking
* Minimal Impairment: It has to be a means that’s constructed to impair rights as little as possible. In this case, you could’ve changed it from legal burden to evidentiary burden, could make the infringement lesser.
* 3. Proportionality: Considering the nature of the right and the nature of the infringement, whether those two are proportional. The more significant the charter right that’s being infringed, the more stringent the test would be. It this case, s.11(d) would very, very important.
* When you’re determining if a charter right has been violated, the burden is with the person making the charge, the accused. When you’re determining whether s. 1 saves it, the burden shifts to the Crown.

**Class 9**

Appleby/Whyte

* charged with having care and control of a motor vehicle while ability to drive was impaired, where it is proved that the accused occupied the seat ordinarily occupied by the drive of a motor vehicle, he shall be deemed to have had care or control of the vehicle unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion
* Oakes: with change in legal burden, there is violation of s.11(d). Crown has to show that it’s necessary or justified under s.1.
* Appleby was charged with having care of vehicle while impaired, he was sitting in the driver’s seat. He said he was there to try and use the radio of the taxi to report an accident. Saying he had no intention of driving..
* Crown has to prove that the person was impaired, has to prove that this person was occupying the driver’s seat. If they can prove this occupance, the inference is then made that they would have care and control of that vehicle.
* Accused can rebut this presumption. Accused has to give another explanation or reason for his occupying that driver’s seat. Accused has to establish this on a balance of probabilities, a legal presumption, one that reverses the onus.
* Whyte has same provisions as in Appleby, but argued under the Charter. Crown wants the presumption upheld, the defence wants it quashed. Crown has to say why that particular presumption does not violate s. 11(d) (the presumption of innocence).
* It doesn’t matter how you technically divide up an offence and a defence, it doesn’t matter if the presumption assists the Crown by making the accused prove a defence or excuse or evidentiary point if the end result is that the accused can be or must be convicted despite reasonable doubt, that violates s.11(d).
* Legal presumptions, presumptions that switch burden from crown to excused, are ALL going to violate s. 11(d) due to this. If statutory set-up reverses burden to accused to disprove something, that’s going to violate s. 11(d) no matter the context. However, Crown still has the opportunity to lead evidence on the s.1 portion.
* Crown doesn’t have to prove intention in impaired driving, just care and control. All the accused has to do is raise an alternate intention. However, because intention is not an element of the offence, Crown is saying that they’re not asking the accused to disprove an element of the offence. It’s not a violation of presumption of the innocence because of this. Argukment fails because court says it’s too technical. The important point is that in the end, when there is this reversal, there can be a conviction based on balance of probabilities, even if there is a reasonable doubt.

Using the Oakes test in Whyte

* s.1: there has to be a reason for doing this, there has to be an objective that’s considered pressing and substantial. Court says that this passes that. Impaired driving is a big enough problem, there is a huge problem with drinking and driving, it’s a great social concern
* Crown next has to prove a rational connection. There has to be some connection between the presumed fact in relation to the objective. Connection between the presumption and the goal. Also has to be a rational connection between the presumed fact and the proven fact. Court here says being seated in driver’s seat as opposed to passenger fact is directly and self-evidently linked to driving.
* Next part of the Oakes test, or the proportionality component, is minimal impairment. Very strong, high standard, impair the right as little as possible, looking to make sure that Charter rights mean something. Starting with Whyte, this particular part of the s.1 test is watered down as time goes on. There is much less required of the state and the Crown to uphold something which is a violation because of this section of the test.
* Parliament doesn’t want to require mens rea for drinking and driving offences because if you’re drunk, you can’t have intent. If we insist on high level of intent, than intoxication would be too often a defence and no one wants drunkenness as a defence for drunk driving. Compromise, difficulty with mens rea – a minimal interference with presumption of innocence.
* proportionality – threat to public safety, statutory setting where impracticable to prove an intention to drive. Proportionality between the infringement and the good it brings (public safety) This is upheld as constitutional, it’s upheld under s.1

Downes

* living on the avails of prostitution. Crown just has to prove the living arrangement and if it does, then it can be presumed that the accused is living off the avails of prostitution.
* It’s a rebuttable presumption. Accused has to provide some doubt that can remove the presumption. This is not a reversal of the persuasive burden. The accused doesn’t have to convince anyone but the presumption sets up a fact 1-fact 2 inference unless there’s evidence raised to the contrary. Accused just has to raise some evidence, evidentiary burden, create a reasonable doubt.
* This case is SCC looking at whether evidentiary presumptions violate s. 11(d). The language doesn’t require the accused to prove anything, only to raise some evidence. Downey established that mandatory evidentiary presumptions violate presumption of innocence (here upheld as reasonable limit) to be determined under sl.1 on a case by case basis.
* Court found that the same rule applied: if a person could be convicted despite reasonable doubt on the basis of that presumption, than that violates the presumption of innocence. Accused loses presumption of innocence because he or she HAS to testify/give evidence. Normally in a criminal trial, accused does not have to testify and it is his/her choice.
* After Downey, Oakes, Whyte, everything is evaluated on a case by case basis when it comes to whether a particular case works under s.1.

In Downey:

* if crown does not show he was living off the avails and accused does not raise evidence to the contrary, jury to convict even if there is reasonable doubt
* Living with a prostitute, though, does not inexorably lead to the conclusion that he/she is living off that prostitute, yet all the Crown has to prove is that there was this living arrangement.

Employing the Oakes Test (relaxed minimal impairment test)

* Objective: target is to get at pimps parasitically living off a prostitute’s earnings, provision addressed at cruel and pervasive social evil. Passes this test
* Means: rational connection satisfied. Research shows that pimps tend to keep prostitutes in close proximity.
* Minimal Impairment: parliament not required to choose absolutely least intrusive alternative as Oakes said, but whether could *reasonably* have chosen an alternative to achieve objective as effectively. *Could* they have done anything else that would’ve done the job as effectively? That’s now the test.
* Proportionality: balance of social and individual interests. Upheld. Presumption is held to be constitutional despite the fact that it violates 11(d).

Permissive presumption

* court is told that if a person fails to comply with demand for breathalyser, then you COULD draw an adverse inference that accused was over the limit. The words are permissive, “may draw,” read the words presumption carefully.

**Class 11**

Elements of the offence

* look very carefully at the particular offence that the individual is charged with and break down that offence into its elements because the Crown’s responsibility and duty is to prove each and every aspect/element of that offence beyond a reasonable doubt.
* Elements of the offence are the legal requirements of the offence. It’s always what you start with when you analyze a problem, looking to see what the constituent legal factors are as specified by the statute that the Crown has to prove. Need to separate each and every element
* Essential elements of the offence: Actus Reus (physical components of the crim) and mens rea (the mental component or fault requirement). Two parts must come together, Physical component and mental component/blameworthiness/fault must coincide.

Actus Reus

* an act or an omission (latter is a much smaller section of offences). Crown must prove in most cases that the individual DID something, performed an action that is prohibited in a context. Occasionally, the liability comes from failing to do something, omitting to do something, but those are much rarer, subject to a number of rules.
* Usually it’s a physical act like inflicting force or, in the case of omission, failing to provide necessaries, failure to do something
* Actus Reus is almost always found in the description of the crime.

Mens Rea

* blameworthiness, fault, guilty mind. The part of the offence that goes to, in part, what the person’s mind was. What does the Crown have to prove about the mental state of the individual? Does the person have to do this willingly, does he have to do it with knowledge of the circumstances? What state of the person’s mind is required by the particular offence? Includes things like intention, can include knowledge of the particular prohibited circumstances.
* Statute generally is silent about the kind of mens rea required, which makes it difficult. Sometimes, you may have words in the offence that tells you the mens rea, words like ‘willfully’ or ‘intentionally.’ But more often than not, words like this aren’t there.
* If you nothing, the Crown must prove subjective mens rea (not what the reasonable person should’ve done/known, but what this particular individual’s state of mind). Crown may, for instance, have to prove the defendant’s recklessness.

Parts of the Actus Reus: Conduct, Circumstances, Consequences

* In actus reus, there is always some kind of conduct that is prohibited. There are usually, but not always, circumstances that are relevant in the crime. Some crimes have consequences, some crimes do not
* Prohibited act or conduct must be a voluntary act or omission.
* same act may be crime in some circumstances, non-criminal in other circumstances. Not enough in many crimes to prove only the conduct because the same action may not be a crime in other circumstances. Circumstances that surround the act to make it criminal (eg absence of consent to sexual activity, being a parent in failing to provide necessaries, bigamy pre-existing marriage).
* Certain crimes require particular sort of harm to have been caused (homicide, for instance, requires that there be a death). Assault causing bodily harm requires bodily harm, destruction of property requires that property be destroyed.
* Certain crimes do not include consequences, they are crimes only by virtue of the conduct and the circumstances (eg. Perjury, attempted murder (sometimes called conduct crimes).
* With consequence crimes, Crown must prove the link between the accused’s prohibited conduct and the consequences.

Charter Rights in Relation to the Offence

* A person can only be convicted of the crime, the offence, that they have been charged with. You have to know the case you have to meet, this is s.11 in charter.
* You have to have opportunity mount a fair defence, to meet the case against you. You can’t meet the case against you if you don’t know what the case is.
* The one exception is that if the Crown fails to prove the particular offence with which you’ve been charged and there are other, lesser crimes that are contained within the one which you’ve charged with, you can be charged with that.

**Class 12**

Mens Rea

* Blameworthiness, fault, guilty mind, can be subjective or objective
* Usually statute silent about the nature of mens rea required
* Starting point, mens rea requirement is subjective but sometimes objective
* There is a required fault or state of my mind for charges.

Subjective Mens Rea

* Crown has to prove something about the internal wishes, desires, knowledge, understanding of the particular accused. Not good enough for Crown to say “you should have known that” or “anyone should’ve known that,” Crown has to prove what the particular individual did know or did intend.
* Difficult to prove as nobody can be required to give evidence, can recuse. There’s a tension where the Crown is required to prove most of the time the subjective workings of the accused’s mind, but without questioning the accused

Types of subjective mens rea:

* Intent: If the particular element (conduct, consequences) requires a proving of intent, Crown must prove that the accused acted deliberately, with will, wilfully, intentionally, wanted to. With respect to consequences, intention can and does mean that the accused wanted to bring about the consequences, wanted to bring about the prohibited consequences, or, even if accused didn’t want to bring about consequences, if the accused was substantially certain they would occur, that satisfies intention.
* Knowledge: actual awareness of circumstance; wilful blindness is equivalent. Knowledge usually refers to circumstances. Some crimes require that the accused knew something. Wilful blindness is the same as knowledge. If Crown proves that the accused knew about the circumstances that knowledge required, that’s good enough. If crown proves that the defendant was wilfully blind, good enough.
* Recklessness: reckless about act, existence of circumstance or consequence, this is less than full intention. Recklessness is that you are aware of the existence of a circumstance or possible consequence to your conduct, but you chose to do it anyway. Crown doesn’t have to prove that the accused wilfully, deliberately did something or that the accused wanted a particular outcome to occur or was substantially certain that it would. It’s a lesser level of proof about what the accused’s state of mind was. Accused was conscious, was aware, knew the risk.

Figuring out what Type of Mens Rea to Use

* you start by looking at the statute, subjective mens rea required, look to see whether statute requires that intention or knowledge is required and if it doesn’t, then you assume Crown has to prove recklessness. Recklessness is hence the default position.
* There is a mens rea requirement for each element of the actus reus/the offence. Looking for correspondence between the elements of the actus reus and the mens rea to fulfill whatever legal requirement there is from the particular crime.

Exceptions

* some crimes have an objective standard of fault, it’s not about what was going on in accused’s mind, but the frame of mind of the reasonable person. Crown just has to prove that the accused deviated from the standard you’d expect from a similarly situated person.
* some offences that are called specific intent offences where the mens rea doesn’t really attach to any of the actus reas elements. It’s kind of an add-on. This is where there’s an extra thing of blameworthiness or fault that the Crown has to prove. Statutory language will usually identify this, these offences are where the purpose of the crime is something the Crown has to prove. Statute will indicate a specific purpose for which the person is involved in that specific context. Statute says “break and enter with specific intent to...” Specific intent offences usually have lesser offenecs included.
* If an offence is categorized as an offence of strict liability or “absolute liability,” then the Crown doesn’t have to prove mens rea at all.

Principle of legality

* you can’t be charged with an offence at Common Law. S.9 of Code abolished any common law offences unless they had been imported into the Code/a statute.
* Even though anything you are to be convicted of must be a crime by statute, defences can come from the common law, even if they are not part of the Code.

Frey v. Fedoruk

* Question is whether peeping is a crime and whether it warrants being arrested by a cop. Defendant says thought they were stopping a crime and plaintiff said no crime committed
* Court says that the argument that “unlawfully did act in a manner likely to cause a breach of the peace by peeping” is too broad, too great a range of crimes.
* Argument for peeping being a crime was that it made the inhabitants of the home uncomfortable, fearful, distressed. Argument against considering this a crime: parliament decides what a crime is, that’s its role, and judges have a different role, but certainly not to determine what the crime is.

R. v Clarke

* Indecency
* Accused charged with s173(1)a wilfully performing indecent act in a public place
* And s173(1)(b) wilfully committing an indecent act in any place with intent thereby to offend any person. Important terms “public place,” “in any place,” “with intent.”
* Finding of fact by trial judge that he did not know he was being watched. Trial judge also found that he did not intend to offend or insult.
* Trial judge declared the living room, however, a public place. From the findings of fact by trial judge, he thus cannot be convicted of s173(1)(b), as there is no intention on offending/insulting. Only thing, having found that, he can only be convicted of anything if he somehow is doing something in a public place. Trial judge said he had converted his living room to a public place due to access to the living room visually. Question becomes whether public access to a place has to be physical, or if it can be defined by visual access.
* CoA concluded that accused conducted himself indecently with intention to draw attention to himself in a residential area. CoA thus parted impermissibly from facts decided by BCSC. Appellent courts may NOT interfere with finding of facts of trial judge unless they are CLEARLY wrong, unreasonable, and unsupported by evidence.
* SCC looks at plain meaning of the word access, that it connotes physical access and not mere visual access. “You have access to this building” doesn’t mean you can just look through the window. SCC also uses the French version of the definition of “public place,” which is complete and, unlike English, dosen’t have word “include” in it. It is simply defined.

Actus Reus: must be voluntary

* the actus reus, the conduct or the omission, must be voluntary. If someone does something that is involuntary and it results in harm or a consequence that is prohibited in the requisite circumstances, if that act or omission is not voluntary, than that actus reus hasn’t happened. It’s not an act of the accused. It’s considered something in which the accused has no agency.
* If the hand of someone forces you to pull the trigger, literally does that, it’s an involuntary action. Involuntary consumption of drugs: you’ve been given something then did something without your knowledge or consent. An act, in order to fulfill the requirements of the actus reus, must be voluntary. If there is a successful defence of mental disorder, extreme intoxication, or automatism, then the reason those defences are successful is not because the person didn’t have the proper mens rea, it’s because it wasn’t a voluntary action.
* Voluntary consumption of substances does NOT go to voluntariness 99.9% of the time.
* Luski: road conditions. Swerved due to icy roads and hit someone. Question of voluntariness, it wasn’t an act of himself, had no control over what happened at all and that’s why involuntary.
* Wolfe: reflex. Complainant punches appellant, who by reflex hits complainant in the head with a phone. Reflex, involuntary. Most minimal idea of intent in voluntariness. Whether something is deemed voluntary or involuntary is individualized, not reasonable person.
* Defence of involuntariness is the only defence on mental level that can be used in absolute liability offences, where there is no mens rea

**Class 13**

Omissions

* General policy is that failing to do something isn’t an actus reus.
* Restricted contexts where omissions can count as the conduct for the actus reus
* Omissions satisfy conduct as an element only when specified in the offence or when legal duty breached.
* If the offence says failing to do a particular thing constitutes the crime, that would be obviously one way in which the omission would be the conduct of the actus reus.
* Other kind of situation is in those places where there is a legal duty on the person and the person fails to do the thing that is relevant to the legal duty. Most common is s.215 in the code, failing to provide the necessaries of life if you are a parent or in a particular relation to child.
* Mens rea and actus reus must be concurrent, must overlap. Can’t be convicted of a crime where you have the mental requirement, the idea/intention, on one day and then you forgot about it, and an accident happened and the actus reus happens the next day.

Fagan

* guy pulled over by cop, when pulling over, he accidently drives over the police officer’s foot...then intentionally delays moving car off the foot.
* Fagan is being charged with is assault. Legal problem is that failing to do something, an omission, cannot constitute an assault. It must be an intentional infliction of force. Intentional is mens rea, infliction of force is the actus rea. In this case, court recognizes that omissions can’t satisfy conduct requirements
* Driving onto the foot was not sufficient because there was no intention. There was a reasonable doubt that he did that deliberately/intentionally. If it ends before intention is formed, it is not going to be sufficient as no concurrence between mens rea and actus reas.
* This assault does not start out as an assault, no intention, only becomes an assault the moment that intention shows up as the act is continued. The act is continuous, but only becomes assault the moment it becomes intentional.
* Person here was engaged in continuing act, started with him driving on foot, and then continued with not getting on the foot with the intention formed that he was going to stay there.
* Dissent said no actual act of assault. The not getting wheel off foot was not the actual actus reas, the unintentional act of driving onto the foot initially is the actus reas.

R. v. Moore

* Moore ran a red light, traffic violation, and admits to doing it. But charge is obstructing a police officer, so charged with much more serious offence. This is an indictable offence.
* Court says not guilty, because Moore was on a bicycle, which is not a motor vehicle.....no obligation for cyclists to give cop name and address. Only operators of motor vehicles or so obligated.
* Police officer has duty under statute. Reasoning is that if there’s one duty that happens to be in hands of law enforcement agent, then there’s an implied or reciprocal duty on the other person to assist, to aid, to cooperate with the police officer’s fulfilling his duty. There’s nothing like this in statutory framework or common law that says this, SCC just ruled it. General rule is that omission is not part of conduct of actus reas unless there is a duty or is specified in the statute.
* The only way they could find that Moore’s omission to do anything was culpable was to make there a duty that he was failing to fulfill. It’s awkward and wrong reasoning that the majority finds that he is guilty.
* The dissent is very strong and they say that there are two really important rights being undermined by the analysis of the majority. Police power of interrogation and right of citizen’s to remain silent, this right was supposed to be absolute and rooted to presumption of innocence and s.11 of Charter rights.
* Dissent says that general principle at issue here is that there has to be a duty to act in order for an omission to be culpable. Any duty to identify oneself must be found in common law or statute. Dixon can’t find any statutory duty of this sort, for a cyclist committing traffic violation to divulge name and address.
* The other thing that the dissent looks to is to say whether there is a common law duty. They can’t find that either. They may be a moral or social duty to help police in their work of protecting community, there isn’t a common law duty and a person cannot obstruct a police officer in lawful execution of his duty by refusing to answer a question unless under a legal duty to do so.
* Criminal law is no place within which to introduce implied duties unknown to either statute or common law.
* Law is trying to keep up with medical advances regarding HIV.
* Was tested for HIV and knew he had it. Tried to donate blood. Charged under 180 of the code. Is this omission to inform or disclose something culpable
* First defence that defence raised was the principle of legality, that this wasn’t an offence that we knew or was part of our law, that there was no offence.
* There is no statutory duty...though there is in many other jurisdictions. Duty to disclose HIV status with criminal consequences, potentially, for failure to do that.
* Question is whether s.180 of Criminal Code should have common law duty, some authority to suggest that there IS a common law duty to refrain from conduct where there is a reasonable chance, reasonable foreseeability, that harm can be caused to another person. Not strong authority, but would bring this behaviour within the ambit of s. 180.

**Class 14**

Causation

* It is only an issue with consequence crimes. When arising, Crown must prove that the consequence occurred because of the action of the accused
* Difficulties if intervening events occur, or multiple parties in the crime
* There is a section of the Code which is about parties, s.21. this sets out the different ways that an accused can be held liable as a party with respect to criminal liability.
* Most of the rules about causation are judge made, they are from case law. Exceptions are the statutory provisions of homicide (s. 222(1)(5), 224, these say homicide depends on causation or brings up causation regarding homicide
* Causation is all or none in criminal law. You are either are or are not. There could be multiple co-accused, but there’s no apportionment of liability. You either are or you aren’t. This doesn’t mean you can’t consider the degree of responsibility, but the gradations are taken into account in sentencing, but not in criminal liability.
* There may be more than one person who caused the consequence who may be held liable for criminal conduct, even if causation is all or nothing.

Regina v. Smith

* fight between soldiers, dude is stabbed, guy carrying him to the hospital drops him three times, and then hospital administers not the best treatment. Various things happen after the initial act that make it seem like these things are involved in this person’s death. So that maybe if he hadn’t been dropped or hadn’t been given the wrong medication, maybe he wouldn’t have died. Should that original action be held to have caused the consequence (death)?
* Court of Appeal says that if at the time of death, the original wound is still an operating cause and a substantial cause, than the death can properly be said to be caused by the wound, albeit some other cause of death is also operating. Only if it can be set that the original wound is merely the setting in which another cause operates can it be said that the death does not result from the wound.
* Putting it another way, only if the second cause is so overwhelming as to make the original wound part of the history can it be said that the death does not flow from the wound.
* Courts are extremely reluctant to take criminal liability away from the person who started the sequence of events

Regina v. Blaue

* Jehovah’s witness was stabbed multiple times, taken to hospital, needed blood transfusion, but refused, so died. Could have lived if she had the transfusion?
* Court says you take your victim as you find her, and that includes the whole person, including their religious convictions as part of who they are. Tough luck if that’s what’s happened.
* It’s not up to assailant to determine if victim’s behaviour is appropriate, ridiculous. Doesn’t change that his stabwound caused the death.
* Doctors have no ability to overrule consent or lack of consent in a competent adult
* Fact that you start something and someone decides not to do the thing that would prevent the death, that doesn’t mean that you haven’t caused the death, statutorially.

R v. Smithers

* There’s a fight where the accused punches the victim and the cause of death of the victim is suffocating on his own vomit, but the reason for this was that he had an unusual, physical, anatomical condition that would produce this result.
* Accused argued that the actions of the accused did not cause the death, it was the faulty epiglottis that was responsible for the death.
* Test: Were the actions of the accused a contributing cause of death outside the de minimis range?
* De minimis: something just above trivial. Anything in a consequence crime which was a cause outside the de minimis range, something a bit more than trivial, would be considered a cause in determining whether the accused’s conduct or omission was responsible for consequences.

Harbottle

* person who is charged with first degree murder under s.231(5)
* Harbottle didn’t do the act that was the immediate cause of death, which was the strangling....he just held the victim down while she was strangled.
* A murder can be first-degree if “planned and deliberate,” or if a person is involved in another offence listed in s.231 and death ensues, then equivalent to what’s necessary for first degree Accused here is charged with first degree murder on the basis of his participation in sexual assault where death occurred.
* In this case, the court applied a more stringent test than Smithers for causation. Said in this case, have to determine whether or not the accused’s action was an essential, substantial, and integral cause of death.
* This standard is higher due to the gravity of the offence, the punishment for first degree murder is much greater.
* For first degree murder, the test is changed from Smithers. To hold someone liable for first degree murder on the causation question, then the individual has to have been an essentially, substantial, an integral cause of death.

R. v. Nette

* Accused hogties a 95 yr old lady while robbing her, leaves her alone, tied up. She falls over at some point and dies.
* This jury convicts on second degree murder. On appeal, the accused said other factors killed her: she fell off the bed, lacked muscle tone, asthma, alleging that on charge to the jury, the charge about second degree murder was wrong.
* Accused’s position is that all homicide charges should have one standard: the Harbottle “substantial cause.” Accused wanted this cause to be charged to the jury, accused says Harbottle applies and not Smithers.
* Respondent, and intervener, say applicable standard for second degree murder is de minimis from Smithers. Say substantial cause is higher standard that only applies to first degree murder.
* Court decides Harbottle doesn’t apply to second degree, but makes suggestion for rearticulating the Smithers test. Majority says it’s just a clarification of the words, that juries should be told one thing instead of de minimis test and the minority thinks that’s a big change, the reformulation (“significant contribution” instead of de minimis)

**Class 15**

Factual causation

* the scientific, medical, concrete understanding of the cause of death. That would be expressed in terms of medical experts, it’s about whether or not there is a link between the actions of the accused and the ultimate result, being death.
* it’s a “but for” question, “but for the actions of the accused, would the individual have died?” This is one way of thinking of factual causation, but doesn’t tell you necessarily whether that action of the accused is, in law, the cause of the consequence.

Legal causation

* a question of liability, responsibility, about whether the individual should be held responsible on the causal question, for causing the individual’s death, or is there some other set of things that have occurred, factually, that make the individual not legally responsible for causing the individual’s death. Intervening events that overwhelm the original actions of the accused.
* Argument that juries must be instructed on factual vs. Legal causation is not a redeemable error because it’s all one process for juries. Juries fined beyond reasonable doubt that the accused is responsible because of an act or omission for the cause of the individual’s death.

R. v. Nette cont’d

* the Harbottle test does not apply to second degree murder. Court also interested in the directions in legal and factual causation – only one direction need be given.
* Judge in Nette seemed to think that it’d be preferable to rephrase the Smithers test to say for everything but first degree murder, were the actions of the accused a “significant causal connection” to the consequence. Majority in Nette say they’re not going to do this. Minority say there’s a difference, however beteen significant and “not insignificant.” Not the same, you’re changing the text and raising the standard.

R. v. JSR

* Rarely try people together who are claiming that it’s going to be the other guy that’s responsible
* evidence is that intervening events did not break chain of causation.
* Actus Reus of homicide– Crown has to prove beyond reasonable doubt all of the requisite elements in s. 222 . The conduct must be an act, you don’t get convicted of homicide by an omission. It must be voluntarily performed. Circumstances aren’t specified so no particular circumstances of the actus reus that Crown must prove. Consequences are taken directly from s.222, directly or indirectly cause the death of another person
* Causation is more than a de minimis cause for all homicide save first degree. Jury should be directed to convict if they conclude that A’s actions were a significant contributing cause to B’s death and are convinced beyond a reasonable death.

**Class 16**

Mens rea Principles

* Look first to statutory language (wilfully, knowingly, recklessly, meaning to cause of death)
* If no statutory provision (usually the case) determine what parliament intended
* If no statutory provision, presume some level of subjective fault required
* Subjective is what was going on in the mind of the accused
* Objective fault is community standard of care
* Mens rea applies to each element of the offence (but exceptions in some consequence crimes)
* Motive is not mens rea (Lewis)
* Knowledge of illegality/immorality not an aspect of mens rea
* Existence of a collateral inconsistent belief does not vitiate mens rea (Theroux)

Subjective Fault

* If there is no statutory provision, general starting point is that there is some level of subjective fault required. Usual starting point is that parliament intended that there be proof of the particular individual’s state of mind.
* The premise is that we need to know whether this particular individual intended, was reckless, knew, all of these are subjective fault elements. Subjective is what was specific to this particular accused, what was going on in his mind, crown must prove fault by raising evidence about the accused’s state of mind, if you have a subjective fault requirement.

Objective fault

* Influenced substantially by Charter jurisprudence. For some offences, we are asking whether the individual departed significantly from a community standard of care. Much close to reasonable person than goings-on in mind of the accused.

Mens rea link to actus reus

* Usual rule is that there is a fault requirement for each and every element of the actus reus.
* Say what is going on in mind of accused with respect to conduct, circumstances, and consequences

Things that are Not Mens Rea

* Motive is not mens rea
* Motive is important, particularly in sentencing and sometimes can be used to infer mens rea, but we don’t care whether a person has killed a man out of compassion or to get his money.
* Whether or not anybody knows that something is against the law is also not usually an aspect of mens rea. To say “I didn’t know this was against the law and therefore didn’t have appropriate mens rea” is not mens rea, is something different
* Existence of something that you believe that’s inconsistent does not remove mens rea.

Hierarchy of Subjective Fault

* Highest form is intention/knowledge/wilful blindness (desire to bring about consequences/substantial certainty about facts or consequences)
* Slightly lesser requirement is recklessness (actual awareness of risk but take the chance)

Beaver

* Accused and brother sell substance to undercover police officer, represented as heroin. Evidence that accused believed contents to be sugar.
* Main issue of the case: Crown argue he possessed it, regardless of whether he thought it was sugar. His argument was he didn’t even know he had drugs in his possession & didn’t mean to.
* Beaver tells us that the starting point with true crimes is that subjective mens rea is required, that if something is a true crime, then there is a general underlying principle in criminal law that blameworthiness includes a constituent mens rea element that is subjective.
* Starting point with true crimes is subjective mens rea unless statute says otherwise
* Beaver rules that it is whether the belief is honest, not whether it is reasonable, reasonableness only goes to evidence.
* Parliament could always legislate otherwise if they wanted mens rea to not be required. Have to have said so, otherwise presumed to be there.
* Proof of “knowledge of the character of the substance” required in criminal matters. Full mens rea required for drug offences, possession offences.
* Whether person has a belief that’s really stupid isn’t important, only whether the person honestly believes something, Crown has to find out whether Beaver knew he had heroin, that he was in possession. Whether the person SHOULD HAVE known is another matter. Question is whether the belief is honest, not whether it’s reasonable.
* Reasonableness does, however, go to believability. Finder of fact has to find that the person had an honest belief in something; the stranger that belief, the more unrealistic it is, the more it’s a departure from what the reasonable person would have thought and the less likely the finder of fact will find it to be an honest belief.
* Without very good evidence or clear words, you do not impute the intention of parliament to remove mens rea.

Public Welfare Offences vs. True Crimes (raised in Beaver)

* A public welfare offence is something that is a series of things that are passed in order to regulate everyday life, that it has some civil or administrative law character. Wider range of people affected by regulatory offences or public welfare offences and there’s an attempt to protect the public more generally there.
* true crime is one where reason for having it as a crime is for preventing particular kinds of conduct
* Much of the distinction between true crimes & public welfare offences has a constitutional base.
* For true crimes, subjective mens rea is required and for possession offences, it is the honest belief that’s required and not a reasonable one.

Sault Ste. Marie

* City contracts with Cherokee Company to dispose of garbage. Compacted layering approach pollutes creek and river. Was the City guilty of violating Water Resources Act? Statute is silent. City argues no mens rea, they didn’t intend to pollute, they didn’t know about the process and therefore were not criminally liable.
* Sault Ste Marie re-emphasizes Beaver: if something is a true crime, a person should not be held liable for the wrongfulness of his act if that act is without mens rea.
* “Where the offence is criminal, the Crown must establish that the accused who committed the act did so intentionally or recklessly, with knowledge of the fact constituting the offence or wilful blindness. Mere negligence is excluded from the concept of the mental element required for conviction.”
* a discussion about absolute liability, which means wouldn’t require the Crown to prove anything about knowledge, recklessness, etc, just say that if the actus reus is there, if the guy sold bad meet or the company was involved with polluting the creek, that’s it. Promotes administrative and judicial efficiency. State has all sorts of things that are public welfare offences (traffic), if there’s no requirement to prove any blameworthy mental state in the accused then clearly it’s easier to prosecute those kinds of offences.
* That’s the evolution of public welfare offences; petty offences in England were just considered absolute liability because it just made it easier on the system to prosecute them. Promote higher compliance with those regulations and laws designed to have a more organized and safe society, but we’re loath to impose penal liability on people where there is not some requirement of knowledge, intention, or recklessness

**Class 17**

Sault St. Marie

* begins to set out different categories of offences. True crimes require subjective mens rea, these are most of the crimes in the Code unless the statute says something different
* Sault St. Marie begins to take other offences that are public liability offences, only partially criminal, asks whether absolute liability is a good idea here, don’t have to prove mens rea.
* End of that case comes up with a third category: offence of absolute liability, where there’s a defence of due diligence.

R v. Buzzanga and Durocher

* Francophones trying to establish francophone school in Essex County. Published a document to show how crazy the opposition was. They didn’t mean the content of the document, it was meant as satire of the opposition.
* The threshold question is the meaning “wilfully.” It modifies words “promotes hatred” rather than “communicating statements.” So court is saying that “wilfully” modifies the consequences and not the conduct. Trial judge made an error in considering “wilfully” in context of the conduct, the “communicating statements.”
* Court says that “wilfully” has been used in many different ways in many different places, the understanding and meaning of the word depends on the context. Primary meaning is “intentionally’ but can also mean “recklessly,” there is no fixed meaning. Here, the court says it means “with the intention of promoting hatred” and does not include recklessness.
* The thing is that the immediately previous section, 319(1) is about public place, but they are not charged under this. (1) is restricted to saying statement in public place.
* Judge arrives at decision by contrasting the two contiguous sub-sections of the Code
* Tells us about the use of objective evidence to determine subjective intent. How we infer or determine subjective mens rea. It’s difficult that we demand Crown prove the subjective state of mind of accuased. Accused does not have to present any evidence. Yet for most criminal offences, we need to know fault of this person and what he knew and intended.
* “The great the likelihood of the relevant consequences ensuing from the accused’s act, the easier it is to draw the inference that he intended those consequences. The purpose of this process, however is to determine what the individual intended, not to fix him with the intention that a reasonable person might be assumed to have in the circumstances.”
* You can look at what the person has done, look at the circumstances around what the person has done, and you could, considering all the evidence, draw an inference about the subjective intent of that accused. Look at all the surrounding evidence and behaviour and make an inference about the subjective state of mind of the individual.
* Purpose of the process is to determine what that particular individual intended, not what reasonable person would do/know in the circumstances. In this context, of Buzzanga, if you look at what happened and what accused did, you might think they were trying to promote hatred, might take circumstances, if it were a reasonable person, but not necessarily the accused with his background and circumstances.

Theroux

* accused is charged with fraud, was building houses telling buyers they had insurance when they didn’t, but honestly believed the houses would be built and everything would be okay.
* Theroux demonstrates the close link between actus reus and mens rea and that sometimes the distinction between them isn’t completely clear. Some actus reus elements can look like mens rea elements.
* Case says that actus reus of fraud, this offence, constitutes two things: a dishonest act and a deprivation or risk caused by dishonest act
* Test for mens rea is subjective, test is not whether a reasonable person would have foreseen the consequences of the prohibited act but whether the accused subjectively appreciated those consequences as a possibility, looks to intention and facts as accused believed them to be.
* Mens rea is not a morality question. A defence or explanation that this wasn’t wrong, or it wasn’t going to happen, or that it was fine according to the accused doesn’t vitiate the mens rea of the offence. “inquiry has nothing to do with the accused’s system of values.”
* “crown need not in every case, show precisely what thought was in the accused’s mind at the time of the criminal act. In certain cases, subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference. The fact that such an inference is made does not detract from the subjectivity of the test.”

Recklessness

* means that a person recognizes the risks that actions may cause the prohibited consequence or that the circumstances exist but the accused will take the risk anyway. The individual must be subjectively aware that the risk exists, but takes the risk anyway.

Wilful Blindness

* a substitute for knowledge, not recklessness lower standard. When a person’s suspicions are aroused (re: circumstances or that actions will cause consequences) but deliberately closes eyes to risk and does not investigate further. This can substitute for the requirement of knowledge.
* Suspicions are aroused to the point where he or she recognizes the need for further inquiry but does not do so, accused shut his eyes as he knew or strongly suspected that looking around would fix him with the knowledge.

**Class 18**

Willful Blindness Issues

* It’s a clear policy consideration to develop wilfull blindness, but it is at odds with the requirement of knowledge/subjective thought, as the whole idea is the person DOESN’T know and closes his eyes to finding out.
* For policy reasons, the common law has developed the idea that wilful blindness is the same as knowledge and a substitute for it. If there’s a knowledge requirement in the crime and the Crown proves that accused knew of the circumstances, then satisfies, but in the alternative, if the Crown can prove that the individual deliberately made himself ignorant of those facts so as not to have the knowledge imputed to him, that’s the same thing.
* Wilful blindness is only a relevant idea when knowledge is a requirement of the offence

R. v. Briscoe

* Issue was whether each accused was involved and whether criminal liability flowed from this involvement. There are numerous people involved in the crim and question is the extent to which their participation in the offence is deserving of perhaps a criminal liability. Queswtion: whether the nature of his participation in this series of events was sufficient to make him criminally liable. Trial judge finds that he didn’t know, he didn’t have the requisite knowledge of what was going to happen to the victim, not criminally liable.
* Briscoe argues that there’s inconsistency between wilful blindness and the subjective requirements of fault, that allowing wilful blindness runs afoul of the idea that in order to be convicted of murder you must have subjective foresight of death. If you’re wilfully blind you don’t have that foresight.
* Court says it does not define mens rea requirement of the offence, but can substitute for actual knowledge whenever it is required by the mens rea. Did the accused deliberately shut his eyes to stop himself from looking so wouldn’t have knowledge?

Motive

* in constructing and analyzing offences, for the most part, motive doesn’t matter. It’s not the same thing as mens rea. The reason why people do things is for the most part not an aspect of the legal requirements of an offence. The crown is not required to prove whether the individual had a good reason or a bad reason for doing anything
* Crown must only prove the intention. Crimes with no motive may still be intentional

Lewis

* mails a package with a kettle bomb in it, when it gets used, bomb goes off and kills the intended victims. He gets someone to help him, Lewis, and Lewis goes and mails the package and that’s all that he does. He had no particular motive to do the deed that he did.
* Motive can be relevant as to the evidence led by the Crown, but it is not a legal element of the offence. It doesn’t matter what the reason is for a particular action, but motive may help by way of evidence to explain the actions of the accused with respect to intention.
* Fact that he didn’t have any stake or reason to want this person killed, he knew that the package contained the bomb, and that was sufficient for the mens rea. Motive by itself is almost never a legal element of the offence, but motive can be circumstantial evidence.
* Motive is always relevant evidence and admissible. Motive is, however, legally irrelevant. Motive is simply a question of fact. Whether or not motive is a significant piece of evidence in a crime depends on the particular case.

R. v. Gordon

* Transferred intent may arise when the accused’s intent for one type of harm to occur to one victim and either by miscalculation or accident, that harm befalls another victim
* Higher standards for mens rea in attempts because offence is incomplete.
* Doctrine of transferred intent does not apply to inchoate crimes.
* Doctrine of transferred intent arises in inchoate crimes. These are uncompleted crimes: mostly these are attempts and conspiracy. By themselves, they are crimes (attempted murder), but because in attempts the Crime is essentially not completed, there is a much heavier emphasis and higher standard on the mens rea than the actus reus.

**Class 19**

Sentencing

* spelled out in the Code. They are essentially fines, probation, community service, or jail. All of these are sprinkled throughout the Code for different dispositions that can be attached to particular sentences.
* The Code rarely sets out a specific punishment/sentence for a specific crime. What it does is always set out a maximum and occasionally set out a minimum.
* Gives judge a great deal of discretion in what the actual sentence is that anyone receives for a particular crime. Up to the judge to decide what’s appropriate.
* Either have a maximum attached to the offence specifically or the generic maximums that go with summary conviction offences ($5000 fine or 5 months in jail), question then becomes how the judge decides what is appropriate for this particular offender in this particular context for this particular crime, and in that regard that the judge’s discretion is important.
* It used to be that the principles of sentencing were all judge-made principles because in order to decide what ought to happen for this particular person for this particular offence, judge needs to apply principles of sentencing. 1996 they became codified in Code. Judge looks to the Code to get the range of sentences and see what maximum is or minimum in some cases, then look at the principles that he is going to use in sentencing this particular offender.
* Because of this wide discretion that the judge has and the different kinds of cases and different kinds of communities, you may find that a person is likely to get a certain kind of sentence in a Vancouver court that is quite different than a sentence the individual would get in another community in BC. more lenient in dealing with those offences than someone who sees that offence rarely, like in Quesnel.
* Another thing to realize in sentencing is that there are a number of parties that are interested in a sentencing decision. The victim, the victim’s family, the accused, society, the Crown, the police, a number of different kinds of interests that all come together in the sentencing decision.

Sentencing process

* can occur after a trial or after a guilty plea. There are sentencing decisions that suggest that in situations that the accused admits guilt early and doesn’t prolong the process, it is a mitigating factor in judge’s sentencing.
* judge will hear from Crown council, who will read in the police report, and from defence council, who will talk about the personal life and personal characteristics of the accused. The judge will always want to know whether there’s a criminal record. Judge may hear a victim impact statement. Some occasions that a judge will seek a pre-sentence report – a probation officer who does a more indepth general assessment of the individual character. Sometimes specific psychiatric reports are also put into the sentencing hearing.

Two main theoretical streams of punishment

* Utilitarian framework for sentencing: what is the practical impact of sentencing on the offender and on society? What is the practical consequence, result? We sentence because we’re concerned about the practical end of what the particular sentence will do.
* Retributive theory of punishment : A different way of thinking about sentencing or punishment: we sentence someone because of a moral stance, we sentence on the basis that is the right thing to do, not necessarily with respect to the result but with respect to what we think a citizen of society should do or expect.

Objectives of Sentencing

* Denounce unlawful conduct
* Deter the offender and others from committing offences (either specific deterrence or general)
* Separating offenders from society where necessary (justification for imprisonment)
* To assist and rehabilitate offenders (sentencing could rehab an offender, depending on how you fashion a sentence, could contribute to helping the particular offender with some part of his or her life that may have contributed to the offending behaviour.)
* To provide reparation for harms done to the victim and the community. This could be a fine or community service, which can be attached to a variety of different sentences
* To provide a sense of responsibility in the accused

Central principle of sentencing

* 1. a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The more serious the offence, the more harm that’s done, the more injury, the greater the property damage, the longer term effects, that’s half of an equation that’s important. If you’re on higher end of that, it’s a more serious sentence and if you’re on the lower end, it’s less serious sentence.
* 2. Degree of responsibility of the offender: the degree of participation in any crime by an individual, what the person actually did in terms of the overall commission of the offence is important.

Absolute Discharge (types of sentences)

* most lenient thing that an individual can get is an absolute discharge. You cannot get an absolute discharge if there is a mandatory minimum or an offence that could be punishable by imprisonment for 14 years or more. Serious offences are thus not in absolute discharge.
* Assuming you fall within an offence that has no mandatory minimum and no maximum over 14 yrs, if it is in the best interests of the accused and not contrary to the public interest, then it’s possible to get an absolute discharge. Though person is found guilty or convicted, there is no conviction entered, which means that there is no criminal record.

Suspended Sentence with Probation

* judge will suspend passing of sentence and you’re put on probation with condition for six months or a year and if you behave, you won’t be sentenced to anything, but you will have a conviction on your record. If you violate conditions of probation, then you can be sentenced both on the original charge, whatever that was, and for the breach of probation, so you could end up with two convictions. Period of probation for a sentence can’t be more than 3 years.
* There are compulsory probation conditions, that must always be in a probation order. Good behaviour, show up in court when requested, can’t change your name without notifying your prob. Officer. Conditions of probation are supposed to be for rehabilitation purposes, not punishment.

Fines

* To impose a fine, the court must be satisfied in the offender’s ability to pay, as if you don’t pay your fine there is a prison term in lieu of payment of the fine, so court cannot impose a sentence that is really an imprisonment sentence because person can’t pay. Needs to be investigation of whether defendant can realistically pay the fine.
* The accused is given a certain amount of time to pay, determined by the judge and if you default, there will be certain number of days in jail. There is a formula that provides the way of calculating imprisonment in lieu of the fine.

Imprisonment

* most significant infringement on liberty
* Accused will try to keep judge from giving any sort of imprisonment and if this fails, to try and make the time as short as possible

Conditional sentence of imprisonment

* controversial. The sentence where a person can serve a jail sentence in the community.
* A conditional sentence is only imposed where there would have been a sentence of imprisonment, that jail sentence is one that has to have been less than 2 years, and the judge has to be satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purposes of sentencing.
* Often thought of as house arrest, they’re usually extraordinarily rigorous conditions on person’s ability to move in the community. Usually not allowed out of their home, except for therapy or medical appointments, not allowed alcohol and there are sometimes curfews.