

When the fudge no longer satisfies: when, how, and why tolerance for ambiguity in criminal law starts and ends

“Seen in the perspective of time all statements of the law, whether by the legislature, or by judges, or by jurists, are no more than working hypotheses. They are, quite simply, temporary approximations which some people in their wisdom have found to be convincing at certain points of time.”¹

Lord Goff

“EXISTENCE, n.
A transient, horrible, fantastic dream,
Wherein is nothing yet all things do seem:
From which we're wakened by a friendly nudge
Of our bedfellow Death, and cry: “O fudge!””²

Ambrose Bierce

1. Fudge: working definition, object, fictions, and effect

“ambiguity or untruth which is generally known, tolerated and treated as correct.”

1.1 Object of fudge: factual/legal; theoretical/doctrine

1.2 Effect

The effect of fudge appears to be to avoid changing, or appearing to change, the substantive law either in general, or by reducing its ambiguity, but still resolving the question in front of the decision-making as if a changed rule. Fudge gives scope for the *law in action* to continue or change, without formally changing all of the *law in the books*. It does so by requiring the *law in minds* to pretend that something ambiguous or erroneous is correct. Perhaps the interesting effect of fudges is to shape or maintain not just some rule of substantive law, but an existing intellectual structure, while in fact achieving legal change.

1.3 Fudges and Fictions: role of ambiguity-untruth spectrum

1.4 Forms of doctrinal Fudge

1. “as if”: e.g., “common purpose” (“the person actually giving the stroke is no more than the hand or instrument, by which the others strike” Foster, *Crown Law* (1792), 351)
2. “deem”/“for the purposes of this Act”/find or infer/sufficient to prove:
 - a. *Nedrick* and *Woollin*?
 - b. S. 47(2)-(4) SCA 2007.
3. Presumptions: s. 75 cf. 76 of the SOA 2003
4. Estoppel and equivalence: e.g., intoxication rules

2. Where we fudge

2.1 Examples of legal fudge which has changed in criminal law recently

1. AR/MR being defined for each offence
2. Intention (including conditional intent): *Moloney*, *Woollin* and now *Anwar* and *Johnson*
3. Attempts MR: *Khan*, *AG's reference* and *Pace and Rogers*
4. Dishonesty: *Ghosh* and *Ivey*

¹ *Judge, Jurist and Legislature* (1987) 2 Denning Law Journal 79, 80.

² *The Unabridged Devil's Dictionary* (2001, University of Georgia Press; original 1906 and 1911), 74.

2.2 Examples of legal fudge which have not (yet) changed

1. Insanity's relationship with automatism
2. Manslaughters
3. Intoxication, especially *Kingston*
4. Mental states in criminal law
 - a. Recklessness of negligence
 - b. Foreseeing and suspecting
 - c. Knowledge
 - d. Intention

2.3 What do we learn from these areas? Ambiguity all round; lay persons

3. Why we have fudge: what are we hiding?

3.1 Issues

- 3.1.1 *Obfuscating fudge, e.g., gross negligence manslaughter*
- 3.1.2 *Scaffolding and sandbox fudge, e.g., dishonesty*

3.2 Processes

- 3.2.1 *Iterative fudge, e.g., manslaughter*
- 3.2.2 *Disagreement fudge, e.g., dissent in CACD; Lord Mustill in Powell and English*
- 3.2.3 *Process of change fudge, e.g., Khan, and Pace and Rogers*
- 3.2.4 *Explanatory fudge, e.g., "presumed to know the law"*

3.3. Outputs

- 3.3.1 *Continuity fudge, e.g., Pace and Rogers*
- 3.3.2 *Implementation fudge, e.g., Kingston*
- 3.3.3 *Political fudge, e.g., Moloney*

4. Patterns in fudge

4.1 Where we find fudge

4.2 Inflection points in changing a fudge

4.3 Chains of decision-making

4.4 Ambiguity and Error

4.5 The nature of law?

5. Conclusion: what can fudge show us about the criminal law?

1. Configuration
 - a. of decision-makers; of law and fact
 - b. of appeal structure and funding
2. Comparisons
 - a. Does England and Wales have more fudge than other criminal laws?
 - b. Does Criminal law have more fudge than other areas of law?
3. What issues can be fudged, for how long, and why and how do they change?