other hand, Willmer, L.J. felt that, if the sum could not be applied for the benefit of the plaintiff, damages should be reduced accordingly.[28] Pearson, L.J. suggested that this was a consideration which could be left to the jury to be taken into account by them to such extent as they thought fit in the particular case.[29]

In *Wise* v. *Kaye* all three lords justices agreed that it was irrelevant to the assessment of damages that the sum awarded could not be applied for the personal benefit of the plaintiff.[30] Upjohn, L.J. pointed out that, once damages are proved and assessed at the proper figure, the sum of money becomes the absolute property of the plaintiff and "it matters not that the plaintiff is incapable of personal enjoyment of the money in the very vague and, as I think, indefinable sense of spending it on herself".[31]

The majority concluded that the award of £15,000 general damages by the trial judge should not be disturbed. Leaving aside the major questions of legal principle involved, this conclusion strikes one as being rather unusual. At the present time many people feel there is a need for the legislature to intervene to assimilate the position of the person injured in a road accident to that of the injured factory worker by placing the negligent party in the former case under much stricter, if not absolute, liability, for injuries he causes to others. However, the legislature can scarcely take this step as matters stand, for already third-party insurance premiums constitute a burden on the community and the rise in the level of these premiums, which would result from such a step being taken, would make that burden almost intolerable. The alternative method of achieving this aim would be to reduce the awards of damages being made in personal injuries cases. One would, therefore, expect the courts to be anxious to seize any opportunity to do this. This case presented such an opportunity to the Court of Appeal. In the particular circumstances it did not matter to the plaintiff whether a small or large sum was awarded to her for her general damages. As far as authority was concerned, there was no decision binding on the court and little authority directly in point at all. The court rejected the opportunity. It is submitted that, in doing so, it set an unforunate precedent.

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MISPRISION OF FELONY

SYKES v. *DIRECTOR OF PUBLIC PROSECUTIONS*

Having asserted in *Shaw* v. *D.P.P.*[1] that "there is in the court a residual power, where no statute has yet intervened to supersede the common law, to superintend offences which are prejudicial to the public welfare",[2] the House of Lords in *Sykes* v. *D.P.P.*[3] quickly used that power to affirm the continued existence in the law of what has generally been considered to be an obsolete offence.

Briefly, the facts of the case were as follows: certain persons stole firearms and ammunition from an armoury in Norfolk and took them to Manchester

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[28] *Id.* at 237.
[29] *Id.* at 243.
[30] *Supra*, at 264, 267, 275.
[31] *Id.* at 267.
[1] (1961) 2 W.L.R. 897.
[2] *Id.* at 917. Similar views were expressed by Lord Simons at 917 and Lord Hodson at 938.
[3] (1961) 3 W.L.R. 371.

to arrange for their sale. The appellant played some part as a contact man, and he was charged, *inter alia*, with misprision of felony and convicted. He appealed to the Court of Criminal Appeal where his appeal against conviction was dismissed, but his appeal against the sentence of five years' imprisonment was upheld and the sentence reduced. He was granted leave to appeal to the House of Lords limited to the following points: (i) whether there is such an offence as misprision of felony, and (ii) whether active concealment is an essential ingredient of the offence.

The House of Lords[4] was unanimous in deciding that the offence still exists as an indictable common law misdemeanour and, to use the words of Lord Goddard,[5] " . . . a person is guilty of the crime if, knowing that a felony has been committed, he conceals his knowledge from those responsible for the preservation of the peace, be they constables or justices, within a reasonable time and having a reasonable opportunity for so doing". It was further agreed that active concealment is not an ingredient of the offence and the *dictum* of Lord Westbury in *Williams* v. *Bayley*[6], that the concealment must be for the benefit of the person concealing the felony, was disapproved.

It has long been one of the fundamental principles of the common law that the provisions of a penal law should be certain and clear, not couched in such vague terms that it constitutes a dragnet to entangle anyone a particular court and jury can be persuaded to envelop in it.[7] It is submitted that the definition of misprision of felony propounded in *Sykes* v. *D.P.P.*[8] is just such a dragnet type of law that, had it appeared in a penal statute, these same Lords would not have hesitated to criticize the draughtsmanship.

Take, for instance, the difficulty of knowing the answer to the question, "What is a felony?". Until recent times the distinction between felonies and misdemeanours lay in the consequences. A felony entailed forfeiture of property in addition to the punishment whereas a misdemeanour did not. As a rule, the more serious offences were felonies, but this was not an absolute rule, simple larceny, for example, being at common law a felony whereas perjury was a misdemeanour only. Forfeiture was abolished in England in 1870 and in New South Wales in 1883[9] and thus any difference today is largely historical.

The position in New South Wales has been much simplified by ss. 9 and 10 of the Crimes Act, 1900-60. These sections provide that any offence under the Act punishable by death or penal servitude shall be a felony while any offence punishable by imprisonment, whipping, or a fine in addition to, or without imprisonment shall be a misdemeanour only.

So it is quite a simple matter for the citizen of New South Wales to avoid liability for misprision. He needs to know which of the crimes set out in the Act is punishable by penal servitude or death, and which of the common law crimes not covered by the Act and any new offences created since the Act are classified as felonies. Thus he will at once know whether he is bound to reveal the crime of which he has knowledge to the nearest constable or justice, always providing, of course, that the offence of which he has knowledge is not one which is regulated by the Commonwealth Crimes Act, 1914-60, since under that Act all offences are punishable by imprisonment only and no distinction is drawn between felonies and misdemeanours.

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[4] Lord Denning, Lord Goddard, Lord Morton of Henryton, Lord Morris of Borth-y-Gest and Lord Guest.

[5] (1961) 3 W.L.R. 371 at 389.

[6] (1866) L.R. 1 H.L. 200 at 220.

[7] D. Seaborne Davies, "The House of Lords and the Criminal Law" (1961) 6 *Journal of the Society of Public Teachers of Law* 106.

[8] (1961) 3 W.L.R. 371.

[9] See now Crimes Act, 1900, s.465.

This problem did not seem to worry their Lordships unduly. Lord Denning, in defining the ingredient of knowledge, says that a man accused of misprision "need not know the difference between felony and misdemeanour — many a lawyer has to look in the books for the purpose — but he must at least know that a serious offence has been committed: or, as the commissioners of 1840 put it, an offence of an 'aggravated complexion': for after all, that is still, broadly speaking, the difference between a felony and misdemeanour. Felonies are the serious offences. Misdemeanours are the less serious. If he knows that a serious offence has been committed — and a lawyer on turning up the books sees it is a felony — that will suffice".[10] And Lord Goddard, also speaking broadly no doubt, seems to think "some serious crime"[11] is a sufficient definition.

It is difficult to see how their Lordships can maintain this position. In a century which has seen the creation of so many serious statutory crimes which have not been graded as felonies, the distinction between felonies and misdemeanours no longer even represents a workable division between those crimes which are serious and those which are not.

Both Lord Denning and Lord Goddard made light of the hypothetical question raised by counsel for the accused which had been dealt with by Slade, J. in an earlier case of *R.* v. *Wilde*,[12] as to whether the offence obliges a person to report a boy stealing apples. They think that this is not "a serious crime" and therefore need not be reported. Slade, J. thought that the offence must be such "that a reasonable man would consider it his duty to inform the police"[13] and therefore a reasonable man need not report a boy stealing apples. Lord Morton, however, was of the opinion that Slade, J. erred in law in importing this limitation so he presumably takes the view that a person is obliged to report the boy. And the other members of the court must be presumed to take this view also, since they do not seek to define a felony as a "serious crime".

The very length of time that was spent in the judgments dealing with the boy and the apples seems to indicate that even though they define the offence as concealing a felony their Lordships are themselves uneasy about the impossible width of this definition. Each in his own way (with the exception of Lord Guest) tried to import some limitations to the offence. The majority, however, saw the limitation in terms of the discretion of the prosecutor rather than in any precise definition of the crime. Lord Morton thought that the limitation of Slade, J., mentioned earlier, though an error in law, could be regarded as a " . . . valuable indication of the type of case in which a prosecution for the offence is appropriate".[14] Both Lord Goddard and Lord Morris felt that prosecutions should be infrequent and they, too, seem to suggest that prosecutors will be discreet, the former saying "the law is nowadays administered with dignity and common sense"[15] and the latter asserting that "the fact that prosecutions have been, and doubtless will continue to be, infrequent demonstrates that the law is the handmaid of reason".[16]

While it is refreshing to see such confidence reposed in our prosecutors, one cannot but wonder if such confidence may be misplaced and think perhaps that a law which tells its prosecutors clearly what they cannot do, is

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[10] (1961) 2 W.L.R. 371 at 384.
[11] *Id.* at 389.
[12] (1960) Crim. L.R. 116.
[13] *Id.* at 119.
[14] (1961) 3 W.L.R. 371 at 391.
[15] *Id.* at 389.
[16] *Id.* at 392.

better than a law which merely offers suggestions about what they ought not to do.

Up to the present time it has always been understood, in accordance with the Judges' rules, that when a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person, whether suspected of the crime or not, from whom he thinks that useful information can be obtained. But it has never been assumed that such person is under any obligation to answer the questions so put to him.[17] Since *Sykes' Case* this can no longer be taken to be the position. A person other than the felon himself with any knowledge of a felony will be bound to answer any questions put to him by the police concerning the felony or else lay himself open to a prosecution for misprision, and it would be strange if the police did not take advantage of this to extract any information that they could. Further, when a person suspected of a crime actually becomes the accused, since the main object of questioning him must be to obtain proof against him by means of admissions, such questions have properly been the subject of restraints of one kind or another. At common law two points are emphasised — firstly, that the alleged confessional statement must be shown by the prosecution to have been made voluntarily, and secondly, that a statement will not be classed as voluntary, if for any reason the will of the person making it has been overborne.[18] Various State statutes,[19] though somewhat narrower in scope than the common law rule, also provide that statements, confessions or admissions will be inadmissible in evidence if procured by untrue representations, threats or promises held out by a person in authority.

Again, the Judges' rules are chiefly directed at methods of questioning an accused which tend to be unfair or oppressive. The whole tenor of the rules is aimed at ensuring that any statements made to the police by a person suspected of a crime are voluntary and made of his own free will. The spirit of these rules, though not rules of law, has customarily been observed both in England and Australia, and it has long been accepted as a firm principle that any suspect may remain silent should he choose to do so, when he has been charged with a crime. The rules themselves lay down the form of the caution to be administered to a prisoner when he is charged with a crime as follows:

> Do you *wish* to say anything in answer to the charge?
> *You are not obliged to say anything unless you wish to do so* but whatever you say will be taken down in writing and may be given in evidence.

Lord Devlin speaks of this as "the accused's right to silence".[20]

How, then, is the right to be silent to be reconciled with the duty to speak, imposed by *Sykes' Case*? The two are plainly contradictory. A person who has been accused of a felony, but who, though himself innocent, knows the person who in fact is responsible, may be advised that he need not answer questions put to him unless he wishes to, but on the other hand must be warned that if he refuses to answer he is likely to be prosecuted for a misprision of felony. This is hardly a right to stay silent.

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[17] Lord Devlin in *The Criminal Prosecution in England* (1960) at 26 states the position thus: "It is true that the law which gives freedom to the police to question equally gives freedom to the subject not to answer. Indeed, there is virtually no obligation on anyone to give the police helpful information".

[18] *R.* v. *Lee* (1950) 82 C.L.R. 133 at 146; *Ibrahim* v. *R.* (1914) A.C. 599 at 609; *McDermott* v. *R.* (1948) 76 C.L.R. 501 at 514.

[19] *E.g.* Crimes Act, 1900 (N.S.W.) s.410; Evidence Act, 1958 (Vict.) s.149.

[20] *Op. cit.* at 49.

And, should the unfortunate prisoner decide to answer the questions so put, could his information be said to be given voluntarily — without threats of prosecution or, alternatively, with promises that if he speaks, no such prosecution will be made? One would hardly think so. Thus, should the police seek to use the statements so procured in evidence against the true criminal, any judge in the exercise of his discretion would almost certainly exclude such statements under any one of the statutory, common law or customary rules discussed above. Truly a very strange position.

One finds it difficult to see the necessity for this offence today. Although the judges cited a wealth of authority, starting with the hue and cry and the Statute of Westminster (1275), and working up through successive centuries, to support their conclusions that misprision of felony has always been an offence, what none of their Lordships squarely faced was why this offence had for so long been regarded as being in a state of desuetude. Why was it that, apart from a few cases of its revival after 1928,[21] there had been no prosecutions for this offence since 1813?[22]

It is submitted that the reasons for this are twofold. Firstly, at a time when the enforcement of the criminal law was largely based on private initiative, no doubt it was the duty of every citizen to help enforce the law, and wilful refusal to do so would in fact be likely to endanger the welfare of the whole community. But by the nineteenth century at least, and particularly today, with a regular organized body of police with wide powers to apprehend criminals, the danger to the community by the mere silence of a citizen can no longer be regarded as serious.

Secondly, and more importantly, there has been the long and widespread feeling that the definition of this crime is impossibly widely drawn. This can be seen from the report of the Commissioners of 1840 used by Lord Denning in support of his statement that the defendant in misprision "must at least know that a serious offence has been committed".[23] These Commissioners did not believe that the concealment of *any* felony should be within the definition and in their 1843 Report drafted a section on misprision that would limit its operation to felonies which were capital or punishable by transportation for a minimum period of seven years.

So, too, Lord Westbury's suggestion that the offence should be limited by the qualification that the concealment must be of some benefit to the concealer may have been because he " . . . was momentarily confusing misprision with compounding a felony",[24] but it seems more likely that he felt the need for some limitation to this offence.

Lord Denning, alone of their Lordships, was sufficiently impressed with the need to limit the definition rather than rely on the discretion of the prosecutors, to endeavour to consider how this might be done. The limitation he purported to introduce was that people who stood in certain relationships to the felon, and he mentioned particularly lawyers, doctors, clergymen, employers and headmasters, were under no duty to disclose a felony for they might, in good faith, claim that they were under a duty to keep it confidential. "Non-disclosure may be due to a claim of right made in good faith".[25] As Glanville Williams points out,[26] "This attaches an unusual meaning to 'claim of right made in good faith', which ordinarily refers to a mistaken assertion of right". One must agree that an honest but mistaken belief that he was entitled to withhold information might be a reason for not prosecuting

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[21] Notable was the decision of the Victorian Supreme Court in *R.* v. *Crimmins* (1959) V.R. 270, applied by their Lordships in the instant case.

[22] (1813) 31 State T. 969.

[23] (1961) 3 W.L.R. 371 at 384.

[24] *Id.* at 389.

[25] *Id.* at 385.

[26] G. Williams, *Criminal Law: The General Part* (2 ed., 1961) at 426.

an accused, but it seems hard to see how one can say that the offence has not been committed. However, since Lord Denning's remarks are neither supported by any other authority nor given any support from the speeches of the other Law Lords, the offence cannot at this point of time be said to be subject to any such qualification.

It is Lord Denning, again, who leaves us with another hope that the offence may one day be properly defined and limited when he says:

> The judges have not been called upon further to define the just limitations to misprision, but I do not doubt their ability to do so when called upon.[27]

As well as limiting this offence some time in the future, the court will also decide if the non-disclosure of a contemplated offence is to be included in it. It seems that Lord Denning is in favour of imposing upon the citizen a duty to disclose any knowledge he has of a meditated crime for he says, "This is good sense and may well be good law".[28] Lord Goddard, on the other hand, would " . . . hesitate to hold that it is established that there is such a duty",[29] but since Lord Goddard felt in 1948[30] that the offence of misprision of felony was itself obsolete, it may well be that he will overcome his hesitation on this point at some later date. How certain a criminal law is this!

In any case, one must question the necessity for the courts today to create new offences or revive ones long regarded as obsolete. In times when legislative intervention was rare, some useful purpose may have been served, but now Parliament sits regularly and if additional penal laws are required for the protection of society, Parliament should enact them. If it does not, the presumption must be that the misconduct complained of is better left to be controlled by the moral feeling of the community, which feeling changes according to the values of the age.

We are happily now living in a period where respect for the judiciary is high, but this has not always been so, and surely it is better now to guard against what may be done in the future than to leave the way open for generations less fortunate than ours to be harassed and oppressed under a spurious cloak of legality by introducing into our law such a vague and ill-defined crime as that of misprision of felony.

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MENS REA IN STATUTORY OFFENCES

R. v. *REYNHOUDT*

In *R.* v. *Reynhoudt*[1] the High Court of Australia was again confronted with the problem of *mens rea* in statutory offences. Reynhoudt was indicted under a statutory provision that anyone who "assaults, resists or wilfully obstructs any member of the police force in the due execution of his duty . . . shall be guilty of a misdemeanour".[2] The Chairman of General Sessions, before whom Reynhoudt was tried, instructed the jury that it was not incumbent upon the prosecution to prove that the accused knew that the person whom he was

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[27] (1961) 3 W.L.R. 371 at 385.
[28] *Id.* at 386.
[29] *Id.* at 388.
[30] *R.* v. *Aberg* (1948) 1 All E.R. 601.
[1] (1962) 36 A.L.J.R. 26.
[2] Crimes Act, 1958 (Vic.) s.40.