Interpreting Taxing Statutes # 14J - Requirement to comply with legislation

Every person to whom an Act of legislature applies is under a legal duty to comply with it.

Every person to whom an Act of legislature applies is under a legal duty to comply with it. ^[1] The same is true of a legislative instrument made under prerogative or delegated powers. Ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it. It is of the nature of legislation that every person to whom it applies has a legal duty to obey it. ^[2] This applies equally to private citizens and corporations and public officials and bodies. Everyone is equally obliged to obey the law, and there is no separate machinery for the enforcement of public administrative enactments. Often the sanctions for breach of a statutory duty are specified in the Act itself. Where this is not done, it is inferred that Parliament intended to rely instead on sanctions arising under principles of the general law.

The courts do not take an over-fussy view in determining whether a purported compliance satisfies the requirements of the Act for it is not necessary to take leave of one's common sense.

The courts do not take an over-fussy view in determining whether a purported compliance satisfies the requirements of the Act for it is not necessary, in construing a statutory expression, to take leave of one's common sense. ^[3] A mere literal compliance without the substance will not suffice. Here implication may

[1] Bennion 2019 p 215 Sec 7.1

[2] Bennion 2019 p 215

[3] Bennion 2019 p 216

need to be drawn on. So, for example, a requirement to provide information implies that the information must be true. A statutory duty, even if absolute, may be taken not to extend so far as to require performance of an act that it would be unreasonable to require, for nothing is law that is not reason. Conversely, a statutory duty is not adequately performed if the mode of purported compliance is unreasonable. A statutory duty is regarded as discharged where more is done than the duty requires. This is in accordance with the maxim *omne majus continent in se minus* (the greater includes the less). The rule corresponds to the rule that where an act is permitted, anything less is included in the permission. In general hardship is not accepted as an excuses for lawbreaking. Absolute necessity may however be a defence.

Ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it.

Ignorance or mistaken understanding of legislation is not accepted in law as an excuse for failure to comply with it.^[4] Blackstone said that it is the subject's business to be thoroughly acquainted with the law 'for if ignorance of what he might know were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity'. ^[5] Blackstone also said of mistakes as to the law: if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so, this is willful murder; for a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. In Coke's version of the rule there is a prefatory phrase to show that

[4] Bennion 2019 p 217 Sec 7.2

[5] Bennion 2019 p 217

the rule does not extend to ignorance of fact: *ignorantia facti facti excusat;* ignorantia juris non excusat. ^[6] If a person knows the facts, but does not know that they constitute an offence by him, he is not excused. This applies for example to aiding and abetting. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, "I knew of all those facts but I did not know that an offence had been committed", would be allowing him to set up ignorance of the law as a defence'. However, mistake of law will not oust a right of appeal and there is a growing tendency for the courts to relieve from the harshest effects of the maxim. The law does not import a presumption of legal knowledge. ^[7] It makes no difference to the application of the rule that the subject is a foreigner. The rule is based not on fairness but expediency: one who enters a foreign land is necessarily under an obligation to comply with its laws. A person is not excused from the principle that ignorance of law affords no excuse by the fact that the operative ignorance is that of his or her professional adviser. ^[8]

The wording of an Act may be such that the principle that ignorance is no excuse does not apply. ^[9] An Act may confer a benefit on conditions which are satisfied where ignorance of law exists. Many Acts use the concept of reasonableness in judging behavior. The question arises whether a person can argue that behavior was not unreasonable because it was prompted by ignorance of the relevant legal rule. Although the rule that ignorance forms no excuse is applicable to every type of law, it

[6] Bennion 2019 p 217
[7] Bennion 2019 p 218

[8] Bennion 2019 p 218

[9] Bennion 2019 p 218 - 219

does not apply to an executive instrument made, under a statutory provision, in relation to a named person only. ^[10]

In ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity.

Where an Act imposes a procedural or other requirement in connection with the doing of anything under the Act but does not spell out the consequence of breach, the question arises whether a failure to comply invalidates the thing done. In ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity.^[11] Precedents applying the former distinction in mandatory and directory requirements are not relevant unless they are addressed the question of legislative intention as to the consequence of non-compliance. 'A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows.^[12] ' . . . the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, the emphasis ought to be on the consequences of non-compliance, and posing the question

[10] Bennion 2019 p 219

[11] Bennion 2019 p 220 Sec 7.3

[12] Bennion 2019 p 220

whether Parliament can fairly be taken to have intended total invalidity." ^[13] The question of legislative intention is not to be equated with the 'judge's view of the seriousness of the non-compliance on the particular facts'.^[14]

Substantial compliance by a public body would amount to fulfillment of statutory requirement.

There are cases where the decision of a public body is challenged, often involving administrative or public law and judicial review, or which concern procedural requirements for challenging a decision whether by litigation or some other process. Here, the courts have asked whether the statutory requirement can be fulfilled by substantial compliance and, if so, whether on the facts there has been substantial compliance even if not strict compliance.^[15]

Compliance by a private person depends on the requirement of the statute, if the requirement is critical then strict compliance would be required and if the requirement is ancillary then substantial compliance would serve the purpose.

A different approach is taken where the statute confers a property or similar right on a private person and the issue is whether non-compliance with the statutory requirement precludes that person from acquiring the right in question.' Here, the court show a consistent approach in relation to statutory requirements to serve a notice as part of the process for a private person to acquire or resist the acquisition of property or similar rights conferred by the statute. In none of them has the court adopted the approach of

[13] Bennion 2019 p 220

[14] Bennion 2019 p 221

[15] Bennion 2019 p 221

"substantial compliance" as in the first category of cases. The court has interpreted the notice to see whether it actually complies with the strict requirements of the statute; if it does not, then the court has, as a matter of statutory interpretation, held the notice to be wholly valid or wholly invalid.^[16] Given that the consequences of non-compliance in such cases depends on the legislative intention, the outcome does not depend on the particular circumstances of the actual parties, such as the state of mind or knowledge of the recipient or the actual prejudice caused by non-compliance on the particular facts of the case'.^[17] Rather, the court must consider the statutory scheme as a whole. If the notice, or information missing from it, is of critical importance in the context of the scheme, the court is likely to decide that Parliament intended a failure to result in total invalidity. By contrast, where missing information is of secondary importance or is merely ancillary, failure to supply it is unlikely to result in invalidity.^[18]

No significance is to be attributed to use of the word 'must'.

Finally, no significance is to be attributed to use of the word 'must' (as opposed to "shall'). The words "shall" and "must" are both synonymous as denoting something which is required to be done as opposed to something which is intended to be merely optional. Both words impose an obligation but, detached from the statutory scheme as a whole, they throw no particular light on whether the legislature intended non-compliance to result in invalidity and nullity'. ^[19]

[16] Bennion 2019 p 221

[17] Bennion 2019 p 221

[18] Bennion 2019 p 222

[19] Bennion 2019 p 223

Whether a person can effectively waive performance of a statutory requirement, and whether a person bound by a statutory requirement can effectively contract out of complying with it, depends on legislative intention.

Whether a person can effectively waive performance of a statutory requirement, and whether a person bound by a statutory requirement can effectively contract out of complying with it, depends on legislative intention. ^[20] The question whether it is legally possible to contract out, or waive performance, of a statutory requirement depends as always on the wording of the legislation.^[21] A well-drafted modern Act may make the matter clear. Where the Act is not clear, careful scrutiny of the wording may be necessary to glean Parliament's implied intention. The opposing maxims cited below derive from a time when such clarity was rare though they still have their uses today. ^[22] The starting point must always be what the Act actually says, but the important contrast is between cases where the policy of the Act allows contracting out and cases where it does not. Here changes in the outlook and *mores* of the community (which judges inevitably and rightly reflect) are particularly relevant. ^[23] In the Victorian age of *laisser faire*, courts were ready, even anxious, to assume that Parliament intended persons of full capacity to be able to give up statutory benefits if they wished. So, for example, in *Rumsey v North Eastern Rly* Co it was held that a railway company could freely contract out of its statutory duty to allow passengers to bring luggage on their journey. ^[24] By contrast, the modern state believes it to for people's own good that they

[20] Bennion 2019 p 224

[21] Bennion 2019 p 224

[22] Bennion 2019 p 224

[23] Bennion 2019 p 224

[24] Bennion 2019 p 224

should not be exposed to any risk of being overreached. As early as 1926 the House of Lords held that an employer could not contract out of a statutory duty to pay a pension. In that case, Pollock MR said: the public should be safeguarded from the melancholy spectacle of seeing a man who had done work and been in a responsible position during years of his life, suffering from poverty and distress by reason of the fact that no adequate provision had been made to enable his to spend his latter years in reasonable comfort.' ^[25] There are several relevant maxims, which to some extent point in opposite directions.^[26] The maxim *quilibet potest renuntiare juri pro se introducto* (a person may renounce a right introduced for his benefit) is mentioned by Coke. Another version is *omnes licentiam habent his, quea pro se indulta sunt, renunciare* (everyone has liberty to renounce those things which are granted for his own benefit). These may be applied to statutory requirements of any kind, provided they have some identifiable beneficiary. ^[27] The maxim *pacta private juri public derogare non possunt* (a public right is not overridden by the agreements of private persons) is also cited by Coke. In his discussion of it, Broom says: 'the consent or private agreement of individuals cannot render valid any contravention of the law, nor can it render just, or sufficient, or effectual that which is unjust or deficient in respect to any matter which the law declares to be indispensable and not circumstantial merely. A related principle prevents parties agreeing that a transaction between them shall have a juridical nature different to its true one. ^[28] It is inherent in the concept of property that the right to it can be given up if the owner thinks fit. Where the right is

[25] Bennion 2019 p 224

[26] Bennion 2019 p 225

[27] Bennion 2019 p 225

[28] Bennion 2019 p 225

conferred by Act, this liberty to renounce is precluded only where Parliament so intends. Such an intention may exist on grounds of public policy, or where other persons have an equal right which might be adversely affected by the renunciation. The intention may be set out expressly, or may be left to be inferred. ^[29] Many of the cases in which the maxim *quilibet potest renuntiare juri pro se introducto* (a person may renounce a right introduced for his benefit) has been applied concern the waiver of statutory defences. In general it is taken that when Parliament provides for such a defence it intends the party entitled to the defence to be able to waive it (whether by conduct or by an express agreement not to rely on the defence). This doctrine is in accordance with the usual rule whereby what is pleaded is within the control of the party pleading. ^[30] Where a procedural rule is laid down for the benefit of a party to litigation, that party can usually waive compliance with it. ^[31] Many Acts require notice to be given of certain matters. If there is no express or implied indication that absence of notice is fatal, the person entitled to notice can waive the requirement. ^[32] Where there is a statutory requirement that notice must be in writing, or must be of a certain length, the question whether this can be waived by agreement between the parties should depend on whether the legislative intention is to prohibit the party intended to be protected by the notice requirement from yielding up that protection. ^[33] A distinction is drawn between benefits for a particular class of persons and benefits for the community generally. In the former case the class can renounce the benefit; but a general benefit

[29] Bennion 2019 p 225

[30] Bennion 2019 p 225

[31] Bennion 2019 p 225

[32] Bennion 2019 p 225

[33] Bennion 2019 p 225

cannot be renounced.^[34] Conduct by a person will not be taken to amount to the waiver of a statutory right unless it appears that he or she was aware of all the facts establishing the right. Waiver can arise only from presumed intention to give up a right. Conduct does not raise this presumption if it occurred in ignorance of relevant facts. Eve J said the party renouncing must have been in a position 'to appreciate what his true legal rights were'.^[35]

Where there are joint beneficiaries, waiver by one will bind them all.

Waiver of a statutory right is ineffective if not made by the beneficiary of the right. Where there are joint beneficiaries, waiver by one will bind them all. ^[36] Equally, a third person cannot object to the waiver of a right by the beneficiary. ^[37]

Legislator may create a procedure under which contracting out is typically prohibited, but may be allowed upon application to a court.

It is often better for the drafter to put the matter beyond dispute by stating expressly whether or not contracting out is permitted. The drafter may be particularly inclined to do this in matters relating to contracts, where it might otherwise be assumed that a person is entitled to decide the terms upon which he or she contracts.^[38] Parliament may create a procedure under which contracting out is typically prohibited, but may be allowed upon application to a court. ^[39] Where a contract contains a void term

[34] Bennion 2019 p 226

[35] Bennion 2019 p 226

[36] Bennion 2019 p 226

[37] Bennion 2019 p 226

[38] Bennion 2019 p 228

[39] Bennion 2019 p 228

purporting to relieve a person of the obligation to perform a statutory duty, the remaining terms will not be affected provided they can be severed. Severance is not possible where an illegal consideration is the basis, or one of the bases, for all the provisions of the contract. ^[40] Where it is clear, upon grounds of public policy, that provisions of an Act are not intended to be set aside by private bargain the courts will so hold. ^[41] The view has been taken that accused persons should not be able to waive procedural requirements of the criminal law. These are imposed in the interests of justice, with a view to securing a fair and true verdict. It is not for the accused, even under legal advice, to attempt to forego that protection the law thinks right to give him.^ [42] Similarly, it has been held that, where a statutory provision confers a jurisdiction on the courts, and the jurisdiction necessarily involves interference with contractual rights agreed between the parties, it would be inconsistent 'for the legislature at the same time to allow for the parties to contract out of that interference'.^ [43] If Parliament has considered it necessary to require the permission of the court to some step in litigation, the parties cannot contract out of the duty to obtain permission. ^[44] If the parties to litigation have made a contract which is void because it purports to contract out of, or waive, a statutory requirement where this is not possible as a matter of law, then (as with any other illegal contract) it is the duty of the court to intervene so as to prevent an improper order being made.

[40] Bennion 2019 p 228

[41] Bennion 2019 p 228

[42] Bennion 2019 p 229

[43] Bennion 2019 p 229

[44] Bennion 2019 p 229

Contracting out may be disallowed because it involves ousting the court's jurisdiction. ^[45]

Powers conferred on a minister may be exercised by an official authorised to act on behalf of the minister.

Powers conferred on a minister may be exercised by an official authorised to act on behalf of the minister, unless the contrary intention appears in an enactment. ^[46] Similar principles may apply in relation to powers conferred on a statutory office holder. Whether they do apply depends on the terms of the statutory provisions creating the office in question. This **Carltona principle** gets its name from the landmark case, *Carltona Ltd v Commissioner of Works,* in which it was said, 'In the administration of government in the country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organization and

[45] Bennion 2019 p 229

[46] Bennion 2019 p 230 Sec 7.5

administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them.'^[47] The courts have approved reliance on the Carltona principle in cases where officials had signed stopping up orders and traffic restriction orders. In the latter case, the court rejected the proposition that the principle could never be relied on as regards the exercise of legislative functions. ^[48] The Carltona principle may be excluded expressly or impliedly. For implied exclusions, the legislative framework will need to be considered carefully in order to ascertain whether it prevents or confines the ability of a minister (or office-holder – see below) to authorize others to act on his or her behalf. ^[49]

All things are presumed to be the correctly and solemnly done by a public authority.

Unless the contrary intention appears, an enactment by implication imports the principle of the maxim *omnia praesummuntur rite et solemniteresse acta* (all things are presumed to be the correctly and solemnly done). The maxim *omnia praesumuntur rite et solemniter esse acta,* which establishes the presumption that acts of a public nature were correctly performed, is found in Coke. This presumption of correctness was described by Viscount LC as 'one of the fundamental maxims of the law'. A fuller version, expressing the obvious fact that the presumption applies only until the contrary is proved, is *omnia praesununtur legitime facta donec probetur*

[47] Bennion 2019 p 231

[48] Bennion 2019 p 231

[49] Bennion 2019 p 231

in contrarium.[50] The maxim establishes the presumption that an Act is properly passed, or delegated legislation correctly made. It also applies to the administration of legislation. Lord Russell of killowen CJ said of the administration of local government byelaws that 'credit ought to be given to those who have to administer them that they will be reasonably administered'.[51] Under the presumption of correctness it will be assumed, in the absence of evidence to the contrary, that a judge, magistrate or other judicial official acted correctly. [52] The maxim does not raise a strong enough presumption to enable it to be relied on exclusively in proving the existence of a necessary element in the commission of an offence. Referring to the maxim, Lord Parker CJ said, 'I think for myself that one ought to take very great care in a criminal case as to the length one goes in applying that presumption'. However, it has been held that, in the absence of evidence to the contrary, the court will presume that a mechanical or electronic device used for determining whether breach of a statutory duty had occurred was in proper working order at the material time. The maxim establishes the presumption that official acts purported to be done under an enactment were indeed done in accordance with the enactment.[53] The presumption of correctness is applied to any question of whether a person was duly appointed to a public office. [54] 'An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of illegality upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or

[50] Bennion 2019 p 234

[51] Bennion 2019 p 234

[52] Bennion 2019 p 234

[53] Bennion 2019 p 235

[54] Bennion 2019 p 235

otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders'. ^[55]

It is of the essence of a legal command that there should be a sanction or remedy for disobedience to it, though this may not be necessarily provided.

The remedy is, if any, available for breach of a statutory obligation depends on the legislative intention. The intention may be that there should be a special remedy provided for in the enactment creating the obligation or a related enactment, or that the general remedy should apply, or both. And applicable special general remedy may be criminal or civil. The legislative intention may be that there should be no legal remedy.^[56] It is of the essence of a legal command that there should be a sanction or remedy for disobedience to it. However, this is not necessarily provided.^[57] If it thinks fit, Parliament has power to issue legislative commands without attaching sanctions or remedies. Nevertheless there is a presumption that a legislative command does carry a sanction or remedy, in accordance with the maxim *ubi jus ibi remedium* (where there is a right there is a remedy). Thus Coke said that 'whensoever an act of parliament doth generally prohibit any thing' the party grieved shall have his action 'for his private relief'. ^[58] Sanctions for disobedience to a statute may be criminal or civil, or both. Here it has to be remembered that the objects of criminal and civil law are different. In very broad terms, the criminal law exists to punish wrongdoing, remove dangerous criminals from circulation, and deter potential wrongdoers from offending: while the main object

[55] Bennion 2019 p 235

[56] Bennion 2019 p 236 Sec 7.7

[57] Bennion 2019 p 236

[58] Bennion 2019 p 236

of civil law is to compensate the victim. Parliament may intend to visit breaches with both types of sanction, or one or other of them alone. If there is clearly no criminal sanction, the inference is stronger that a civil sanction is intended. ^[59] There are a vast number of criminal offences, both general and specific, created by Acts and delegated legislation. The scope of each offence will of course depend on the precise wording used. ^[60] In the regulatory field, an Act may create a civil penalty regime (or confer power to create such a scheme. ^[61] Common law duties of care may arise where duties are imposed by statute. Consideration of the circumstances in which a duty of care may be owed is outside the scope of this work – readers are advised to consult specialist works.^[62] Duties of care are occasionally imposed by statute. ^[63] A person may apply for the Attorney-General to bring a relator action to enforce a public right or public duty (and in certain other cases). Here the Attorney-General acts in pursuance of his or her constitutional function as guardian of the public interest. Once the Attorney-General's consent to the action has been obtained, the actual conduct of the proceedings is in the hands of the relator, who is responsible for the costs. The question of giving consent is solely for the Attorney-General, and the court cannot intervene. ^[64]

Where a breach of statutory duty causes damage to a person the breach may constitute the tort of breach of statutory duty.

[59] Bennion 2019 p 236
[60] Bennion 2019 p 236
[61] Bennion 2019 p 236
[62] Bennion 2019 p 237
[63] Bennion 2019 p 237
[64] Bennion 2019 p 237

Where a breach of statutory duty causes damage to a person the breach may, depending on the legislative intention, constitute the tort of breach of statutory duty. ^[65] Whether the breach of a statutory duty gives rise to a (private law) cause of action depends on the legislative intention.^[66] The cause of action is 'founded on tort'. It arises 'when the breach causes damage to the claimant'. ^[67] The common law treats actionable breach of statutory duty as a species of tort. Parliament also has recognized such a breach to be a tort. The Limitation Act 1980, s 11 (1) speaks of 'any action for damages for negligence, nuisance or breach of duty'. Judicial reference is sometimes made to a 'statutory tort'. In *Harris v Lewisham and Guy's Mental Health NHS Trust*, Stuart-Smith L J said that a claim for racial discrimination has been described as a claim in respect of a statutory tort. It follows that statutory references to 'tort' include breach of statutory duty. ^[68] It is of course perfectly possible for an enactment to provide that breach of a particular statutory duty does, or does not, constitute a tort. Where it does so, that is the end of the matter. ^[69] The difficulty of determining – in the absence of express provision – whether a remedy for breach of statutory duty is intended, and if so which one, prompted Lord du Parcq to say: 'To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed

[65] Bennion 2019 p 239 Sec 7.9

[66] Bennion 2019 p 239

[67] Bennion 2019 p 239

[68] Bennion 2019 p 239

[69] Bennion 2019 p 239

probably to be . . . I trust, however, that it will not be thought impertinent, in any sense of the word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.^[70] Where, as is usually the case, no express provision is made about the consequences of a breach of statutory duty, the 'central question is whether from the provision and structure of the statute an intention can be gathered to *create* a private law remedy'.^[71] The distinction is between duties created for the benefit of a specific class and those created for the benefit of the public generally.^[72] Of course, if there is a duty then to be entitled to recover in tort the claimant must be a member of the limited class for whose benefit the duty has been imposed. An action for breach of duty must be brought 'by a person pointed out on a fair construction of the Act as being one whom the Legislature desired to protect'.^[73] Four points may be made here.^[74] First, where the statute provides some other method of enforcing the duty that will normally indicate that the duty was intended to be enforceable by that method alone (and not by private right of action).^[75] Second, the likelihood that Parliament intended breach of the statute to amount to the tort of breach of statutory duty is lessened where some other adequate civil remedy is available.^[76] Third, occasionally a statute may provide that the existence of a particular method of enforcement (eg a criminal offence) does not affect the existence of any other

[70] Bennion 2019 p 240

[71] Bennion 2019 p 240

[72] Bennion 2019 p 241

[73] Bennion 2019 p 241

[74] Bennion 2019 p 242

[75] Bennion 2019 p 242

[76] Bennion 2019 p 242

liability arising from breach of the duty. Where it does so, the question whether breach of the duty constitutes the tort of breach of statutory duty is to be decided in the usual way.^[77] Fourth the existence of another method of enforcing the duty in question is a factor which points against there being a private law claim for breach of statutory duty, but is not determinative.^ [78] As mentioned above, the question is whether an intention can be gathered from the enactment to create a private remedy. Some factors that the courts have taken into account are considered below.^[79] The courts have said that the way in which the duty is imposed is relevant, although the current position on this is not clear.^[80] Here it is relevant to note that the former practice by which parliamentary drafters declared a certain act to be 'unlawful' has largely been abandoned in favour of declaring the doing of the act to be 'an offence'.^[81] Where an Act contains a detailed scheme of enforcement of its statutory duties, Parliament is unlikely to have intended to create additional private remedies. ^[82] Similarly, where an Act confers a right to recover damages for breaches of certain duties only, the implication is that no such right is created for breaches of other duties. ^[83]

Where, in order to determine whether a duty has been breached, it would be necessary to review the exercise of some person's discretion or judgment, it is likely that only a public law remedy was intended. ^[84] If the duty is of a general administrative or

[77] Bennion 2019 p 243

[78] Bennion 2019 p 244

[79] Bennion 2019 p 244

[80] Bennion 2019 p 244

[81] Bennion 2019 p 245

[82] Bennion 2019 p 245

[83] Bennion 2019 p 245

[84] Bennion 2019 p 245

regulatory nature imposed on a public authority, breach of the duty is unlikely to constitute a breach of statutory duty. ^[85] If the duty is imposed on a public authority, a consideration is whether it concerns the formulation of policy or the carrying out of an operational function. In the former case the tort is unlikely to arise. In the latter case it may do so.^[86] The courts have drawn a distinction between 'policy discretion' conferred by statute and 'operational powers' so conferred. The latter involves the implementation, rather than the taking, of policy decisions. ^[87] Where Parliament has entrusted policy to an organ of the state such as a government minister or a local authority it is not for the courts to intervene save where, on public law principles, there has been a failure of justice. ^[88] Where Parliament is dealing with a new or increased social mischief involving high risk to the personal safety of individuals, that may suggest that it intends the law to give them adequate protection. ^[89] The fact that legislation is designed to reduce the risk of personal injury or damage to property is by no means an infallible indication the Parliament intended to give individuals a private right of action for breach of its provisions. It is simply one factor to be taken into account'. ^[90] In the enactment was made by delegated legislation it is necessary to determine whether the delegate was given power to create new actionable rights.^[91] If Parliament did not intend to give a civil remedy for breach of the statute, the fact that the person bound to perform the duty acted maliciously will not in

[85] Bennion 2019 p 245

[86] Bennion 2019 p 246

[87] Bennion 2019 p 246

[88] Bennion 2019 p 246

[89] Bennion 2019 p 246

[90] Bennion 2019 p 246

[91] Bennion 2019 p 247

itself create a remedy. ^[92] In order to consider what constitutes a breach of a statutory duty, it is of course necessary to identify the scope of the duty in question. Some statutory duties impose strict liability, while others are broken only if there is a failure to take reasonable care, a qualification which may be express or implied. ^[93] The remedies available for the tort of breach of statutory duty are the same as for tort generally. ^[94] The claimant must establish that the breach of statutory duty caused the damage in question. Further, the tort of breach of statutory duty does not arise unless the breach gives rise to loss or injury of a kind for which the law awards damages.^[95] In determining whether a breach constitutes the tore of breach of statutory duty it is necessary to ask whether the damage suffered by the claimant is the type of mischief the enactment set out to remedy. ^[96] In the absence of any indication that a foreseeability test is being imposed by the enactment in question, such a test is not to be taken as implied. This distinguishes the tort of breach of statutory duty from the parallet tort of negligence. ^[97] In a successful action for the tort of breach of statutory duty the damages awarded may be reduced on account of contributory negligence in the same way as where an action for tort is founded on negligence. Where the claimant is seeking to benefit from his or her own wrong, that may provide a complete defence. ^[98]

Except where criminal sanctions are expressly laid down, a breach of legislation does not amount to a criminal offence.

[92] Bennion 2019 p 247

[93] Bennion 2019 p 247

[94] Bennion 2019 p 247

[95] Bennion 2019 p 248

[96] Bennion 2019 p 248

[97] Bennion 2019 p 248

[98] Bennion 2019 p 248

Except where criminal sanctions are expressly laid down by the legislation in question, it is taken in modern times to be the legislator's intention that a breach of that legislation does not amount to a criminal offence. ^[99] It was once considered to be the case that a statute which did not prescribe consequences for its breach attracted the common law offence of contempt of statute.^[100] Coke's name for this general offence was contempt of the king's law: 'whensoever an act of parliament doth generally prohibit any thing . . . the party grieved shall not have his action only for his private reliefe, but the offender shall be punished at the kings suit for the contempt of his law'. ^ [101] Later commentators referred to disobedience to an Act's commands as contempt of the statute'. That there should be punishment for contempt of statute is a common law rule under which the court may have a discretion as to whether to quash the indictment. ^[102] The doctrine of contempt of statute was a mere rule of construction and of little use in construing modern statutes^[103]

Extra-statutory concessions in tax related matters may be given by the tax authorities to some extent.

Where the legal meaning of a taxing enactment produces a charge which the tax authority considers should not be imposed, or should be imposed in a way less onerous to the taxpayer, the practice is for the authority to grant an extra-statutory concession by the operation of which the charge is waived or alleviated accordingly. There are however limits on the authority's power

[99] Bennion 2019 p 251 Sec 7.10

[100] Bennion 2019 p 251

[101] Bennion 2019 p 251

[102] Bennion 2019 p 251

[103] Bennion 2019 p 252

to make concessions. ^[104] An Extra-Statutory Concession is a relaxation which gives taxpayers a reduction in tax liability to which they would not be entitled under the strict letter of the law. Most concession are made to deal with what are, on the whole, minor or transitory anomalies under the legislation and to meet cases of hardship at the margins of the code where a statutory remedy would be difficult to devise or would run to a length out of proportion to the intrinsic importance of the matter.^[105] The term 'extra-statutory concession' is sometimes used in non-tax com-texts.^[106] This is not to be confused with a power to disregard (or allow others to disregard) the law.^[107] "It is fundamental to our legal system that the executive has no power to authorise a breach of the law and that it is no-excuse for an offender to say that he acted under the orders of a superior officer." ^[108]

[104] Bennion 2019 p 252 Sec 7.11

[105] Bennion 2019 p 252

[106] Bennion 2019 p 253

[107] Bennion 2019 p 253

[108] Bennion 2019 p 253