# "THE LABYRINTHINE LAW OF DISPOSAL OF THE DEAD: THE COMPLICATIONS, THE COMPLEXITIES AND THE CONVENTION"

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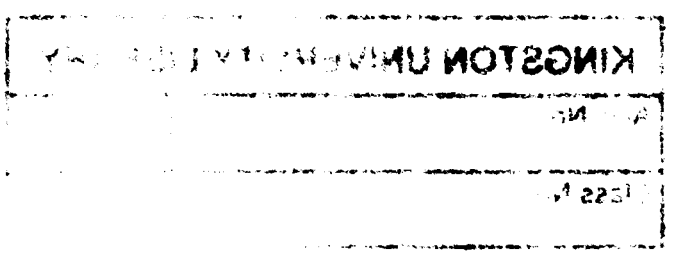
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## ABSTRACT

This thesis examines whether the law of disposal of the dead in churchyards fits within the human rights framework of the European Convention on Human Rights. In doing this it aims to fulfil three objectives. Firstly, to show that the body responsible for much of the policy and decision making in relation to disposal of the dead is a functional public authority for the purposes of the Human Rights Act 1998, secondly to analyse the existing rules and procedures around burial, maintenance and management and exhumation in churchyards against that framework of human rights and finally to demonstrate where there are opportunities for the Church of England to consider its policies and laws that regulate this area of law.

Disposal of the dead is, of course, a sensitive subject which involves not only the rule of law, policy making, public heath, moral and ethical issues but it is also one of the essential functions in society which passes on important messages to those generations to come. This thesis plays a vital part in untangling what is, without doubt, a complex area of law by using the human rights framework to evaluate and critique the existing law with a view to highlighting where the Church of England's regulatory structure is at risk of breaching human rights standards. The social costs of disposal of the dead and land management are increasing and this thesis also has an important role in public discussion of the issues of rights and responsibilities for funding.

Within the thesis, the human rights framework of the European Convention on Human Rights and the Human Rights Act 1998 are placed over the existing practices to create a juxtapositional matrix or map which demonstrates where the current law is out of synchronisation with a human rights framework and thus supports the hypothesis that in some key areas, the Church of England and more particularly the PCC are open to challenges brought under the Convention and other rights.

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My parents have been my inspiration, and this thesis is dedicated to my Dad, Barry Barton who I know will be bursting with pride that I finished it, and to my Mum, Pam Barton who never stopped believing in me. And for all the other family members, most particularly my children Charlotte, Tom and Stephanie, thank you for being there.

My husband has had to live and breathe this thesis with me but has never complained. Our 'stumble' conversations have resulted in some of my most exciting ideas and have tested the thesis throughout. Thank you, Adam for being all the things you are.

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## Chapter One: Introduction, Methodology and Background of the Thesis

### *1.1 Introduction*

This thesis examines whether the legal regulation of disposal of the dead in Church of England churchyards fits within a human rights framework as provided by the European Convention on Human Rights and the Human Rights Act 1998.

The fundamental questions which this thesis sets out to test are whether the Parochial Church Council (PCC) is a functional public authority for the purposes of s6(3)(b) of the Human Rights Act 1998 (HRA) when acting as the policy maker in relation to disposal of the dead in churchyards; whether the policy and regulation applicable to churchyards is compliant with European Convention on Human Rights (ECHR) standards and finally whether the multiplicity of approach to interpretation from both State and Church creates an overly complex and user-unfriendly regulatory system that needs updating to meet Convention standards.

The context and issues that are the subject of this examination are burial and the funerary furniture of the churchyard and cemetery in a human rights framework, the maintenance and management of the churchyard both while the responsibility of the PCC and after passing to the local authority for maintenance including property rights and exhumation. In Chapter Two, the constitutional structure of the PCC is explained as an important indicator for the hypothesis that the PCC can be argued to be a functional public authority. Further, the policies and regulatory rules issued by the PCC and incumbent when it comes to the shape and form of headstones and materials for graves is the focus of the thesis. Chapter Two has first to establish that the PCC could be found liable under the Human Rights Act for its policies and regulations, particularly in light of the *Aston Cantlow*[1] (hereinafter referred to as Wallbank) decision in the House of Lords. The issues that are raised by a thorough case review include the problematic

[1] *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants) v Wallbank and another (Respondents)* [2003] UKHL 37

definition of a functional public authority and this is explored in detail with a suggestion made for the relevant tests. In Chapter Three, the focus of the thesis is on burial with Article 10 providing the human rights framework against which to map the current practices. The chapter explores the potential engagement of Article 10 in this context, particularly in relation to the permitted words, style, shape and form of graves and memorials, where interference with freedom of expression is analysed via the case law of the consistory court and the European Court of Human Rights. In Chapter Four, the responsibility for management, liability and safety in churchyards is examined and in particular there is an historical aspect to this Chapter. The Church of England can close a churchyard when it deems that it is full and responsibility for the maintenance is then passed to the local authority. This expensive privilege of the Church is rigorously examined by tracing back in time the root of the arrangement. The thesis suggests a number of ways in which the meanings and purposes of historical roles and taxes have been misinterpreted to result in the current arrangement. In Chapter Four, there is also some theoretical discussion about the socio-historic importance of headstones and memorials as against the economic/bureaucratic arguments in favour of it for defining an era. Chapter Five uses the human rights standards in application to the law on exhumation from consecrated and unconsecrated ground. The historic and current case law is examined and human rights standards are mapped against this. It is in Chapter Five that the muddle and confusion of the law are particularly prevalent.

### *1.2 Background and Rationale for the thesis*

Having introduced the issues which this thesis considers, this section identifies the rationale for the project, explaining both the significance of the study and how it sits amongst the background literature in this field. There is no separate literature review in this work, but rather the literature is used throughout the text to illustrate and explore themes within the work and in this way, the current literature is reviewed and its relevance to the thesis is explained. Subject specific

terminology is used where appropriate in this thesis, with an explanatory section included in this introductory Chapter for the most commonly used. Other subject specific terms are explained in the run of text where the explanation does not interfere with the flow of the argument.

### 1.2.1 Consideration of Existing Literature and Rationale for the thesis

Prior to the passing of the HRA, but at a time when enactment was approaching, there was some concern voiced by the Church of England about the particular impact of the HRA on its law and processes and whether the HRA would or even should apply to it at all.[2] This concern about the application of the HRA to Church Law could be said to be an anomaly particularly in view of the forceful argument that, as the established church, it was inevitably part of the state and therefore would naturally be bound by the HRA. This thesis does not intend to revisit the arguments about whether the Church, in all its manifestations, should be considered to be part of the State but rather to focus on establishing that the PCC, when creating policy and regulating disposal of the dead, is a functional public authority and, therefore, liable for unlawful interference with Convention rights.

Following the expression of concern, the Church of England went on to announce that it was generally welcoming the new Act, but there were further expressions of concern voiced in Synod.[3] As Research Paper 98/26 points out in its summary, the impact of the HRA on the Church was not really seen as an issue by those involved in the preliminary stages of the progress of the Human Rights Bill.[4] In fact, it was not until the Committee Stage in the House of Lords that the issues were addressed in Parliament. However, discussion had been taking place in other concerned groups, for example, the Ecclesiastical Law

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[2] Research Paper 98/26, House of Commons Library "The Human Rights Bill [HL] Bill 119 of 1997-98 Churches and Religious organisations" Home Affairs Section
[3] Comments from the Bishop of Ripon reported in the Daily Telegraph 18 December 1997
[4] Research Paper 98/26, House of Commons Library "The Human Rights Bill [HL], Bill 119 of 1997-98: Churches and Religious organisations". Home Affairs Section.

Society. Mark Hill, who features prominently in this thesis as one of the leading academics and practitioners in the area of ecclesiastical law, and who is a member of the Church of England, was publishing his second edition of 'Ecclesiastical Law' at the time just prior to the HRA and his treatment of the Act is interesting. It merits merely a very short entry with a 'let's wait and see' feel.[5] An article published in the Ecclesiastical Law Journal gave a more detailed consideration[6] to areas which Hill supposed may result in responsibility for the church under the Act. Interestingly, there is no mention of disposal of the dead in his list of functions that may be affected. This article is subject to scrutiny in this introduction because it illustrates the approach that the Church has taken to human rights issues that has become apparent from the case law, regulations, policies and writing in the years following the enactment of the HRA.

In the article, Hill sets out the purpose of the Act and then moves to consider the Church as legislator. Measures are included in the HRA as primary legislation (s21(1) (d) (e)) and therefore must be read to ensure compatibility with the protected rights in the Convention. However, should incompatibility be found in a Measure, Hill asserts that the fast track amendment procedure outlined in the Act will not apply but he does not explain how such a matter would be dealt with. He also refers to the fact that s19 (statement of compatibility) does not apply to Measures (i.e. the legislation does not have to state on its face that it complies with the Convention). This distinction for treatment of Church legislation is demonstrable evidence of the Church's wish to remain separate from the ordinary procedures while promoting the position of Church legislation as primary legislation. This thesis does not follow this point about the status of the legislation, but this is an area that could be developed for future research purposes.

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[5] Mark Hill ,*Ecclesiastical Law* Oxford 2nd ed 2001 pg 11 para 1.24 and 1.25
[6] *Hill* "The Impact for the Church of England of the Human Rights Act 1998" (2000) 5 Ecc LJ 265 at 431-439

The next question raised in the article is an important one for Chapter Two of this thesis and was whether the Church of England could be considered a public authority for the purposes of the HRA. According to Hill:

"...since the Church of England and its institutions[7] are public authorities, any of its acts which are incompatible with a Convention right are unlawful, unless the authority, pursuant to primary legislation, could not have acted differently..."[8]

This broad acceptance that the Church would be envisaged as a public authority seemed promising, but as will be demonstrated within this thesis in Chapters Two and Five in particular, attempts to limit the inclusion of the PCC as a functional public authority has far reaching implications for the Church of England when law and policy making for disposal of the dead is considered. This thesis will argue that when applying policy and regulating disposal of the dead, the PCC is a functional public authority and therefore within the scope of public bodies that are liable under the HRA for breaches of Convention rights.

Clearly, Article 9 of the Convention is important to this area of law although much of the debate about the scope of Article 9 is outside the rationale for this thesis. Hill adds that:

"In response to concerted lobbying from various religious organisations within the United Kingdom a statutory concession – the value of which is doubtful – was introduced (into) the Human Rights Act 1998, section 13 of which now reads:

'(1) If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion, it must have particular regard to the importance of that right.

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[7] As footnote 5 at footnote 19 "i.e. synods, councils, commissions, courts, tribunals and committees and perhaps also bishops, incumbents and churchwardens".
[8] As footnote 5 at page 432

(2) In this section 'court' includes a tribunal'

It remains to be seen how this section, which appears to create a statutory hierarchy of rights, will, in practice, affect the balancing of freedom of religion against, say, freedom of expression. For what it is worth, the Home Secretary at the Committee Stage of the Bill said:

"The intention is to focus the court's attention in any proceedings on the view generally held by the Church in question, and on its interest in protecting the integrity of the common faith of its members against attack, whether by outsiders or by individual dissidents. That is a significant protection....If a case is brought against a charity and the charity can show that what it is doing is to maintain and practise the religious beliefs which it shares with its parent Church, we consider that [section 13] would come into play so as to ensure that due consideration was given to those beliefs...."[9]

It is interesting that Hill has used the potential of Article 10, freedom of expression, to be weighed against Article 9 because this thesis explores the possibility of challenges under Article 10 in Chapter Three which focuses on burial and the marking of graves and which develops the argument that the Church could be liable for breaches of Article 10 by over-restrictive regulatory rules which restrict the shape, form and wording for headstones and memorials.

At the time that Hill wrote this article, it was, of course, impossible for him to predict how the HRA would affect the Church and he recognises this in the article but he does speculate in a number of areas about possible applications by people claiming a breach (education being one of these). He does not refer to disposal of the dead as one of these possible areas and this thesis argues that this is indicative of how the area has been underdeveloped. This supports the claim of originality of this work. Hill's conclusion is perhaps the most indicative

[9] Hill as footnote 5 at page 434

part of the article when it comes to ascertaining the thoughts of the legal experts at the time:

"These matters, briefly discussed, merely illustrate where the Human Rights Act 1998 might have an impact upon the Church of England. It is difficult to predict with precision where and how the effects of the new legislation will first be felt. One can merely await, with trepidation or expectation, a litany of unintended consequences."[10]

However, something perhaps more revealing of the underlying view of the Church of England at the passing of the HRA is stated in a footnote to the article:

"The author wishes to put himself in the expectation category and avoid the fate of Lord McCluskey who, writing extra-judicially, remarked *inter alia* that the incorporation of the European Convention on Human Rights would provide ' a field day for crackpots, a pain in the neck for judges and legislators, and a goldmine for lawyers'. His impartiality was considered to be compromised under Article 6 and a case on which he had sat was remitted for rehearing by a differently constituted court: Hoekstra v HM Advocate (2000) Times, 14th April"[11]

This quotation shows that while the Church had some trepidation about the potential effect of the HRA, it was trying to remain impartial rather than hostile. This thesis will show that such impartiality has led to stale policies, restrictive practices and wrongly decided court judgments. The thesis suggests that a more proactive or perhaps more positive desire to be engaged with the HRA could protect the Church from claims of breach of Convention rights.

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[10] Hill as footnote 5 at page 439
[11] As footnote 5 at footnote 71

Mark Hill's texts form a key part of the literature that is utilised in this thesis. His text, *Ecclesiastical Law,*[12] was written prior to the HRA and Hill was able to refer to the likely impact of the legislation on Church law, but he decided to take a decidedly 'wait and see' approach for two reasons: one, the book is intended as a text book describing the law as it stood at the time of writing and two, the coming into force of the Act at the time of writing which meant that it was too early to be certain precisely what that impact would be.

The book is set out with eight chapters giving commentary for each area of Ecclesiastical Law (they being: The Nature and Sources of Ecclesiastical Law, the Constitution of the Church of England, The Parish, Clergy, Services and Worship, Church Courts, Faculty Jurisdiction and Cathedrals) followed by a 'materials' section containing firstly the Canons of the Church of England, then Statutes and Measures, then statutory instruments, the Church Representation Rules, and finally some important case law. The book is invaluable as a research tool and has provided a rich source of information for this thesis as well as providing an interesting contrast with the changes that emerged in the third edition showing the progression of attitudes to human rights values.

In the opening chapter, "The Nature and Sources of Ecclesiastical Law", Hill acknowledges that:

"Measures must now be read and given effect in a way that is compatible with the European Convention on Human Rights."[13]

He refers in his footnotes[14] to the fact that the Measures of the Church Assembly and of General Synod are expressly classified as primary legislation in s 21(1) of the HRA and refers to the fact that an instrument of legislation, once declared incompatible with a Convention right, can be subject to remedial action by a

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[12] As footnote 5
[13] As footnote 5 at page 11 at 1.24
[14] As footnote 5 at page 11 footnote 64

government minister, who can order re-drafting or removal from the legislative record so that it does accord with the Convention. He states that this does not apply to Measures because of the way they are brought into effect i.e. as a matter of history the creation and amendment to Measures is dealt with completely differently to Parliamentary legislation.

This 'untouchable' quality to Church law has been subject to some comment in case law. Hill refers to two English cases, a Court of Appeal decision *R v Archbishops of Canterbury and York, ex parte Williamson*[15] and *Williamson v Archbishops of Canterbury and York*[16]. With reference to the first case, Hill quotes the Master of the Rolls as stating:

"Once a Measure has been duly enacted by the Houses of Parliament, and has received the Royal Assent, it enjoys the invulnerability of an Act of Parliament and it is not open to the Courts to question vires or the procedure by which it was passed, or to do anything other than interpret it."[17]

In reference to the second *Williamson* case, he quotes Morritt LJ., who observed:

"...[t]he Church of England is and at all material times has been the established Church. As such its doctrines and government were and are susceptible to change by the due processes of law." [18]

In this volume of his text, Hill does not really deal with the issue of invulnerability which was thought to include the lack of judicial review as a remedy. This is now clarified since the writing of the book (for example the decisions made surrounding the Priests (Ordination of Women) Measure 1993 which confirms that part of the process is now reviewable and all law must be read with a view to

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[15] The Times, 9 March 1994, CA
[16] 5 September 1996, CA (unreported)
[17] As footnote 5 at page 11 at 1.23
[18] As footnote 13

giving effect to the rights contained in the Convention). Again, this point is outside the scope of this thesis but may form the subject matter of future research as was referred to on pages 10/11 above. However, in Chapter Two of this thesis, the topic of which bodies are susceptible to judicial review is referred to when considering the development of the definition of a functional public authority and therefore, it is pertinent to include Hill's view here.

Hill also refers to the status of Canons as subordinate legislation and prefers this definition to that of equal primary status for Canons and Measures.[19] The matter was raised by counsel for both sides in *Brown v Runcie.*[20] The case gave the opportunity to discuss the availability of judicial review as a remedy for Church of England law, but this opportunity was not taken, apart from by Dillon LJ., who commented that there seemed to be a "convenient practice that a Measure is made authorizing the General Synod to make a Canon to achieve whatever is the desired practice".[21]

It is important to understand the status of Measures and Canons because as will be developed in the thesis, it would appear that the Ecclesiastical Courts have power to usurp the State in certain areas and the availability of challenge to such events is important. As an example, in Chapter Four of this thesis, the responsibility for maintenance of a closed churchyard is examined by arguing the legal basis for the current arrangements is not valid.

The sections of Hill's book that are particularly relevant for the thesis are the historical aspects of the law itself, the court system and the faculty jurisdiction. The case law included at the back is also extremely important to Chapter Five that examines the law for exhumation.

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[19] As footnote 5 at page 13 at 1.27
[20] *Brown v Runcie* (The Times, 20 February 1991, CA)
[21] As footnote 16 at pg 650

Mark Hill produced an updated copy of the text book in 2007.[22] The layout remains the same but of relevance to this thesis, there has been a substantial revision to Chapter 7 of the text which covers the growth in the number of cases dealing with exhumation that have passed through the consistory courts. The new chapter to the text was required because the issue of exhumation causes one of the main conflicts between the wishes of the Church to uphold the traditional approach to disturbance of remains and the wishes of the relatives of the deceased to keep their loved ones close. The concept of portable remains is raised often in the case law and is an issue examined in Chapter Five of this thesis in relation to competing rights. The book remains an invaluable source and the respected authoritative text on Ecclesiastical Law. The book does draw attention to the newly published 'Legal Opinions concerning the Church of England' produced by the General Synod's Legal Advisory Commission and Hill comments[23] that he has relied on this publication wherever possible. Again, this supports the feeling that Hill is drawing together the sources of law to provide an authoritative and single text for researchers in the area.

It is important to this thesis that both editions are consulted as they do show the subtle changes to language that have helped to inform the thesis, particularly with regard to the emerging human rights culture, or more particularly the lack of it in decisions of the consistory courts in relation to Chapter Five below, since the passing of the HRA.

Other literature that has formed a backbone to the understanding of the legal structure of the Church and which is relied on as authoritative for this thesis is Newsom and Newsom's *Jurisdiction of the Church of England*[24] which, while old, comprehensively explores the scope of Ecclesiastical Law and in particular the faculty jurisdiction receives a full analysis. This is good background material

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[22] Mark Hill *Ecclesiastical Law* (3rd ed) Oxford University Press 2007
[23] As footnote 22 on page vii of the Preface
[24] GH Newsom and GL Newsom *Jurisdiction of the Church of England* (1993) 2nd ed. Sweet and Maxwell

against which to measure any changes that may have occurred since the Human Rights Act came into force and has been read alongside the more modern Ecclesiastical Law by Mark Hill. In fact, Newsom is more detailed in relation to the Faculty jurisdiction compared to Hill's chapter on this, and where there has been no change Newsom will be the preferred source in the thesis.

In order to be able to relate to the case law, this thesis has relied on Erskine May *Parliamentary Practice,*[25] which again, while an old text, clearly sets out how the laws of the Church of England are passed through Parliament, as these have a distinct system of their own. This is an important area for the thesis to outline as it may lead to some challenges to established practise.

Finally for this section of the thesis, it was important to the thesis that the law of the Church of England was put into a comparative context in order to afford a greater understanding of the way that the law is structured. This context was found in Norman Doe's text.[26]

In this 1996 text, Norman Doe refers to the previous lack of a comparative study of the law of the Church of England with any other comparable system of law. This text is a comparative study between the law of the Church of England with the law of the Roman Catholic Church. He gives a hint of the changes that are likely to happen in light of the then proposed Human Rights Act 1998 but keeps this to a comment about administrative procedure. The text indicates the lack of material that existed at the time and while Doe's work is useful, this thesis intends to draw together the law of the Church of England and that of Parliament, rather than another religious legal system, to see whether Convention rights are being given the required level of protection when it comes to burial or disposal of human remains.

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[25] Erskine May *Parliamentary Practice* (Edited by Sir Donald Limon, W.R. McKay) 22nd ed Butterworths 1997

[26] Norman Doe *The Legal Framework of the Church of England* "A Critical Study in a Comparative Context" Clarendon Press, Oxford 1996

Doe's book is a useful historically informative volume that can be used to gauge the likely response of the Church of England to challenges to their legal system.

While writing this thesis, it has become apparent that the law relating to the disposal of the dead, including burial, land management and related property issues, and exhumation is a poorly covered area in terms of literature. There is no single body of research on these areas. In fact, there seemed to be very little at all written about the legal systems that were engaged in this area. The literature already referred to above offered the best opportunity to evaluate and analyse the important legal issues that are raised along with the case law. The lack of material reveals one of the main rationales for this thesis and is evidence of the originality of the work. This thesis, therefore, is for the first time, making an analysis of the law within the human rights framework of the Convention in the particular area of disposal of the dead.

As the research for the thesis began, there was an important step taken by the Government, triggered by a report from the Environment, Transport and Regional Affairs committee which highlighted the lack of available burial space in London and the confusion about responsibility, liability and regulation of the law.[27] This was followed by a review started by the Home Office but now continued by the Ministry of Justice into the law and policy of burial. These consultation documents were published from 2004 to 2007 with recommendations being put forward. As of yet, no 'harmonisation' of the law as between Church and State has occurred and it is contended that this will not happen because of the fact that there are two legal systems at work which conflict with each other; firstly, the Church, whose legal roots are deeply buried in history and doctrine and, secondly, the secular law which purports to reflect the law of a modern society. Neither seems to wish to follow the other, although the State was quite attracted

[27] Environmental Subcommittee of the House of Commons Select Committee on the Environment, Transport and Regional Affairs, Eighth Report, 21 March 2001 HC 91-1.

to some of the money-making opportunities offered by following the Church's approach to exhumation regulations which is the subject of Chapter Five of this thesis.

This thesis has drawn together the law and regulation of disposal of human remains in England and Wales and in particular has drawn on the secular law and the law of the Church of England, which retains the ability to legislate for itself as the established Church through the workings of history rather than rule. (This is not so, for example, in Wales where the Church is disestablished). While this routinely necessitates exploration of the law of burial, land management and property issues and exhumation, disposal of the dead involves the ownership and use of land and this is an intrinsic part of the thesis. There is no single publication that examines the law of Church and State and considers a matrix of Convention rights in all these areas.

This thesis has a black-letter approach to the evaluation of the regulatory structure for disposal of the dead, but there are obvious theoretical aspects to this subject matter. This thesis does not include theory in any substantial way, focusing instead on the problems caused by the letter of the law in what is a technically complex area of the law, but it is true that theory cannot be completely ignored and it does play a role in the development of the hypothesis regarding the status of the PCC as a functional public authority for the purposes of the HRA as explored in Chapter Two. Surrounded by superstition, suspicion, sensitivity and not a small amount of dread and awe, disposal of the dead leaves us with a sense of confusion which the law does little to remedy. Robert Pogue Harrison, a theorist who has examined disposal of the dead starts his book with this:

"One of the blessings of our planet, along with life itself, is that it allows for the disposal of its dead"[28]

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[28] Robert Pogue Harrison *The Dominion of the Dead* The University of Chicago Press 2003

Pogue Harrison's view is that we owe the dead for our language, society, culture and religion and that we necessarily keep them close and build upon them, both literally and figuratively.[29] While such theory is challenging and exciting, it is the complications and complexities of the legal structure for disposal that is the purpose of this thesis. Pogue's views, however, echo through the legal regulation of land used for human disposal as well as the disposal itself. This is expanded on in Chapter Four.

Pogue Harrison's book has addressed an issue that has arisen in preliminary research for the thesis. It is not really possible to disentangle the rules and procedures from theoretical aspects when dealing with Ecclesiastical Law because the norms of Christian society are a hugely relevant reason for why there is, for example, a rebuttable presumption against exhumation. The book has a particularly interesting chapter (chapter 7) which is entitled "Hic Non Est" (which is given the translation of 'He is not here' in the title to the chapter) which talks about the way that Christianity has brought the souls of the living and the dead together. It has challenged the early perceptions of the author of this thesis that the Church were simply sticking to dogmatic opinion in the very strict and narrow way that they interpret the tests for rebutting the presumption of portability of remains and merely arguing that portable remains were not to be encouraged without being able to provide any real justification.

Taking this more theoretical framework, together with the human rights framework, this text has enabled the thesis to develop a richer and more complex argument in support of the finding that the PCC is a functional public authority when it is creating policy and rules for disposal of the dead.

Within this introduction to the thesis is the background of the tension between the secular laws of State with the ecclesiastical law of the Church of England. Now that the Convention is part of English law, the thesis argues further in all

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[29] As footnote 28

subsequent Chapters that both must be read for compatibility with the protected rights of the Convention and in light of the HRA and this is the central theme of the thesis. The fact that the Church of England is able to legislate for itself, will inevitably mean that there are areas where the two systems collide and this is no more apparent than when considering disposal of the dead. This introductory Chapter will set out the law-making process and powers of the Church to enable the thesis to use the appropriate language of the subject without need of further definition.

Further the thesis will consider the law of burial, and exhumation as it applies in secular law and Church law. This will involve a consideration of the rules as they apply in consecrated and unconsecrated ground, but also how the rules apply in municipal Church burial grounds. There is no doubt that very different rules apply as between the different systems which supports the assertion of this thesis, namely that Convention rights are rarely, if at all, considered to have application in the churchyard and this is to be challenged to avoid breaches of Convention rights by regulatory structures and practice.

Thirdly, the thesis will look at the legal complexities relating to land management and property issues and the disposal of the dead. There are environmental considerations currently under debate in a number of groups[30], relating to the urban regeneration of closed cemeteries as open spaces for public use, but it is noted within Chapter Four of the thesis that this issue is not new or unknown in England. England has long had a problem with space for the dead as discussed by Catherine Arnold.[31] The law about ownership of these spaces and indeed the memorials that mark them is complicated and rooted in archaic practises that carry both legal and heavy cost implications for the State. Recent government research indicates no easy alternatives to re-use of burial space despite the

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[30] For example the Commission for Architecture and the Built Environment (now defunct following the closure of many publicly funded groups in 2010 under the Coalition Government spending cuts; Ministry of Justice Burial Grounds: The results of a survey of burial Grounds in England and Wales June 2007;

[31] Catherine Arnold *Necropolis London and Its Dead* 2006 Pocket Books

growth of cremation as a disposal choice (now 70/30).[32] Newspapers are regularly reporting the need for local authorities and churchyards to explore new areas of land for burial including the possible use of allotments for this purpose.[33]

Fourthly, the thesis will be a drawing together of the areas from the first three phases, highlighting the human rights framework and identifying those areas where the Church of England could be susceptible to successful challenges under the legislation. The thesis also identifies problematic issues that can form the focus of future research.

The importance of addressing the anomalies is well made in Pogue Harrison's work when he reflects that:

"Is the sword of biological death so sharp that there is no lingering association between corpse and person?"[34]

This highlights an area for the post thesis research to develop - the attribution of Convention rights until disposal rather than at the point of death:

"...precisely because human dying does not coincide with perishing"[35]

Currently, it is thought that Convention rights cease to apply to a person once that person is declared dead. Could Pogue have a point that protections offered by the Convention, particularly those of article 8, 9, 10 and 14 should be extended until actual destruction or decaying of the physical body? Can these rights be 'subsumed' by those who grieve for the deceased? Would this work as an argument against the practice of "lift and deepen" to increase burial space? Could it prevent re-use of graves? An article that supports this possibility

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[32] Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach. Home Office January 2004
[33] Kaya Burgess *Dead end: no room left to rest in peace* The Times, Tuesday May 17 2011
[34] As footnote 28 at page 143
[35] As footnote 28

appeared in September 2003[36] which will be examined in more detail within the thesis but in the synopsis of the paper is a quotation that tells the story of where this part of the thesis is focused:

"It is a fact that a man's dying is more the survivors' affair than his own." (Thomas Mann *The Magic Mountain*. Trans HT Lowe-Porter (1924) ch 6 p 532)

The central importance of 'proper' disposal is also a central feature of the thesis and, again, the thesis turns to Pogue Harrison to sum up the undercurrent of human behaviour that runs through this area of law:

"Everywhere one looks across the spectrum of human culture, one finds what we might call an *obligation* to the corpse, or the remains thereof...The obligation usually takes the form of a traditionally mandated duty, yet it has its basis in a human imperative to dispose of the dead deliberately and ceremonially."[37]

It is whether the law provides the necessary structure to enable this to happen that lies at the root of the thesis.

The rationale, therefore, lies in the relevance of issues relating to the PCC and the Church of England policies, regulations and laws, both in relation to the physical churchyard space and in the consistory courts approaches to disputes. This means that the first rationale is geographic, physical and involves the land, the headstone and grave markings and the second rationale is about intangible issues, approaches to human rights frameworks and standards and attitudes to those left bereaved, muddled and confused by the current complex labyrinthine law.

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[36] Heather Conway "Dead but not buried: bodies, burial and family conflicts" Legal Studies Vol 23 No 3 September 2003 edited by Derek Morgan & Celia Wells Cardiff Law School at pg 423
[37] As footnote 28 at page 144

### 1.2.2 Introduction to Issues

This introductory Chapter has identified and briefly discussed the most important available literature and expressed the relevance of that material to the developments contained in the work. It has related the literature to the rationales for undertaking the research and identified the specific problem areas that are to be examined in relation to disposal of the dead. This section now provides an introduction to the specific problems which are the focus of the thesis.

The first issue identified in Chapter Two is the difficulty there seems to be in providing a definition of a functional public authority for the purposes of s6(3)(b) of The Human Rights Act 1998. This issue has proved problematic from the earliest discussions about Human Rights Act. Governments have made several attempts to provide advice as to what the definition should be[38] as have the courts through case law, particularly the notorious *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants) v Wallbank and another (Respondents)*[39] and other important decisions from the House of Lords which are comprehensively reviewed in Chapter Two. There has also been considerable academic debate, including contributions from Dawn Oliver and Francesca Klug on the scope and potential width of the definition and the types of authorities that may find themselves liable under the Human Rights Act if their view is to prevail.[40] Other major contributions are made by Ian Leigh[41] on the mechanics of how the Act may work. In Chapter

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[38] Session 2002/3 No 6 28 February 2003 Press Notice Call for Evidence – Inquiry into the Meaning of Public Authority under the Human Rights Act; House of Lords Paper 39/House of Commons Paper 382 – The Seventh Report from the Joint Committee on Human Rights of Session 2003-4 on the Meaning of 'Public Authority' under the Human Rights Act; House of Lords, House of Commons, Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006/7 HL Paper 77, HC 410 (Report together with formal minutes, minutes of evidence and appendices) 19 March 2007

[39] [2003] UKHL 37

[40] *Public Law* 'The frontiers of the State: public authorities and public functions under the Human Rights Act' Dawn Oliver (2000); *Public Law* 'The Human Rights Act 1998, Pepper v Hart and all that' Francesca Klug (1999)

[41] Ian Leigh, Religious Liberty and Human Rights, Ecclesiastical Law Society 2001 Residential Conference, Trinity Hall, Cambridge 30 March – 1 April 2001 – paper entitled Freedom of Religion: Public/Private, Rights/Wrongs

Two, the academic debate assists the thesis in creating an argument for finding the PCC to be a functional public authority

Through analysis of these sources, the thesis goes further than the current literature and provides a more 'holistic' view of the definition than has previously appeared but builds on the tests that are advocated by several parties in the debate. This makes a valuable contribution to the vexed argument in the existing literature.

The second issue is parity with human rights frameworks or standards for the existing policy, regulations and laws of the Church of England and this is examined in Chapter 3, the particular issues that relate to burial, in Chapter 4, the management and maintenance of burial space and Chapter 5 in relation to exhumation. As stated above, the thesis is primarily black letter in approach, but the particular issues do involve emotion and sensitivity and, therefore, the thesis looks at some theoretical underpinning provided by Robert Pogue Harrison.[42] There are also contributions to the debate concerning the social/historical importance of the shape, form, wording and styles for headstones and memorials or in our treatment of the disposal of the dead from authors such as Catherine Arnold and Ruth Richardson. Both of these authors have had an impact on this thesis, helping to widen the perspective from a purely black letter law approach. In considering a human rights framework and the standards that must evolve from these, it is essential for the integrity of the thesis that the emotional and social repercussions of disposal of the dead do not disappear under the letter of the law. In Catherine Arnold's book[43] the focus is on London and its surrounds and she describes the various denominational and secular burial grounds that lie in, around and under London from a historical perspective right up to the modern day. It also examines the cult of mourning across the time scale which is relevant for the thesis to explore the approaches used in Victorian times where death had

[42] As footnote 28
[43] Catherine Arnold *Necropolis London and its Dead* 2006 Pocket Books

an entire social and business entity of its own and which the thesis then develops in Chapters Two, Three and Four to explain why the standards applied today may amount to interference with rights protected by both Article 8 and 10 of the Convention. The book creates an interesting tangential perspective when read with Robert Pogue's theoretical book, because it describes the geographical and physical aspects of his theoretical stance on the importance of keeping our dead close and how society manifests this very human need.

Arnold's book also examines the problems caused by lack of burial grounds in previous generations which resulted in the building of great cities of the dead such as Brookwood Cemetery in Woking, Surrey which is an example of a necropolis. These same problems are once again topical. In modern England there is no access to the great swathes of land that the Victorians had and it is clear that space is running out again. It is thought that there is probably less than 20 years, and could be as little as 8 years, burial space left in the London area,[44] according to the Government's advisory group on architecture, urban design and public space. The use of cremation is under review due to environmental concerns about the procedures involved in the complete conflagration of the human corpse, so may not provide the whole answer to the problem. Arnold's book has played a central part in the development of the hypothesis in Chapter Two, that the PCC is a functional public authority, as it introduced the concept of memorials as historic and social documents which can be at the whim of fashion but still hold an important role in defining a society and, therefore, supports the hypothesis set out in Chapter Three of this thesis relating to the potential engagement of Article 10.

In her book Ruth Richardson reviews the history of dissection, The Anatomy Act 1832 and human reaction to death[45]. The book explores the public fear of the growth in anatomical dissection that occurred without regulation until the

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[44] Commission for Architecture and the Built Environment (CABE) Briefing Paper: *Cemeteries, churchyards and burial grounds* Published 2007
[45] Ruth Richardson *Death, Dissection and the Destitute* 1998 Penguin Books

Anatomy Act 1832. That fear or superstition could be argued to be behind the dislike of the concept of portable remains that is evidenced in the case law reviewed in Chapter Five of this thesis. The explosion in medical science required the supply of corpses for dissection to aid the training of doctors. This led to higher and higher prices for bodies and stories of grave robbing. The common fear was that if your body was dissected, then you could not enter heaven. Prior to regulation of the supply of bodies through the Anatomy Act, the remains of a set number of criminals were taken from the gallows and used for the practice because it was considered that they were not going to heaven anyway. Richardson states that the practice of taking four bodies from the gallows started with Henry VIII because of his fascination with the workings of the human body, in particular his own, with the number increasing to six bodies during the reign of James I.[46] The precautions taken by ordinary people to prevent their bodies being dug up and handed over to anatomy schools has underpinned the hypothesis in Chapter Three relating to the form and style of graves in this thesis.

The third issue relates to the approaches taken by the consistory courts when hearing faculty applications for exhumation and/or changes to memorials. The authors earlier referred to in this Chapter, particularly Doe, demonstrate that the law of the Church of England has been constructed without human rights frameworks underpinning the development and the thesis identifies and discusses the areas where a risk of liability for the Church of England could be avoided. In order to assist readers with the technicality of the language, the next section offers some definitional outlines.

[46] As footnote 45

## *1.3 Definitions*

### Background to the Articles

Below is an explanatory background to Articles 3, 8, 9, 10 of the Convention which feature in this thesis. This background is to assist the reader in understanding how and why these specific Articles are referred to.

This thesis explores the potential for engagement, rather than reaching a definite breach position, of four Articles of the Convention. Articles 3, 8, 9 and 10 are the focus within the work. As part of this introduction to the thesis, below is a description of each Article and an evaluation of how each of the Articles has been interpreted and applied by the European Court of Human Rights (ECtHR). The substantive topic of the case law set out will rarely touch on the substance of this thesis, but the cases are used to define approaches, rationales and reasoning.

Article 3 features fleetingly in the concluding Chapter of the thesis in relation to the case of *Re Crawley Green Road Cemetery, Luton*[47] where the applicant adduced evidence of severe mental health problems to support her application for a faculty for exhumation.[48] Article 3 states:

'No one shall be subject to torture or to inhuman or degrading treatment or punishment.'

The Article is, therefore, absolute in nature rather than being qualified and is unlike Articles 8, 9 and 10 in this regard. This does not mean that every circumstance of behaviour allegedly in breach of Article 3 will be so found, however. Foster states:

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[47] [2001] 2 WLR 1175

[48] For discussion and analysis of the case please see Chapter 5 of the thesis. No reference to Article 3 is made at this point but it is raised as potentially engaged in the concluding comments in Chapter 6.

"...although the right under Article 3 of the Convention is an absolute as opposed to a conditional one, the European Court will inevitably apply some principles of legitimacy and necessity in deciding whether there has been a violation of that article: in other words, whether the act in question has crossed the requisite threshold to allow the Court to pronounce a violation."[49]

Using proportionality is arguably defeating the absolute nature of the protected right[50] but the ECtHR has to look at the nature of the act complained of to see whether it serves a greater good or whether the act falls within the categories of torture or inhuman treatment *per se.* The court will also have to see whether the particular applicant has suffered treatment that passes the threshold. If the answer is affirmative, then the ECtHR cannot apply the qualifying questions from those other, protected, qualified rights:

"....cases under Article 3 merely pose one question: does the act in question constitute a violation of Article 3? If the answer to that question is 'yes', then no justification can be put forward on behalf of the state."[51]

Defining the type of act that would violate Article 3, the European Commission of Human Rights in 1969 set out some guidelines in *Greek*[52]. These were that all acts of torture would also be inhuman and degrading and all inhuman treatment would be degrading. Inhuman treatment is where there is deliberate unjustifiable and severe suffering which can be physical or mental. That torture was generally seen as an aggravated form of inhuman treatment. Treatment or punishment would be degrading if it grossly humiliates an individual in front of other people or forces the person to act against their will or conscience.

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[49] Steve Foster *Human Rights and Civil Liberties* Pearson 3rd ed., at page 225
[50] Palmer *A Wrong Turning: Article 3 ECHR and Proportionality* [2006] CLJ 438
[51] Steve Foster as footnote 3 page 227
[52] (1969) 12 YB 170 as cited in Foster as at footnote 5 pg 231/2

These guidelines are widely drawn and to be interpreted against the time and the facts in which each case occurs. *Ireland v United Kingdom*[53]gives an indication of the approach. In the case, suspects were subjected to sleep deprivation, they were not fed, they were made to stand for prolonged periods of time and bombarded with constant noise. The treatment caused psychiatric problems. The ECtHR found that this treatment amounted to inhuman treatment because it was undertaken deliberately but also found that the treatment was degrading because the suspects were humiliated and frightened. However, this did not amount to torture because:

"....[t]he European Court held that the techniques did not amount to torture, which the Court felt was treatment constituting *deliberate* inhuman treatment causing *very serious and cruel suffering.* In the *Ireland* case the European Court stressed that the distinction between 'torture' and the other terms would be a question of degree."[54]

Foster provides his understanding of what the distinction between the terms should be as:

"The distinction between the terms 'inhuman' and 'degrading' then appears to be based on the type of harm suffered by the victim; inhuman treatment causing physical, mental or psychiatric harm, and degrading treatment constituting an attack on a person's dignity, although the distinction could also be made on the level of harm suffered."[55]

This thesis is utilising this distinction provided by Foster to support the argument that Article 3 could potentially have been engaged in *Crawley Green* using degrading treatment as an attack on dignity. The threshold over which the act must step for engagement of the Article is set very high as is shown in

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[53] (1978) 2 EHRR 25
[54] Foster as at footnote 5 page 232
[55] As footnote 54

*Wainwright v United Kingdom*[56]. A policy of strip searching prison visitors was in place when the applicant visited a prison to visit her son. She was accompanied by another son who suffered from cerebral palsy. Mrs Wainwright was separated from her son and taken to an office to be searched. The office was overlooked and blinds at the window were not drawn. She had to remove all her clothing except underwear, which she then had to pull down. She was asked to bend forwards and an examination took place by officers. Mrs Wainwright was physically sick during the process. Her son was also asked to remove clothes and was searched. After the visit, both exhibited symptoms of post-traumatic stress and other pre-existing mental health conditions had deteriorated.

Eventually, a case was entered under Articles 3 and 8 of the Convention. For Article 3, the Court found that the strip search was for a legitimate preventative purpose, that of preventing drugs being brought into prison, but that the process ought to have been conducted with particular attention to proper procedure and with due respect to the dignity of Mrs Wainwright and her son. The Court found that the officers had not adhered to the proper procedure and were generally discourteous but that what had happened was not a breach of Article 3.

For the purposes of this thesis, Article 3 is explored as potentially engaged but the point is probably moot until such time as the definition of dignity in this context is expanded or developed.

Article 8 of the Convention is probably one of the most developed through interpretation by the Courts and the Article has been used in a wide and extensive range of circumstances[57]. Article 8 states:

'Everyone shall have the right to respect for his private and family life, his home and correspondence.

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[56] (2007) 44 EHRR 40

[57] Helen Fenwick *Civil Liberties and Human Rights* 4th ed Routledge at page 803 citing Feldman (1997) 3 EHRLR 264

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

Article 8 is therefore, a qualified right, where interference is permitted in the circumstances set out above. This thesis discusses the potential for engagement of Article 8 in relation to Chapter 5 on exhumation issues but primarily questions whether the correct procedural steps are being taken by the consistory courts when an issue gives rise to a claim under Article 8. Commentators often analyse Article 8 in different ways – for example, breaking down the analysis into respect, private, family, home and correspondence[58] – but Lady Hale summarised the essence of Article 8 as:

"Article 8, it seems to me, reflects two separate but related fundamental values. One is the inviolability of the home and personal communications from official snooping, entry and interference without a very good reason. It protects a private space, whether in a building, or through the post, the telephone lines, the airwaves or the ether, within which people can both be themselves and communicate privately with one another. The other is the inviolability of a different kind of space, the personal and psychological space within which each individual develops his or her own sense of self and relationships with other people. This is fundamentally what families are for and why democracies value family life so highly...Article 8 protects the private space, both physical and psychological, within which individuals can develop and relate to others around them."[59]

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[58] See for example: Hoffman and Rowe *Human Rights in the UK* 3rd ed Pearson at page 249 onwards; Merris Amos *Human Rights Law* 2006 Hart Publishing at page 375 onwards

[59] *R ( Countryside Alliance) v AG* [2007] 3 WLR 962 para 116

This thesis argues, in Chapter Five, that refusal of an exhumation order of itself, potentially engages Article 8 and that this engagement should then lead to a proper examination of whether the interference is in accordance with the law, necessary in a democratic society, follows one of the legitimate aims in 8(2) and the interference must be proportionate to the interest which motivates the interference.[60]

This process is not the current position and it is this procedural point that the Chapter is making rather than arguing that the refusal to issue an exhumation is *prima facie* a breach of Article 8.

Article 9 is mentioned in various parts of the thesis and has been raised in cases before the consistory courts, with some limited success by the applicants. This is particularly so in Chapter Five when applicants have alleged mistake in location of the remains of their family member or friend as one of the grounds for their application. Article 9 states:

'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.'

In his article analysing the scope and extent of Article 9, Professor Peter Edge explains that the Article is usually interpreted as having two differing rights; the absolute right contained in paragraph one of the Article, and the qualified right of

[60] As at footnote 58 – Hoffman and Rowe pg 250

manifestation contained in paragraph two.[61] The article breaks these two rights down further into four: the right to a religious belief; the right to a religious identity; the right to be a member of a religious community; and the right to act on such belief, identity or membership of a community. Much of the case law in this area has involved employment related cases but as Edge points out:

"...[t]he freedom to manifest religion may be modified by the particular circumstances which the applicant voluntarily assumes."[62]

This thesis accepts that often an applicant will have voluntarily chosen the churchyard for the disposal of the remains in question and therefore Chapter Five has referred to those cases where Article 9 rights have been raised and accepted by the consistory court when hearing applications for faculties for exhumation on the grounds of mistake as to location. However, the Chapter also examines the case law where no engagement with Article 9 is raised but the same grounds of mistake are put forward. This indicates that the thesis is correct to discuss whether it is necessary to use Article 9 in exhumation cases.

In Chapter Three and Four of the thesis, Article 9 is also raised. In relation to the wording on headstones, or general marking or style of a grave, the thesis is challenging whether the manifestation of belief would lead to engagement with the Article. Edge states:

"Manifestation of belief can take a number of forms...It seems that merely acting from a religious motivation is not sufficient to make an act a manifestation of religion."[63]

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[61] Peter W Edge *Religious rights and choice under the European Convention on Human Rights* [2000] 3 Web JCLI
[62] As footnote 61
[63] As footnote 61

As to whether the desire to record words of choice on a headstone are a manifestation of belief, this thesis argues that the words used by Lord Nicholls in *Williamson*[64] show that there is, at the very least, the possibility that they will:

"The belief must be consistent with basic standards of human dignity or integrity...The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance...Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor...."(Turning then to non-religious belief) "...for its manifestation to be protected by Article 9, a non-religious belief must relate to an aspect of human life or behaviour of comparable importance to that normally found with religious belief."[65]

This language does seem to indicate that, at the very least, the PCC's regulations should acknowledge that Article 9 may be engaged in disputes around the recording on headstones or design thereof and this is discussed in Chapter Three of this thesis. Would the threshold of importance be reached in this instance?

"In *Countryside Alliance v AG*[66] there was a challenge to the statutory ban on hunting foxes with dogs (and certain other forms of hunting) based on a number of Articles. The challenge failed on all grounds but in reference to Article 9, the Divisional Court referred to *Williamson* on what is required for a belief to be protected under Article 9, in particular the references to the importance of the belief, and then considered whether being in favour of hunting met these criteria:

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[64] *R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [2005] 2 WLR 590 at paras 23-24
[65] As footnote 58
[66] [2005] EWHC 1677 (Admin) – permission to appeal on Article 9 was refused so the point was not considered by the Court of Appeal or the House of Lords: [2006] EWCA Civ 817

Not all opinions or convictions, however sincerely or deeply held, constitute beliefs in the sense protected by Article 9(1) of the [Convention]. The right to hunt with hounds does not have the necessary qualities identified [in *Williamson*] to quality under Article 9. In particular, the claimants have failed to persuade us that their belief in the right to hunt went beyond enjoyment of and dedication to a recreational pursuit. It cannot qualify as an aspect of human life or behaviour of comparable importance to that normally found with religious beliefs."[67]

*In re Crawley Green Road Cemetery, Luton* [2001] 2 WLR 1175, a competing set of beliefs was adduced and is discussed in Chapter Five. It is argued in Chapter Three of this thesis that potentially, the competing beliefs in proper recording of the deceased would meet the *Williamson* criteria.

The engagement of Article 10 of the Convention is linked in Chapter Three of this thesis with the possibility of engagement under Article 9. Article 10 states:

'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of thee freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

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[67] As footnote 58 at page 284

Freedom of expression covers a wide range of behaviours as well as communications, and encompasses the written word and photographs.[68] These two media are selected as relevant to the topic of this thesis and in particular to Chapter Three. Within the thesis, reference is made to the advice given to PCCs about the nature of words included on headstones, and in particular, that phrases such as 'beloved wife' may or may not be true and should be discouraged. From *Reynolds*[69] it is apparent that the expression does not have to pass a test of quality or truth in order to be protected by the scope of Article 10. That said, Foster explains:

"The basic idea behind freedom of expression is that it involves the imparting and receiving of information and ideas. Freedom of expression thus consists of the manifestation, via communication, of that information and does not, therefore, cover every autonomous action of the individual. Consequently, many social activities and pursuits will not count as freedom of expression, even though they represent the individual's or group's decisions or choices."[70]

This thesis argues that the wording on a headstone is the imparting and receiving of information and ideas and is the manifestation, via communication about the person who is buried there. This is supported by the arguments in Chapter Three about the socio-historic importance of communicating a message to later generations about ancestors which will be lost if this form of communication is overly restricted. This is supported by *Gaunt v OFCOM*[71] the subject of which was abusive words used during a radio interview. It was found that it was not necessarily the words used, but the context in which they were used, that without a proper context there was no addition to the debate about the issue. Clearly words on a headstone, in the context of the churchyard add to that social and historic knowledge of ancestry.

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[68] *Douglas v Hello! Ltd* [2001] QB 967
[69] *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609
[70] Foster as at footnote 5 at page 353
[71] [2010] EWHC 1756 (Admin)

This thesis will be using secular law as the comparator with ecclesiastical law to highlight the areas of specific interest. The meaning of ecclesiastical law itself is a matter of dispute, but the thesis will take the view of Mark Hill:

"...the term 'ecclesiastical law' is used to denote the law of the Church of England, howsoever created, and, save where the context indicates otherwise, the expression 'canon law' is used restrictively to mean the Canons of the Church of England."[72]

Dispute with this definition could arise when the influence or traditions of 'God' are not included in the legal analysis and this is linked to the reference Hill includes above to 'howsoever' created. Scholars who have a Christian belief may find that law analysed without reference to the input of God carries an inherent flaw but for the purposes of this thesis, law is held to be man-made.

The legal framework of the Church of England (as it applies to this thesis) is detailed below, using the terms of reference that will be used in the body of the work. The research for this has come primarily from Mark Hill's text already referred to.

**Legislation:**

**Measures – the background**

Church legislation comes from a number of sources; from history, from God and from Parliament as well as from the Church legislative body itself. Hill says:

[72] As footnote 22

"Since the Church of England remains the established Church in England, the inextricable link between Church and State permits the State to legislate for the Church and its religious affairs, either directly or by implication."[73]

This instance, however, is reasonably rare when it is considered how much legislation is passed in any year (e.g.Hill refers to 10 examples since 1949). The Church has the power to pass its own legislation via The General Synod of the Church of England. This type of legislation "has the full force and effect of an Act of Parliament"[74] and in 1994, the Master of the Rolls stated:

"that once a Measure 'has been duly enacted by the Houses of Parliament, and has received the Royal Assent, it enjoys the invulnerability of an Act of Parliament and it is not open to the courts to question *vires* or the procedure by which it was passed, or to do anything other than interpret it."[75]

As accepted forms of primary legislation, Measures are affected by the obligations imposed by the HRA. After some initial reluctance to accept that the Church of England was to be considered a public authority for the purposes of the HRA prior to the passing of the Act, the Church secured the addition of s13 to the HRA which states that if the decision of a court may affect the right of a religious organisation or an individual (through the horizontal effect that s6 gives the HRA), to the protection afforded under Article 9 of the Convention, the court must have a particular regard to the importance of that right.

Also, should a declaration of incompatibility be made that a statute or part thereof is not giving effect to Convention rights, s10 of the HRA gives the Minister power to amend the affected legislation to render it compatible with convention rights.

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[73] As footnote 22 at para 1.23
[74] As footnote 22 at footnote 77 "Church of England Assembly (Powers) Act 1919 s4...."
[75] As footnote 22 at footnote 81. It seemed the point of whether Measures were primary or secondary legislation had been left uncertain in previous cases. This decision clarified the point which has been generally accepted ever since.

This does not apply to Measures where the Minister has no such powers as stated in s10(6) due to the process by which Measures are passed.

**Measures – the process**

In order to give enough background to the discussion in Chapter Two of this thesis, the process by which Measures are passed is given in some detail here.

The details of the process are taken from Erskine May, Parliamentary Practice.[76]

The governing statute is the Church of England (Assembly) Powers Act 1919, as amended by the Synodical Government Measure 1969. Measures are drafted and approved by the General Synod and then presented to Her Majesty for the Royal Assent after resolution by both Houses of Parliament and are defined as:

"...legislative measures touching matters concerning the Church of England, intended to receive the Royal Assent and to have effect as Acts of Parliament in accordance with the provisions of that Act."[77]

Once the form of the Measure is agreed by General Synod it will pass to the Legislative Committee who will submit it to the Ecclesiastical Committee in Parliament. This committee was set up by the 1919 legislation and is made up of members of both Houses. The Ecclesiastical Committee is not the usual joint committee in a crucial aspect; it was set up under a statute and is therefore a statutory body and its proceedings are not deemed to be proceedings in Parliament. While the HRA does not apply to proceedings in Parliament, it does apply to the workings of the Ecclesiastical Committee[78].

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[76] Erskine May Parliamentary Practice 22nd ed, *Sir Donald Limon, WR McKay* Butterworths 1997
[77] As footnote 76 at pg 596
[78] As footnote 76 at pg 595

The Ecclesiastical Committee decided in 1921 that it would adopt the procedures of joint committees in Parliament and it consists of 15 members of the House of Lords as nominated by the Lord Speaker, and 15 members of the House of Commons, nominated by the Speaker, who are appointed for the duration of Parliament. The Committee appoints its own Chairman, who since 1947, has always been a peer and Lord of Appeal.[79]

Once a Measure has been forwarded to the Committee, together with any explanatory notes from the Legislative Committee or Synod, it is considered by the Committee who produce a report for presentation to Parliament. The report contains details of the nature and effect of the Measure. The Committee may state their views on the Measure as it affects the constitutional rights of the public, but it may not make any amendments to the Measure. If there is any doubt about the Measure, the Committee can ask for a meeting or conference between the Legislative Committee of the General Synod and themselves. Likewise, if the Legislative Committee so require, they can call a conference. Such a conference is held in public and a report of the proceedings of that conference is made available with the Committee's final report. The rest of the Committee's proceedings are held in private.

The Committee must submit a draft of their report to the Legislative Committee before presenting it to Parliament and until the Legislative Committee indicate that they are in agreement with the report, it is not presented. Once the Legislative Committee approve the report, it is presented to both Houses, printed as Parliamentary papers.

This means that the Legislative Committee may withdraw any Measure prior to presentation if it is not happy with the report of the Committee, which begs the question, what is the point of the Committee at all? The Legislative Committee has shown itself to be quite happy to withdraw Measures and send them back to

[79] As footnote 76 at pg 598

General Synod for further discussions and amendment. This happened to the infamous Churchwardens Measure, which relates to the ordination of women, amongst others.[80]

**Delegated Legislation**

As with Acts of Parliament, there are often enabling schemes, regulations or codes contained within a Measure and these are held to be in the same position as statutory instruments to the parent Act.[81] Erskine May states:

"These schemes etc., are not invariably subject in terms of the Measure to parliamentary scrutiny, and unless the Statutory Instruments Act 1946 is applicable, any expression of parliamentary disapproval would have no necessary effect."[82]

However, it goes on to say that:

"...sub-delegation should be restricted within the closest limits and the subjects upon which such schemes or regulations might be made should be clearly defined. It (Ecclesiastical Committee) recommended that such powers should be carefully scrutinised by the Ecclesiastical Committee."[83]

**Canons**

"The power to legislate by canon now vests in the General Synod."[84] "The Royal Assent and licence is required for the making, executing and promulging of any

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[80] Churchwarden's Measure 2001
[81] As footnote 76 at page 599
[82] As footnote 76 at page 599
[83] As footnote 76 at page 560
[84] As footnote 76 para 1.28

canon, and no canon may be made which is contrary or repugnant to the royal prerogative, or the customs, laws or statutes of the realm."[85]

Equally, a parent Measure may render lawful the making of particular provision by canon.[86]

Canons are subordinate legislation for the purposes of the Human Rights Act[87]

**Case Law**

As will be referred to later in the thesis, it is a matter of history that the law of the Church does not operate a *stare decisis* system. As a matter of some practicality, however, it is accepted that decisions of ecclesiastical courts are generally "considered to be binding on the particular court making the decision and on courts of inferior jurisdiction".[88]

"The decision of a consistory court of one diocese does not formally bind that of another (although it will be persuasive) nor are the decisions of the Court of

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[85] As footnote 22 at footnote 94 "Submission of the Clergy Act 1533 (25 Hen 8, c19), ss 1,3, applied by the Synodical Government Measure 1969 s 1(3).

[86] As footnote 22 at page 17 and footnote 97. "This 'convenient practice', to borrow from the judgment of Dhillon LJ in *Brown v Runcie* The Times, 20 February 1991, CA, effectively precludes any challenge to the lawfulness of the canon, since the parent Measure is declaratory of the law of the realm." "In *Williamson v Archbishops of Canterbury and York,* 5 September 1996 CA (unreported) Morritt LJ stated 'the effect of the Measure is pro tanto to override the Submission of the Clergy Act 1533 to the extent necessary to permit the ordination of women in accordance with the Canon specifically authorized by the Measure". This refers to the challenge to the ordination of women priests that needed legislation to bring into effect and which was subject of fierce challenge by traditionalists within the Church.

[87] As footnote 22 at footnote 100 "It was maintained by counsel for the respondent in *Brown v Runcie* that canons and measures were both primary legislation. Such a submission was not ruled on in the case or in the Williamson litigation which followed. It is respectfully suggested that the better view is that measures are primary legislation and canons are secondary or subordinate. The previous sentence (in the second edition of this work) was cited and approved by Burton J, in *Calvert v Gardiner and others* [2002] EWHC 1394 (QB), 10 May 2002, unreported

[88] As footnote 22 at para 1.33

Arches and those of the Chancery Court of York strictly binding on one another, they being of co-ordinate jurisdiction."[89]

This situation has been the subject of some amendment. According to Hill:

"A number of factors have led to this: first the increase in the reporting of decisions; secondly the borrowing of reasoning and the application of guidelines enunciated in consistory courts of other dioceses; thirdly, the adoption and approval by appeal courts of first instance decisions; fourthly the change in the composition of the Court of Arches in faculty appeals into a body comprising the Dean of the Arches together with two diocesan chancellors and fifthly, the *de facto* elision of the Court of Arches and Chancery Court of York into what is effectively a single court of appeal for both provinces."[90]

This is a development that will help to overcome the concern that has arisen in the past in relation to conflicting decisions as between the provinces.[91] It does not ameliorate the position for that case law which still is said to be the authority in the area of exhumation and this is referred to further on in the thesis.

**Legal structure of the Church**

In order to explain the language used throughout the thesis, it is necessary to consider the structure of the Church in relation to its legal processes. Once defined here, they will be referred to by the same titles later on in the body of the

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[89] As footnote 22 at para 1.34
[90] As footnote 22 at para 1.34 pages 20 & 21
[91] 6 Ecc LJ at page 421 following the case note on *Blagdon,* there is an editorial note as follows: "Note: In reaching the decision the court differed in certain limited respects from the reasoning of the Chancery Court of York in *Re Christ Church, Alsager* [1999] Fam 142, [1999] 1 All ER 117. The consequence of having conflicting precedents in the Northern and Southern Provinces will need to be worked out over time. It is discussed in the editorial." However, on checking the editorial (presumably of the edition in which the note is made, there is no reference to this issue).

work. Reference is, once again, made to Mark Hill as the current authority and he refers to the structure as a:

"pyramid structure of dispersed authority with the General Synod at the top and the parochial church councils at the 'grass roots' level".[92]

There is little need for this thesis to examine all of the structure in detail, but Hill has a brief and helpful paragraph giving the necessarily simplified breakdown:

"Each parish is part of a deanery, which is part of an archdeaconry, which save where the whole diocese constitutes a single archdeaconry, is part of a diocese, which in turn, is part of a province. Just as each of the two provinces of the Church of England is presided over by an archbishop, so is each diocese under the charge of a bishop. There are 30 dioceses in the province of Canterbury and 14 in that of York."[93]

The structures that are of interest for this thesis are the consistory courts, appeal courts, the two provinces and the PCCs, and so the detail of how these structures function is set out below and the information is taken, again, as stated in Hill.

**Consistory courts**

"The consistory court no longer has a criminal jurisdiction……The consistory court has retained its first instance faculty jurisdiction…."[94]

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[92] As footnote 22 at page 38 para 2.10
[93] As footnote 91
[94] As footnote 22 at para 2.58

The consistory court has a more limited jurisdiction today, but is still the court that hears faculty applications for exhumations and/or changes or alterations to memorials.

**Appellate courts**

Appeals from the consistory courts generally lie to the provincial court of appeal. In the province of Canterbury, this is the Court of the Arches; in that of York, the Chancery Court of York. The former is presided over by the Dean of the Arches and the latter by the Auditor. Both offices are required to be held by the same person.[95] In a faculty case, appeals are heard by the Court of Arches.[96]

**The Parochial Church Council (PCC)**

"The parochial church council (PCC) is the central forum for decision making and discussion in relation to parish affairs. Its composition is regulated by the Church Representation Rules and its powers and duties are to be found in those rules, in the Parochial Church Councils (Powers) Measure 1956, and elsewhere in other Statutes, Measures and Canons."[97]

The membership of the PCC is a mixture of church officials including the incumbent of the parish and elected lay members from the electoral roll of the parish and its role is extensive:

"The role of the PCC is significantly more extensive than merely controlling expenditure and maintaining the fabric of the church, although both these tasks

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[95] As footnote 22 at 227 para 2.59 page 60 "The Dean of the Arches and Auditor is appointed by the Archbishops of Canterbury and York jointly, with the approval of the monarch"
[96] Ibid at footnote 228 "Comprising, in this instance, the Dean of the Arches sitting with two diocesan chancellors designated by the Dean. Ecclesiastical Jurisdiction Measure 1963 s 47(1)(b).
[97] As footnote 22 at Chapter 3: The Parish at 3.11

are important. The functions of the PCC include co-operation with the minister in promoting in the parish the whole mission of the Church, pastoral, evangelistic, social and ecumenical, and the consideration and discussions of matters concerning the Church of England, or any other matters of religious or public interest."[98]

The role of the PCC is of paramount importance in this thesis. In an edited collection of papers edited by Mark Hill, Ian Leigh reviews the position of the PCC just post the passing of the HRA.[99] This paper will be reviewed in Chapter Two where it helps in the analysis of the argued status of the PCC as a functional public authority in a human rights framework.

When considering the law as it relates to churchyards, it is necessary to understand the role of the PCC in decisions that affect the space. The legal status of the PCC was stated by the House of Lords in *Wallbank*[100] as not falling under the definition of a public authority for the purposes of s6 (or s6(3)(b)) of the HRA in the specific circumstances of that case (that of requiring payment for chancel repairs from property owners). This finding will be discussed in Chapter Four of the thesis when considering the role of the PCC when a churchyard has been declared closed.

The PCC is, essentially, the body that makes decisions about the parish, often to do with expenditure and upkeep of premises. The PCC also serves as a discussion group for developments in the parish.

The judgments in *Wallbank* were summarised in an article by Edward Nugee QC[101] which he states is well summarised in the Weekly Law Reports as:

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[98] As footnote 22 at 3.21
[99] *Religious Liberty and Human Rights* 2002 Edited by Mark Hill University of Wales Press Cardiff
[100] [2004] 1 AC 546, [2003] 3 All ER 1213, HL
[101] Edward Nugee "The Consequences of Aston Cantlow" 7 Ecc LJ at 452

"Although the Church of England, as the established church, has special links with central government and performs certain public functions, it is essentially a religious organisation and not a governmental organisation. PCCs are part of the means whereby the Church promotes its religious mission and discharges financial responsibilities in respect of parish churches, and the functions of PCCs are primarily concerned with pastoral and administrative matters within the parish and are not wholly of a public nature, and therefore they are not core public authorities with s6(1); and (Lord Scott dissenting) the fact that the public had certain rights in relation to their parish church is not sufficient to characterise the actions of a PCC in maintaining the fabric of the parish church as being of a public nature; so that when the plaintiff took steps to enforce the defendants' liability for the repair of the chancel, it was not performing the function of a public nature which rendered it a hybrid public authority under s6(3)(b)."[102]

There seems to be little argument with the House of Lords on this point but this thesis will contend that the PCC can be argued to be a hybrid or functional public authority when the part it plays in decisions about disposal of human remains are far more clearly of a public nature. If this approach is followed, the decision-making of the PCC in relation to who can be buried, the form of that burial space, the shape and form of the memorial, who can be exhumed, and when a churchyard is declared 'closed' and handed over to the local authority for effective upkeep, are all open to the test of compatibility with Convention rights. As will be seen in Chapters Four and Five, this thesis argues that PCCs are far more than simply a 'grass-roots' organisational part of the Church as described in the quotation immediately above and have a powerful role in the legal hierarchy of the Church and an even more powerful role on those who use the churchyard.

There were concerns that if the House of Lords had found differently, other institutions within the church would become hybrid public authorities, although

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[102] As footnote 101 at page 452/3

before the coming into force of the Act, Mark Hill had acknowledged that many of the institutions would indeed fall under s6(1) without the need to consider whether s6(3)(b) applied. Lord Hope, in the *Wallbank* litigation, went to great lengths to find that the church was indeed established but that did not make it part of government. How that argument stands when bishops have historically and still do sit in the House of Lords is unclear.

**Conclusion**

This introduction has set out some of the key issues that will be covered by the thesis and has explained the different legal structure of the Church of England to aid the reader through the maze that is the law of disposal of the dead. This introductory Chapter has identified some of the major existing literature in the field and has explained how this thesis is for the first time, drawing on all the sources to produce a single body of work that relates to disposal of the dead by the Church of England.

In Chapters Three, Four and Five the thesis takes these theoretical and actual arguments and conclusions relating to policy and law making and applies them to case law that has been heard and practices and policies that exist. The rationale provides an arena to allow the thesis to test its hypotheses and demonstrates how the thesis exceeds the available literature in the area. It also draws into the argument aspects of commemorating the dead, responsibility for land management and maintenance and exhumation, which have not been drawn together previously. The thesis uses such literature as examples and supporting evidence to enhance and embolden its own ideas and arguments.

This introduction has, therefore, provided an overview of some of the important authorities which are cited in this thesis and has shown how it uses them to construct its own theories, arguments and conclusions in an original piece of work that contributes to the academic field.

## *1.4 Contribution to Knowledge*

The first original contribution to knowledge in this field made by this thesis is in the way in which it focuses on disposal of the dead as a topic area in its own right. The thesis does this within a framework of Convention rights and the HRA. Prior to this thesis, no such examination has occurred. Previous work in the area has focused on the discrete issues that arise, such as the property rights in a grave[103] or the issue of portability of remains[104], but this is the first time that policy, regulation and law have been mapped against a human rights agenda covering burial, exhumation, liability and responsibility for maintenance of churchyards and proprietary interests involving interference with protected rights under the Convention. This adds to the field of knowledge by providing a detailed overview of the competing and conflicting law for the first time in this under-researched area of law.

The second contribution to knowledge is made by the detailed exploration of the history of complexity surrounding the definition of a functional public authority. The thesis does not merely rely on a discussion of the issues but develops themes from the judgments, governmental discussion and academic opinion and identifies the key tests that have developed to result in a conclusion that defines the functional public authority from the existing case law and other sources. This contribution to knowledge in the public law arena is sorely needed as the numerous attempts by successive governments and the courts to provide a clear understanding of the scope of the definition has proved elusive as is discussed in detail in Chapter Two.

The third contribution to knowledge is to apply a human rights framework and standards to consistory court judgments and to demonstrate how this is not

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[103] *Conveyancer and Property Lawyer* "Property interest in a burial plot" Remigus N. Nwabueze 2007 517

[104] *Ecclesiastical Law Journal* "Exhumation Reconsidered" Philip Petchey 6 Ecc LJ at page 122

currently being achieved on a regular or consistent basis, leaving the Church of England vulnerable to successful challenges.

This thesis highlights important lacunae in human rights research where very much the emphasis is on convenience for providers, cost effectiveness and chimeric views of aesthetics, while the families, friends and loved ones of those who die are affected by the policies, regulations, laws and practices of the Church of England in a way that fails to recognise the human rights aspect of death as it affects them. It is in this particular regard that the Chapter Three evaluation of the socio/historical importance of disposal is crucial and in Chapters Four and Five the human rights framework to underpin burial, memorials, land issues and exhumation is fundamentally important.

### *1.5 Methodology*

The previous section detailing the contribution to knowledge has made clear that this thesis considers issues relating to both public law and ecclesiastical law. Essentially, this is a dissertation which examines the existing law, regulation and policy against the human rights framework provided by the European Convention on Human Rights as applied within the UK. It uses both Public Law and Ecclesiastical Law as illustrations to substantiate the application of human rights standards to an area of law that is less developed, that of the regulatory structure and policies in regard to disposal of the dead. While there are many areas that could have been selected from within that broad title, it is the role of the Parochial Church Council (PCC) in policy and regulation, together with issues of ownership of headstones and graves, and land management that are the focus of the hypothesis that the Church of England are not operating within the required human rights standards. By mapping against and examining these particular areas, the thesis is able to demonstrate the problems that arise with the existing

policies, regulations and laws and offers an opportunity to review the law and to build on the survey undertaken by government.[105]

The approach of this thesis is black letter in nature, although not taking a fully strict approach It discusses and explores some extraneous sources such as academic commentary, which would not ordinarily feature in a strict black letter piece. It is also formalist with a strong theme of the value of legal certainty in an area that is by its own admission, tangled and confused. The reason that the author has taken this methodological approach is to try and provide a clearer vision of the problematic nature of the complexity of the matrix of regulation surrounding churchyards, demonstrating the potential for engagement of a number of articles of the Convention. It is an objective of this thesis, not to point to *certain* breaches of Convention rights, but rather to draw attention to the *potential* for breach. A black letter approach does provide examination of the case law and statutory materials but this thesis has, in addition, drawn on academic commentary in places to enhance the hypothesis where it was felt necessary to the clarity of what is being said. The methodology used is described in Salter and Mason as:

"In short, black-letter analysis should not be classified as purely descriptive, and hence as necessarily uncritical of the form and substance of legal doctrine. This is particularly so because the pioneering works of the text book tradition actually invented a new discipline founded upon an orderly science of general legal principles through a process of creative selection of sources, organising categories and divisions, and through an ingenious and novel way of defining, classifying and narrating legal sources."[106]

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[105] Burial Law and Policy in the 21st Century The Way Forward – A Response to Consultation carried out by the Home Office/DCA (Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach. Home Office January 2004) Ministry of Justice June 2007

[106] Michael Salter and Julie Mason *Writing Law Dissertations An Introduction and Guide to the Conduct of Legal Research* Pearson 2007 at page 100

This thesis places a strong value on the liberal tradition of the rights of the individual and of legal certainty as an aspect of the rule of law, which of itself gives rise to the ability of the individual to both conform and be autonomous within the system. It therefore does not consider the wider societal effects of the problems it identifies, but instead chooses to focus on the impact on the individual of the discretion exercised by the PCC. It is not the objective of this thesis to propose reforms to the policies, rule, regulations or laws in this area, but to highlight the problematic nature of the same and the way that they are interpreted and deployed. This systematic search for a coherence in the chosen areas examined has enabled this thesis to identify key areas where there is potential for engagement of the Convention articles raised. This search for coherence and consistency in the examined areas can be described by reference to Aldo Schiavello's article on Neil MacCormack's theory[107] where it is argued that legal decisions have to make sense both in the world and within the legal system. For this to be achieved there must be no logical contradictions between a decision in a case and a general norm. It requires harmonisation of every judicial decision with the fundamental principles of the legal system in order to achieve coherence.

This methodology then necessarily presupposes that legal certainty is a value within a legal system influenced by the type of legal positivism espoused by Austin[108], Kelsen[109] and Hart[110] and that legal formalism views law as a system of rules enacted and applied by the state. It rejects the claims of pluralism that law should be more widely defined to include cultural and institutional rules of conduct not underpinned by state sanctions for non-compliance.

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[107] Aldo Schiavello 'Neil MacCormick's Second Thoughts on *Legal Reasoning and Legal Theory.* A Defence of the Original View' *Ratio Juris.* Vol.24 No.2 June 2011 (140-55)( taken from the fourth thesis)
[108] Austin, John (1832) *The Province of Jurisprudence Determined* Ed W.E. Rumble, 1995 Cambridge University Press
[109] As discussed by Raz,J Kelsen's Theory of the Basic Norm *The American Journal of Jurisprudence* (1974) at section 6
[110] Hart H.L.A. (1958) "Positivism and the Separation of Law and Morals", *71 Harvard Law Review* 593 (repr. In Essays in Jurisprudence and Philosophy (1983) Oxford Clarendon Press

The methodological approach of this thesis has a central dilemma to resolve. The competition between the rules of state and the rules of the Church and the natural conflict between growing secularisation and a wish to preserve a legal system imbued with religious historical morality. While the Church is the established church within England and arguably therefore part of the state construct, this thesis deliberately avoids this position in formulating the responsibility of the Church and PCC as outside the remit of this work. Instead, this thesis concentrates on attributing state-status to the PCC via the definition of a functional public authority in Chapter Two. This thesis views the competition as synchronous and historic, a competition between legal positivism and natural law recognized since the times of Henry VIII when the rules of Rome were being challenged by an emergent 'state' or 'king-made' law.[111] This thesis does not try to engage with this theoretical dialogue because the very nature of the legal system being examined in this thesis is so incoherent and uncertain that a better role is served by taking the black letter approach to identify where the discord between the two systems occurs. By this identification, future research can explore theoretical models to further the work included here.[112] [113]

The choice of legislative framework against which this thesis examines the policies, regulations, rules and laws of the Church of England that relate to the disposal of the dead is that of the HRA and Convention. The enactment of the HRA provided what is probably a unique opportunity in legal research to examine or re-examine areas that had previously not been subject to scrutiny through the lens of human rights protections. With its emphasis on holding state bodies to

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[111] Patrick J. Whiteley and Robert Bolt 'Natural Law and the Problem of Certainty: Robert Bolt's "A Man for All Seasons" *Contemporary Literature* Vol 43, No 4(Winter,2002), pp 760-783 published by University of Wisconsin Press. Sourced from Http://jstor.org/stable/1209041 accessed 23/05/12. The article examines the conflict between More and Henry VIII in Bolt's play in the context of legal certainty as a challenge to Natural Law theory.

[112] The debate surrounding establishment and its implications is outside the scope of this thesis. See Mark Hill, *Ecclesiastical Law* 3rd ed. Oxford pg 10 footnote 53 where he sets out numerous sources for this debate, including D McLean, 'The changing Legal Framework of Establishment' (2004) 7 EccLJ 292 amongst other sources

[113] There is a limited reference to the issue of establishment in Chapter Two at 2.6.2 where the *Wallbank* case law is full analysed.

account for interference with individually protected rights, one of the over-arching objectives was to ensure that public bodies devised policies that had their roots in human rights, giving rise to rules and laws that enshrined these principles. A positivist approach would mean that even if morally questionable, the emergent law from such a basis should be consistent, coherent and certain. This has led to decisions that have challenged both public and legal perceptions of fairness when the least desirable 'victims' have secured victory in the courts.[114] This thesis claims that whatever the moral arguments, there is a value in legal certainty that overrides the moralistic or religious viewpoint when contemplating the general norm that these protected rights must have systemic applications. This thesis then takes the black letter position of stating here is a law, sanctioned and given authority of state, which must now be applied to all those who are within its jurisdiction. It examines whether the Church of England and by implication the PCC are adhering to that law as it must.

It is necessary to explain why the specific aspects of disposal of the dead were selected. In order to highlight the impact of non-application of human rights standards the thesis deliberately elected the most emotive areas to discuss. By focusing on issues such as exhumation and choice of words to remember a life, the thesis is able to deliver a clear and forceful picture of the consequences to those who become entangled in the current policies, regulations and laws. The thesis is in a position to help the PCC in particular to review how it determines policy and for the Church of England and its institutions to recognise the need for a more stable and reliable platform for the same.

Land management is a selected issue because of economic factors in the financial climate that existed while this dissertation was being developed – money is a key factor in the thesis. One of the central issues in Chapter Four,

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[114] See among others *Steve Foster* Human Rights & Civil Liberties Pearson 3rd ed at page 35 – Human Rights and the protection of unpopular causes.

which focuses on the passing of closed churchyards to the local authority for maintenance, is a fundamentally problematic area which has been much criticised in the past. Justification for this practice is examined in detail with critical analysis of the roots of the arrangement leading to discussion of the consequences should the arrangement change.

The analysis throughout the thesis is based on measuring or mapping churchyard practices against human rights principles. The examination has therefore been by research in the existing literature and case law. The Middle Temple Library holds the main archive for consistory court reports with the remaining research sourced through text book and internet research at Kingston University. The literature has been used throughout, both to support and to challenge and test the thesis.

### *1.6 Structure and outline of the thesis.*

The thesis contains six chapters each of which demonstrates the importance of observing and applying a human rights framework and standards when regulating the disposal of the dead, developing or applying policies and when attempting to resolve the problems that can arise in that regard when disputes come through the consistory courts. Each Chapter shows the extent to which human rights standards should underpin policy and law in the area giving rise to humane, just and fair decision making which is consistent in application to those who come into contact with the system. The thesis suggests ways that the Church of England and its institutions, down to the grass roots of the PCC, can approach this duty leading to a more reasoned, balanced and predictable platform from which to practise and law that is more certain and fair for users.

Chapter Two analyses the historical and current position of the definition for a functional public authority for the purposes of the Human Rights Act, focusing on the case law with judicial reasoning, governmental reports and the academic discussion. The Chapter closely examines the case law around the *Wallbank*

litigation and makes a claim that the case can neither be disregarded as turning on its own facts, nor that the House of Lords erred in their reasoning that the PCC was not a functional public authority. By developing the tests that have been suggested in *Wallbank* and in subsequent case law, the thesis has been able to compare the role of the PCC in relation to its policies and regulations for the churchyard in relation to the headstone and reach a conclusion that for these purposes, the PCC is, in fact, a functional public authority and, therefore, will be susceptible to liability under the Human Rights Act. By developing a reasoning that reaches this positive rather than negative outcome on this point, the Chapter discusses how that liability could be engaged, routed through the policy making activities of the PCC in regard to freedom of expression. In particular, Article 10 is discussed. The Chapter concludes by illustrating the consequences for the Church of England and thereby the PCC using social and human rights theoretical arguments.

Chapter Three sets out the background rules, regulation and policies for burial in both consecrated ground in the churchyard and unconsecrated ground in municipal cemeteries. The Chapter discusses in particular the case law that has been heard in relation to the words that can be used on headstones, the form of those stones and the grave. Some of this case law was heard before the Human Rights Act came into existence to give a flavour of the approaches adopted by the PCC and the consistory courts before moving into case law where human rights are considered, albeit somewhat fleetingly, by the consistory courts. The policy making methods of the PCC are examined and suggestions are made for ensuring that fewer disputes arise. As a contextual contrast, the law and regulation of municipal cemeteries is compared with the PCC rules. The Chapter concludes by considering whether a more lenient or human rights orientated approach can be identified within the more modern case law or whether the Church is remaining stoically opposed to application of human rights standards and principles.

Chapter Four is focused on the issues of maintenance, management and safety in churchyards. A good proportion of the Chapter focuses on the transfer of closed churchyards to the local authority for maintenance at the expense of the local authority. There is historical research into the root of this undoubted financial privilege that is accorded to the Church of England. Once the Church decides that a churchyard is full, it is entitled by statute to transfer the cost of maintenance to the local authority. The Chapter examines whether there has been a misinterpretation of the Burial Acts 1852 and 1853 by researching the history of Church taxes and the history of liability to pay those taxes. The thesis reaches a conclusion that could indicate the liability is incorrectly placed with the local authority and that, in fact, it should be with the congregation of the relevant church. This is a controversial finding but the argument is well supported by the research. The Chapter also examines liability for accidents in the churchyard and reviews the contested 'topple-testing' method of safety checking by reference to press reports and official documents published by the Church, advising incumbents and PCCs. In this Chapter, some theoretical exploration is made around the social importance and historic importance of the headstones in churchyards and a contrast made with the economic and bureaucratic models that dominate the approach of the PCC. The Chapter concludes by drawing together the various strands of argument developed in the Chapter.

Chapter Five focuses on exhumation. It is in this Chapter that human rights standards are most obvious by their absence in the considerations of the Chancellor. The Chapter draws on the State procedure for exhumation from municipal cemeteries and the procedures laid down and applied by the consistory courts. It becomes apparent that there is a marked lack of consistency of approach by the consistory courts (not helped by the fact that decisions from the two provinces do not bind each other) which has led to some extremely distressing case law. There is reference to some case law from the European Court of Human Rights, particularly from Sweden. There is also some theoretical discussion in this Chapter around the delicate issue of expectation of portability

of remains, with reference to Robert Pogue Harrison's work. Neither the State nor the Church of England is content with the concept of portability, but the thesis explores the secular ideas. This Chapter develops the tests that have emerged from case law and by application of these tests to the case law shows how the law is being applied with less than the certainty that it should. Article 8 is considered in this Chapter. The Chapter concludes with some of the more modern case law showing that the Church appears to be using some double standards depending on the nature and source of the request to exhume[115].
The thesis concludes in Chapter Six by confirming the hypotheses that human rights law should be applicable to the policies, regulations and laws of the Church of England when disposal of the dead is the subject. This is a very public activity, a duty under common law, and a human rights framework is conspicuous by its absence in this area of law at a point where users are probably at their most vulnerable and, therefore, much less likely to challenge the decisions made. The thesis also shows that the current framework of law and regulation is complex, confusing and complicated and has highlighted the need to ensure that the Church and State work together to achieve something more certain, fair and based in human rights standards. The Chapter outlines proposals to this effect which demonstrate the strength of the hypothesis. This Chapter also outlines areas where there is potential for future research.

This thesis has demonstrated that the title assigned to it is accurate. The current regulatory framework is utterly impenetrable, as Professor Norman Doe so accurately said[116]. The thesis hopes to show a better way forward, based on human rights frameworks and standards and building on the work started by Government. The 'Way Forward' report[117] has reviewed some of the issues covered in relation to burial and exhumation in this thesis, but the report is based on an economic model, rather than human rights one. While it refers to the

[115] It does appear that if the request comes from a scientific background or, indeed, from a famous applicant, there is more chance of agreement to exhume than if the request is from an individual of ordinary background. There is expansion of this within Chapter 5.
[116] As footnote 26
[117] As footnote 105

sensitivity of the issues, one of its major conclusions is that it wants the State to investigate whether it should charge for exhumation licences – at the time of writing these are free. This is not an encouraging sign. 'The Way Forward' report and the report to which it is a response form part of the analysis included within the thesis which uses the reports as evidence of the lack of a human rights approach.

The thesis also shows in some detail that the case law in the areas covered in Chapters Three and Five is very confusing and often conflicting as between consistory courts. While an appointment has been made for a person to act as a conduit of good practice between the two provinces, it is the case that consistory courts seem to be able to act with an autonomy that belies a legal system built on precedents. The denial of legal certainty and legitimate expectation, for those who use the churchyard, can only lead to further headlines. The thesis will also enable the Church courts to review their practice in this regard.

In this introductory Chapter, the background and rationale for the thesis have been explored and the issues that will be raised have been introduced. The Chapter has been able to show where a contribution to knowledge has been made and the methodology has been explained. The structure of the thesis has been set out in a clear way, firstly explaining who the PCC are, before demonstrating that the PCC is a functional public authority for the purposes of the Human Rights Act, then considering burial and the memorial markings, then moving to consider land management and property rights issues and then reviewing exhumation. This logical structure helps define the hypotheses in each regard. The important literature in the area has been identified and linked into the thesis, demonstrating the importance of each source to the relevant Chapter. In reviewing the issues in this introduction and referring to the human rights framework and standards, evidence has been provided to show where the thesis develops the current knowledge in each of the Chapters.

## Chapter Two: The PCC as functional public authority within the meaning of s6(3)(b)

### *2.1 Introduction*

This Chapter provides a detailed examination of the status of the PCC in its role relating to disposal of the dead and, in particular, the Chapter examines whether the PCC is a functional public authority within the meaning of s6(3)(b) of the Human Rights Act 1998.

The relevant sections of the HRA are s6(3)(b), s6(5) and s7.

The Chapter is approached in a predominately chronological order, discussing the struggle to provide a clear definition of a functional public authority dealing with the early thoughts of academics, government and Church as to how the new Act may be interpreted when considering which authorities, organisations and bodies would be within the sections. The Chapter then continues with a critical examination of the relevant case law showing how the courts found it difficult to find a workable definition. This chapter develops its own set of criteria derived from the two most forward looking judgments. It then applies this to the work of the PCC in relation to disposal of the dead which it links to the human rights framework which gives rise to a critical analysis at the current developmental phase. The result of these arguments is a suggested model for the definition of a functional public authority which will bring the PCC into the framework.

Throughout this chapter, it will become apparent that the legal language used by both courts and government is interchangeable, with both 'hybrid public authorities' and 'functional public authorities' being used to describe those bodies that have found themselves being examined. This Chapter refers to both as used in the particular contexts as they arise. There is a similar problem with the words 'public service(s)' 'public act' 'governmental function' and 'public function'. Where

opinions have differed as to meanings and usage, this is discussed in the Chapter.

The analysis is one that is important when considering the policy making role of the PCC and, in Chapter Three, in relation to style and form of gravestones and graves, the analysis is essential because it will be asserted that when performing this policy making role, the PCC is acting as a functional public authority within the current definition, thereby making it susceptible to challenges under the HRA by engaging Article 10. It will be contended that the PCC, in this regard, is not acting as a private body, and the hybrid nature of authorities under s6(3)(b) as currently defined in the case law, recognises that some organisations can have a dual personality. In Chapter Four, where maintenance and management of the churchyard is discussed, the historical benefit of the passing of maintenance of closed churchyards is challenged by the thesis, using the principles and arguments from this Chapter and, in particular, the arguments of legal certainty, and, in Chapter Five, the legal framework surrounding exhumation will be challenged under articles 3, 8 and 10.

With direct relevance to this thesis, the first and only case to discuss the implications of s6(3)(b) in relation to the PCC, was *Parochial Church Council of the Parish of Aston Cantlow*[118]). Each of their Lordships gave a speech outlining their reasoning on the issues raised in this Chapter and this will be critically analysed against the academic opinions that it engendered. The Chapter will bring the case law up to date, explore the ongoing academic commentary and develop the argument that when dealing with policy issues relating to disposal of the dead, previous findings (particularly that of *Wallbank,* where the PCC was found not to be a functional public authority) should be distinguished on the facts. The judicial reasoning that discussed the definition of a functional public authority

[118] *Aston Cantlow and Wilmcote with Billesley, Warwickshire (Appellants) v Wallbank and another (Respondents)* [2003] UKHL 37. The case is hereafter referred to as *Wallbank*

supports the hypothesis of this Chapter and is relied on in the formulation of the new suggested approach.

It was held in *Wallbank* at the House of Lords that:

"None of the functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility."[119]

This is clearly open to challenge where disposal of the dead is concerned, as without doubt the State would have to take over this function on the basis of public health alone. In Chapter Three, it will be shown that the Church retains a public law duty to dispose of the dead.

The issues raised by this Chapter are complicated and far reaching. The majority of the case law involves the care sector but the important discussions surrounding the definition of s6(3)(b) will inform the conclusions in relation to the PCC that this Chapter reaches. There is now a common understanding that there are some hybrid authorities that have a dual personality, with some of their functions being held as public and some as private, however, each case turns on its own facts and, therefore, the opportunity to identify the individual elements that have been considered when reaching a decision about the status of each has offered the opportunity to look for commonality and the basis for a new theory of what constitutes a functional public authority.

The arguments put forward also engage the question of the ability of the authority in question, under s7 HRA, to be defined as a victim, so that it has the standing to take an action against a public authority. If a public authority or organisation is deemed to be a 'core' authority, one that is a public authority with no need to examine whether it is caught by s6(3)(b), it will have no such right. If it is deemed

[119] As footnote 118 per Lord Hope

to be a hybrid authority, then when it is acting as a private body, it retains the right to challenge a public authority, but when acting as a public body, it will itself be open to such challenges.[120]

There has been a difficult history for this area of law, with courts taking a variety of routes to reach their decisions, adding to the tangled legal picture that is a feature of the regulatory structures for disposal of the dead. The Court of Appeal in *Wallbank,* found that the PCC was a public authority for the purposes of s6(3)(b) by directing the analysis to the definitions employed in the case law reviewed within this Chapter when deciding whether a public authority was susceptible to judicial review of its decisions. The House of Lords directly opposed this view and instead directed itself to the jurisprudence of the European Court of Human Rights rather than the domestic case law on judicial review. Cases subsequent to *Wallbank* in the Court of Appeal have shown that there is a reluctance to move away from the definition of a functional public authority tied to the definition of a body subject to judicial review. This is indicative of the fundamental disagreements about where to start with a definition, which is explored below in this Chapter. What has emerged since *Wallbank,* which was an early case in the story, are a series of cases that have focused on the functions of the public authority – inspection of the actions of the relevant authority – and this leads in turn to the essential point of Chapter Three of this thesis. Burial is a public function, not simply a matter of private regulation within the Church itself.

As stated in the previous Chapter and above, the Church has a common law duty to bury the dead from the parish, whether the deceased is a member of the congregation or even a believer in Christianity or not. This common law duty is one that can only be declined if the churchyard is full. This thesis contends that this duty lays a foundation for the contention that when dealing with policy

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[120] Helen Fenwick *Civil Liberties and Human Rights* 4th edition Routledge Cavendish pg 218

making for burial, management and maintenance and exhumation, the PCC is a functional public authority.

### *2.2 Recognising the definitional problem for S6(3)(b)*

There was early academic commentary on the scope of s6(3)(b) from a range of disciplines because the impact of the section was thought to be open to an interpretation that was potentially very wide.[121] Most commentary came from academics within their field trying to allay fears by various interest 'groups' such as *inter alia* care homes with state funded patients; sporting adjudicatory panels; social housing providers and others, about the possibility of liability under the new Act when it arrived. The Church of England, although late to recognise that it may indeed fall within the definition of s6, was one such group.

One of the earliest documents that discussed the potential liability of the Church under the HRA was Research Paper 98/26.[122] This paper was in response to the fears expressed by the Church of the possible extent of their liability which, until quite late in the passage of the Bill, had not been foreseen. A taste of the concern is shown in the opening of the document when reference is made to a letter sent to *The Times* newspaper by members of the General Synod:

"In a letter to *The Times*, leading members of the General Synod of the Church of England (supported by at least fifty other synod members) stated that under the Bill secular courts would 'for the first time be given a role in judging moral, doctrinal and spiritual matters'"[123]

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[121] *Elder Law and Finance* Lucy James "Defining the Boundaries of the HRA 1998: The Implications of Heather v Leonard Cheshire Foundation Issue 1 2002: "Before the Human Rights Act 1998 (HRA) came into force on 2 October 2002, there had been considerable debate as to how the definition of "public authority" (HRA 1998, s6(3) and "public function" s6(3)(b) would be interpreted by the courts. There was also considerable uncertainty as to whether the Act would extend to those bodies not traditionally subject to judicial review, making their actions and decisions open to challenge".

[122] Research Paper 98/26 House of Commons Library "The Human Rights Bill [HL] Bill 119 of 1997-98: Churches and Religious organisations". Home Affairs section.

[123] 'Churchmen urge Human Rights Bill rethink', *The Times* 5 February 1998; Letter, *The Times* 5 February 1998

Other religious groups also voiced their concerns about the application of the HRA to their religious principles and beliefs. The essence of the concerns was recognition that the Church did exercise functions that could be held to be public functions but that the HRA would widen these into areas not previously within the jurisdiction of the secular courts. If the Church and its various organisational bodies was found to be within the definition of a functional public authority under s6(3)(b), this would pose more of a threat than if it were not. During the second reading debate, there was discussion of what constitutes a 'public authority' under the Clause 6 of the Bill'.[124] Lord Irving of Lairg stated:

"...[t]hat in deciding what is or what is not a public authority, the point is not the label or the description; it is the function".[125]

Very early on it was apparent that the legislative authorities intended that s6(3)(b) should be read as written and given a literal approach to interpretation and it was the function being performed which should dictate a finding that an organisation or authority was a functional public authority. This broadly applied to the general function under discussion, not, as has later been the case, the precise act which is complained of. It is, therefore, the function of disposal of the dead which is at issue in this thesis.

Lord Lester supported the broad interpretation of the clause "because he could not foresee many circumstances in which such bodies would be directly liable as a public authority. In those cases that did arise, he felt that it would be difficult to see why they should be immune from liability",[126] deciding that such eventualities would be decided on a case by case basis. The argument moved on to discussion of exemption from liability for religious organisations when exercising

[124] Research Paper 98/26 page 10 incorporating footnotes 29 - 31
[125] As footnote 124 at footnote 32
[126] Research Paper 98/26 page 11

public functions, led in the main by Baroness Young. Lord Goodhart made the contra argument stating:

"...[W]hilst recognising the need to ensure that the constitutional balance between the Church of England and Parliament is not upset by a human rights Bill, [he] did not think that the Church should be able to 'claim the benefits and privileges of established status' whilst refusing to be bound by what would be the general law of the land....Insofar as they exercise public functions, for example by providing services to the public in co-operation with the Government, or which the help of public funds, he would consider it appalling if they were not required to comply with the Convention"[127]

This makes sense in relation to the common law duty to bury, where the Church are clearly providing a public service in co-operation with the Government. If this were to be the correct test to apply to the PCC, by creating the policies which regulate the churchyards, the PCC must therefore be seen to be a functional public authority for the purposes of s6(3)(b).

Ian Leigh produced a paper for the Ecclesiastical Law Society 2001 Residential Conference[128] which gave his view, reassuring the Church that its "fears were misplaced"[129] and that the "Articles of the European Convention on Human Rights present a much more balanced and restrained approach to individual autonomy than is often claimed"[130]

He gives a quotation from the Lord Chancellor taken from debates in the House of Lords on the Human Rights Act:

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[127] Research Paper 98/26 – page 13 at footnote 46
[128] Ian Leigh, Religious Liberty and Human Rights, Ecclesiastical Law Society 2001 Residential Conference, Trinity Hall, Cambridge 30 March – 1 April 2001 – paper entitled Freedom of Religion: Public/Private, Rights/Wrongs.
[129] As footnote 128 at page 79
[130] As footnote 128 at page 78

"If a court were to hold that a religious organisation, denomination or church, in celebrating marriage, was exercising a public function, what on earth would be wrong with that? If a court were to hold that a hospice, because it provided a medical service was exercising a public function, what on earth would be wrong with that? Is it not also perfectly true that schools, although underpinned by a religious foundation or trust deed may well be carrying out public functions. If we take, for example, a charity whose charitable aims include the advancement of religion, the answer must depend on the nature of the functions of the charity." [131]

Ian Leigh continues to say:

"It is clear from his (the Lord Chancellor's) rhetorical questions that he expected that the function of the body concerned would determine whether the Human Rights Act applied, rather than whether it was established for religious purposes. The danger this poses, however, (sic) such bodies is that the application of human rights norms to their functions may dilute their purposes. Critics asked, for example, whether under the Human Rights Act clergy would be required to perform same-sex 'marriages', whether the consecration of female bishops would be required, whether abortion clinics could require Catholic newspapers to carry their advertising, and whether religious hospices would be required to employ staff who were in favour of euthanasia. In fact, as I hope to show, many of these fears are misplaced. I shall argue that it is a misapplication of the ECHR to suggest that most religious bodies can be liable for violations of an individual's Convention rights. Arguably, to impose liability upon them (if this is what the Human Rights Act does) is itself a violation of other Convention rights, namely freedom of thought, conscience and religion which is guaranteed under Article 9 to people either alone or in a community."[132]

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[131] As footnote 128 at page 79 quoting from HL Debs, Vol 583, col. 800, 24 November 1997
[132] As footnote 128 at page 79

While Leigh acknowledges that it is the function of the body in question that appears to be the purpose of s6(3)(b) as far as the intention of government is concerned, the fundamental flaw in Leigh's argument is that he is relating this function to interpretation of the Convention rights, when it should be related to s6 of the domestic statute, the HRA, itself, as has been mentioned by the courts since the decision in *Wallbank.* This is further discussed in this Chapter of the thesis and is part of the hypothesis developed within the thesis.

Leigh's paper then tackles the status of the Church of England. Much of the early part of this section of the paper addresses the concern that the status of the Church of England as the established Church in England may lead to decisions by the courts that it is a public authority simply because of its 'preferential' status (described as 'a relatively minor risk' in the article) and this has been proven to be the case in the post HRA case law.[133] He also refers to the position the Church would find itself in if it were a public authority under s6(1) – that is a 'pure public authority' in modern words by citing an article by Dawn Oliver[134] which he states 'paints an apocalyptic picture' (in relation to sporting associations) if applied to the Church, who would then be debarred from complaining as a victim under section 7 of the HRA. His answer is that the Strasbourg jurisprudence would indicate that this will not happen whatever the English courts decide through the application of judicial review.[135]

This thesis argues that what is revealed here is the concern that the Church will have its position and power in the structures of State eroded if it was found to be a functional public authority, a point that becomes important to the thesis in Chapters 3, 4 and 5 as indicative of resistance to a human rights framework.

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[133] As footnote 118 per Lord Hope and others where the discussion about the established status of the Church in England gives little direction in relation to the tests for a functional public authority

[134] D. Oliver "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act", 2000 *Public Law* 476

[135] As footnote 128 at pages 83-84

Leigh reminds his audience that the starting place for deciding what is meant by s6 is to look to Convention jurisprudence, but again, it is argued that this is the wrong starting place when interpreting what the domestic statute means which should be subject to the usual domestic rules of judicial interpretation. It is only when considering the application of Convention rights themselves, that recourse to the Strasbourg jurisprudence should take place.

It is worth replicating his analysis of *Holy Monasteries v Greece* [1995] EHRR 1 as he uses this to support his view that the Church has little to concern it. While the extract cited is long, the points made within it give a platform for this thesis to develop the test for a functional public authority which emerges at the conclusion of the Chapter.

"When Greece passed legislation the effect of which was to transfer large parts of the estate of the monasteries of the Greek Orthodox Church to the state, it was found by the Strasbourg court to have violated the monasteries' right to peaceful enjoyment of their possessions (Protocol 1, Article 1). The Greek government had argued by way of preliminary objection that the monasteries were governmental organisations because of the constitutional status of the Greek Orthodox Church and so were not entitled to complain as victims of a violation of the Convention, since they were not 'non-governmental' organisations under what is now Art 34. The Court's reasons for dismissing this argument have considerable bearing on the status of the Church of England.
In Greece, historical links between the Orthodox Church and its institutions were reflected in the 1975 Constitution and in legislation: The Church and its institutions were treated in Greek law as public law entities ascribed with legal personality, some of their decisions were open to review by the Administrative Court. Although monasteries were technically separate, they had strong links with the church and the state: the Minister of Education and Religion Affairs played a part in initiating proposals to found, merge or dissolve individual monasteries. However, the Court did not regard the legal classification of the

monasteries as public law entities as decisive: it treated this as intended to confer protection from challenge by third parties equivalent to that enjoyed by state institutions. The crucial factor was that the objectives of the monasteries (whether ecclesiastical, spiritual, social or cultural) were not analogous to governmental organisations: their legal powers were confined to spiritual and internal questions and supervision was by the local archbishop and not by the state. Accordingly, they were to be regarded as non-governmental organisations".[136]

The parallels with the findings of their Lordships in *Wallbank* are clear – placing the functions of the PCC in relation to the claiming of the debt for chancel repairs as an internal, private matter despite the history of association with the State. The conferring of legal status for the Greek Church is a much stronger argument for giving it 'governmental' status and bringing it into the scope of s6(1) than is available because of established status for the Church of England and supports the direction the House of Lords took to this in *Wallbank*.

The article continues with the evaluation of s6(3)(b) where Ian Leigh is less confident that the Church may avoid liability under the HRA:

"UK courts are not *precluded* (author's italics) from treating as public authorities under section 6 religious organisations that Strasbourg would treat as non-governmental bodies under article 34. This potential liability opens a possible form of horizontal application of human rights, since its true effect is to make what are in Strasbourg terms private associations subject to HRA duties owed to other private individuals.

Here we reach what is potentially an extremely complex situation. Applying, for example, the domestic standards of judicial review, there is a real possibility that some church functions might be held to be 'public' so that as a consequence for

[136] As footnote 128 at pages 81 and 82

those purposes, if not otherwise, the body is a 'public authority' in respect of those functions."[137]

Leigh's analysis is, then, based on the assumption that it is the jurisprudence of judicial review which will apply to such cases, which, as is discussed further in this Chapter, is not something that the courts now see as the correct approach, being neither particularly relevant nor necessary in the human rights context. The analysis of the paper continues to consider some areas where Leigh believes that the Church may well be performing a public function (such as marriage and education) but does not mention disposal of the dead, surely one of the most obviously public functions in society.

Leigh's view is that the early fears for the Church are 'exaggerated':

"Although real, we can conclude that the danger is exaggerated, at least if the UK courts remain true to the principles governing the application of Convention rights to individuals and associations such as churches. The Convention jurisprudence establishes three important points. First, that mild state preference for one religion over another, as in the position of the Church of England, does not generally violate the Convention. Second, the Convention cannot generally be invoked by religious dissidents or minorities against religious bodies. Third, that churches are generally seen as 'non-governmental' bodies that are entitled to complain as victims under the Convention machinery of violation of their collective rights."[138]

The modern case law supports the third point made by Leigh in that the Church should retain its ability to complain as victim for those acts that are private or internal in nature, but as is stated, this does not prohibit liability under s6(3)(b). It is also doubtful whether the claim to 'mild preference' is valid. Leaving aside the

[137] As footnote 128 at page 87
[138] As per footnote 128

fact of establishment itself, which *Wallbank* has firmly dealt with as not demonstrative of the link between Church and State, although this is not a comfortable argument, but one that is outside the scope of this thesis, the fact is that the Church of England has Bishops in the House of Lords, was able to build faith schools long before any other denomination, has the Head of State as its leader, has a common law duty to dispose of the dead and whose senior members have strong political influence in the Houses of Parliament, must surely be indicative of something rather more than a 'mild' preference. While the modern case law is, indeed, taking a rather more restrictive view of the organisations that can fall within the ambit of s6(3)(b) than perhaps was envisaged by government, Ian Leigh's view does now look dated in that he believes the courts will be considering amenability to judicial review as the basis for determining which organisations will fall within s6(3)(b) which, as will be seen later in the Chapter, does result in a narrower definition.

Interestingly, Research Paper 98/26[139] refers to areas that its authors believe are to be held as 'public services' by the Church, such as marriage and education, but it does not consider disposal of the dead at all.

The Research Paper was produced because of the concerns that one of the effects of s6(3)(b) would be to permit secular courts to interfere with matters spiritual. This was never intended by the Government, as is stated in the Research Paper itself, but the debate does help in shaping or defining the response to the question of the scope of s6(3)(b) – that a case by case approach is required to evaluate the function in question. As the case law review in this Chapter will show, the courts have struggled with the definitional problems of what exactly is a 'function' and what is an 'act', resulting in a less than clear position. This supports the hypothesis that burial and the marking of graves, management and maintenance and exhumation will fall into the category of functions performed and the individual act complained of would be dependent on

[139] As footnote 122

the facts of each case but could relate to the choice of words, decoration or headstone shape.

Francesca Klug wrote, in 1999, exploring the extensive debate on the effect of s6 and s6(3)(b).[140] In dealing with s6, she says:

"The issue of which bodies should be liable for upholding Convention rights probably caused more controversy than any other, both in and out of Parliament. An array of lobbies expressed support for the Human Rights Act provided it did not apply to them. The press and the church were the most vociferous of these, as a result of which the Government introduced amendments in the Commons to address their concerns"[141]

The result of this was the addition of s13 to the HRA which, while not giving increased weight to the rights of religious organisations as against the other rights protected by the Convention, does ask the courts to be mindful of the impact on religious belief or manifestations when considering cases. There has been little to test exactly what 'special consideration' means in practice, but the press also achieved a section in the HRA, s12, which contains a similar sentiment for the media, and case law in this area that has tested the proposition that this gives the media 'extra' protection has found it does not.[142]

Dawn Oliver then joined the debate in her article 'The Frontiers of the State'[143] highlighting that the definitions of public authority and public function were by no means clear. She points out the importance of the classification of bodies outside the obvious 'state' being brought under the umbrella because of the loss of 'victim' status (discussed further below) for such bodies and for the increasing of 'state activities' on the development of civil society. The article develops the

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[140] *Public Law* Francesca Klug 'The Human Rights Act 1998, Pepper v Hart and all that' (1999)
[141] As footnote 140
[142] Steve Foster *Human Rights and Civil Liberties* Oxford 2nd ed Chapter 8
[143] *Public Law* 'The frontiers of the State: public authorities and public functions under the Human Rights Act' Dawn Oliver (2000)

concept of parallels with "common callings", the provision of services and the European concept of "services of general interest"[144] as a way of developing the meaning of s6(3)(b):

"Thus there are grounds for arguing that the provision of a whole range of "services" including taxi services, accommodation in inns, storage at wharves, medical services, education, post, transport and electricity, are to be regarded as "public functions" under the Act. Each of these approaches to, respectively, common callings, the provision of services, and services of general interest, involves the idea that those providing these services to the general public should be under new "vertical" duties to respect the Convention rights of those with whom they have dealings in exercising the function in question. These assumptions need careful analysis. It should not be forgotten that if such services are provided by public authorities the providers are in any event obliged to respect Convention rights, whether the provision is regarded as a public function or not. It is also worth remembering that the courts are very likely to develop private law so as to provide enhanced protection of what would be Convention rights if the breach were by a public authority."[145]

It is suggested that perhaps Oliver is over-emphasising the importance of the word 'public' rather than giving the word 'service' priority which leads to her conclusion. Oliver goes on in the article to acknowledge that such expansion would cause severe problems for the concept of civil society, but within the quotation above it is possible to extrapolate the point that when dealing with disposal of the dead, a civic burial ground is brought into the remit of the HRA so can there be justification for a Church of England churchyard and the rules and policies that affect it to be excluded? Burial is an action or function of public service.

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[144] As footnote 143
[145] As footnote 143

The protection of Article 10 and the freedom of expression for the marking of the grave is more complicated to bring within this definition because the Church argues that, while there is a public duty to bury, its Article 9 rights would be breached by permitting individualising of graves that conflicts with its religious principles, and the common law duty of burial does not extend to the marking of graves. This argument works strongly with the Church view of the scope that should be protected within s13 HRA for the protection of religious belief.
The essence of the argument in this thesis, however, is that the policies made by the PCC in relation to churchyards within each PCC jurisdiction, are functions of a public nature, affecting the wider community and these policies are seldom reviewed, leaving them 'stale' for a modern society[146]. Furthermore, it is later argued in this Chapter and in Chapter Three and Four that it is not religious belief that dictates the policies about the nature of the markings, but rather a fleeting aesthetic position built on perceived good taste and the cost effective manoeuvrability of lawn mowers.

Whitty, Murphy and Livingstone also commented in relation to the definitional problem of s6(3)(b).[147] They recognised that the government were expecting the judiciary to define what was meant by s6(1) and (3) but acknowledge that this has led to a rather confused picture when considering judicial review cases. They referred to the former Home Secretary's statement "that the test under the HRA must relate to the substance and nature of the act, not to the form and legal personality".[148] This is, of course, the way that this thesis argues the law should be developing, leading away from the constraints of the judicial review cases that have an administrative purpose and focusing more closely on a human rights context which focuses on the protection of the rights contained within the Convention.

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[146] This will be further examined in Chapter Three of this thesis.
[147] *Noel Whitty, Therese Murphy, Stephen Livingstone:* Civil Liberties law: The Human Rights Act Era 2001 Butterworths pg 33
[148] As footnote 143 pg 34 – 314 HC 433 (17 June 1998)

Whitty et al then turn to the 'intense debate' surrounding how s6(3)(b) will develop and refer to the '*horizontal effect' (*authors' italics*)* of the HRA that (they claim) has been started by 'Wade's dramatic contention 'that section 6(3) in effect binds judges *never* (author's italics*)* to act incompatibly with the Convention'.[149]

Wade's argument is:

"Since the courts are themselves made 'public authorities' and since it is unlawful for a public authority to act in a way which is incompatible with Convention rights, a court will be unable to give a lawful judgment, if a Convention point arises, except in accordance with that right....In the Parliamentary debates much was said about the definition of 'public authorities' and about bodies which might or might not fall within it. But horizontality will eliminate such problems altogether, since Convention rights will take effect against public and private persons equally, thus saving a great deal of litigation...[A] new culture of human rights has developed in the Western world and the citizen can legitimately expect that his human rights will be respected by his neighbours as well as his government."[150]

Whitty et al then discuss how the courts will approach their task of definition:

"The second perspective on horizontal effect is provided by Murray Hunt. He too argues for an unequivocal duty on the courts to ensure that all existing law is compatible with Convention rights, but not to the extent of totally collapsing the public/private divide through the creation of new causes of action (as appears to have been advocated by Wade[151]). Thus while the HRA does not permit *direct*

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[149] As footnote 143 pg 35 – W.Wade 'The United Kingdom's Bill of Rights' in Constitutional Reform in the United Kingdom: Practice and Principles (Hart, 1998) pp 61-68; and Wade [1998] EHRLR 520

[150] W. Wade, 'Horizons of Horizontality' (2000) 116 LQR 217, 220 and 223-4

[151] Footnote 235 from Whitty citing Wade "Whether this is called direct or indirect effect or a new cause of action seems to be a matter of words and to make no intelligible difference" ibid p 222)

(authors' italics) horizontal effect, there is an *indirect* (authors' italics) horizontal effect flowing from the courts' duty under s6.

The third perspective is provided by Phillipson. Unlike the above two accounts, it suggests a much narrower scope of application for section 6 based on a consideration of the origins and full text of the HRA, the parliamentary debates and the jurisprudence of the European Court of Human Rights. Phillipson accepts that the HRA will clearly have some form of horizontal effect .....he rejects arguments (such as Wade's) that the clear legislative intention only to bind public authorities under section 6 of the HRA...will blatantly be short-circuited by courts adopting an expansive role in litigation involving private bodies."[152]

The conclusion drawn by Whitty from the work of Phillipson, is that there will be a slow case by case development of the area, rather than the revolution indicated by Wade and, in this respect, the conclusion has been proven to be correct.

The definitional problem was then tackled by the courts in a number of cases, the most important of which was *Callin v Leonard Cheshire Foundation*[153] which was heard in the Court of Appeal, which, disappointingly, reached its decision based on judicial review cases.

This part of the Chapter has set the ground work for the argument contained within the rest of this Chapter, that a workable definition of a functional public authority has led to unnecessary confusion which has precluded the PCC from being identified as such an authority because the focus of the questions asked has been incorrect. The Chapter will now continue to build the hypothesis that through the relevant case law, a new test can be identified and developed.

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[152] As footnote 143 at pages 34-35
[153] *Callin and Others v Leonard Cheshire Foundation* [2002] EWCA Civ 595

### 2.3 *Government intervention post Leonard Cheshire*

In February 2003, the Joint Committee on Human Rights announced it would be conducting a short inquiry into the meaning of public authority under section 6 of the Human Rights Act 1998[154]. The inquiry was called for following a line of cases that considered the meaning of public authority for the purposes of s6(3)(b) – the most important of which was *Callin v Leonard Cheshire Foundation*[155]. The Press Notice stated:

"During the debates on the Human Rights Bill, Parliament took the view that responsibility to comply with Convention rights under section 6(3)(b) would depend, not on the status of the organisation concerned, but on the nature of the functions it performed. A broad and flexible interpretation of public authority was seen as necessary to take account of the increasingly large number of private bodies exercising public functions."[156]

This focus on function is one of the platforms that supports the new test developed in this Chapter.

The Press Notice then commented that the cases up to and including *Leonard Cheshire* had seemingly rejected this approach and instead had found that unless the private organisation was exercising statutory powers, or coercive or monopolistic powers delegated by the State, it would only fall into the scope of s6(3)(b) where its structures and work are inextricably enmeshed with the delegating state body. The concern voiced by the Joint Committee on Human Rights was that the UK would not be properly exercising its obligations under the Convention if this line of reasoning were continued.

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[154] Session 2002/3 No 6 28 February 2003 Press Notice Call for Evidence – Inquiry into the Meaning of Public Authority under the Human Rights Act
[155] As footnote 153
[156] As at footnote 154

The report was published in March 2004[157] and, in its summary, it expresses the concern that the narrow judicial interpretation of s6(3)(b) applied in *Leonard Cheshire* and other cases means that there is a flaw in the HRA and that the courts are failing to give effect to the intention of Parliament that the protection offered by the Act should be comprehensive.[158]

While it is apparent that for many of the cases in this area the discussion is about organisations that have taken over areas of opted out services, the PCC is one of the organisations outside this type and which is examined in the *Wallbank* litigation. For some of the organisations concerned in the case law, a suggested remedy of contractual agreement is mooted as an alternative to the gap in provision, but this would not be appropriate for the issues surrounding the PCC, as will be discussed. The thesis does not contest the finding in *Wallbank* that the PCC is outside the definition of a pure public authority under s6(1) but it does contend that when making policy decisions about disposal of the dead the PCC is a hybrid or functional public authority under s6(3)(b).

There is evidence in the Report of a feeling of irritation with the courts for their inability to reach a definition that coincides with that advocated by the Joint Committee conclusion:

"The Committee concludes that there is a fundamental problem not with the design of the law, but with the inconsistent and restrictive application by the courts. The Committee notes the judgement of the House of Lords in the only case it has so far determined on this matter, [here referring to *Wallbank*] which balances a narrow category of "pure" public authority against a generously wide and flexible category of "functional" public authority. This diverges from the approach adopted by the lower courts in other cases. The Committee welcomes

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[157] House of Lords Paper 39/House of Commons Paper 382 – The Seventh Report from the Joint Committee on Human Rights of Session 2003-4 on The Meaning of "Public Authority" under the Human Rights Act.
[158] As footnote 157 at Summary

the approach adopted by the House of Lords and concludes that the courts should be adopting a clear "functional" approach to the interpretation of section 6(3)(b) of the Act."[159]

The Report favours the term 'functional public authority' when discussing those organisations that may fall within s6(3)(b), preferring it to the word 'hybrid'. This is to focus the attention where the Joint Committee believes it lies, which is firmly on the activities of the organisation rather than the form or structure of it.

The Report considers the early Parliamentary debates on the Human Rights Bill stating that:

"the purpose of the 'public function' test under s6(3)(b) was to make the Act comprehensive rather than restrictive in its application, in accordance with the principle that delegation did not absolve the State of responsibility"[160]

To conclude this section, the question to be addressed is whether it is the status of the authority in question or whether it is the function(s) performed by that authority that determines whether the authority is within those intended by s6(3)(b).

### *2.3.1 Is it status or function?*

The Seventh Report[161] then considers the case law to date, which includes only one case on the meaning of a pure public authority under s6(3)(a) – *Wallbank.* The Report summed up the House of Lords decision:

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[159] As at footnote 157
[160] As footnote 157 para 18
[161] As footnote 157

"The House of Lords held that a parochial church council was not a pure public authority. The PCC's basis in legislation and the fact that it was capable of exercising statutory powers were not sufficient to ensure it pure public authority status. It was also significant that, in practice, the function of the PCC was not governmental; it was concerned with the administration of church affairs. Neither was the PCC's forming part of the established church determinative; it was held that, despite the particular recognition which establishment afforded, the Church of England remained an essentially religious rather than governmental organisation. It was also relevant that the PCC received no public funding and that its statutory powers were enforceable against a very specific category of persons"[162]

The House of Lords then went on to analyse the meaning of s6(3)(b) after dismissing the argument that, although not a pure public authority, the PCC was a hybrid for the purposes of this case and this is summarised in the report as follows:

"However, the House of Lords stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority. Lord Nicolls of Birkenhead considered that there should be a 'generously wide' interpretation of "public function" so as to further the statutory aim of promoting human rights protection, whilst still allowing functional bodies to rely on the Convention rights themselves where they acted privately. In determining what was a 'public function' there could be no single test of universal application....given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Lord Hope of Craighead noted that, in contrast to the category of 'pure' public authority, the section 6(3)(b) category of 'functional' public authority –

[162] As footnote 157 para 22

...has a much wider reach and is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of the case, a "hybrid" public authority."[163]

The Report then reviews the case law from the lower courts, where it finds that a less generous interpretation of s6(3)(b) is being given. The summary of the case law states:

"It seems therefore that the courts are likely to interpret the category of 'pure' public authority (all of the actions of which would be required to be compatible with the Convention rights) narrowly. In particular, the courts consider that they must exclude bodies capable of enforcing their Convention rights. But when it comes to interpreting the definition of a 'functional' public authority, which can be held to account under the Human Rights Act only in respect of its 'public' functions, it is not clear that the approach of the House of Lords in Aston Cantlow, which stressed the importance of analysing the character of the function concerned rather than the character of the institutional arrangements of the body performing the function, is being applied in the lower courts. This may be because the clear principles set out by the House of Lords were stated without reference to, and without express disapproval or overruling of, the earlier cases – including Poplar Homes and Leonard Cheshire, which took a predominantly 'institutional' rather than the 'functional' approach to the question."[164]

It would seem that arguments that have arisen in the case law, such as acting in the public interest in the functions being performed, have not been accepted as bringing the organisation within the ambit of s6(3)(b), although this chapter argues that it should if the wider definition that was hoped for is to be achieved. Helen Fenwick supports this argument by pointing to the differences between the lower courts' insistence on adherence to the rules that govern judicial review

[163] As at footnote 157 para 25
[164] As at footnote 157 para 39

which result in a narrower definition.[165] At this point in the history of the problems with s6(3)(b) it appeared from the case law that there was a need for direct statutory powers and institutional connection with government to bring an organisation into the scope of s6(3)(b) but, as will be argued in this chapter, both of these are present when the PCC is making decisions about disposal of the dead.

The Report moves on to give its suggested solutions to the problem including, for the purposes of this thesis, a solution around principles of interpretation of the section. It states:

"It is important that the test that should be applied under s6(3)(b) is functional rather than institutional. It is clear, under the terms of section 6, that 'functional' public authorities fall to be identified by very different criteria from pure public authorities. Whilst the latter attain their public authority status because of the type of organisation they are – by the place of the organisation within or very close to the machinery of government – the status of the latter is to be assessed without reference to the nature of the organisation itself. Section 6(3)(b) makes clear that functional public authority status may be attached to 'any person certain of whose functions are functions of a private nature.' Under section 6(5) such a body is not for all purposes a public authority and will not be so 'if the nature of the act is private".[166]

The report then gives a view of how to decide when a function is public and states that:

"The key test of whether a function is public is whether it is one for which the government has taken responsibility in the public interest. For example, although the various activities involved in care for the sick may be performed by anyone,

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[165] Helen Fenwick *Civil Liberties & Human Rights* as footnote 137 at 217
[166] As at footnote 157 para 136

the State has chosen, through a comprehensive social programme, to provide healthcare to those who wish to receive healthcare from the State rather than privately. This programme is undertaken in the public interest to provide what the government considers to be an important social service. In our view, discharge of duties necessary for provision of the government programme of healthcare is a public function. Discharge of healthcare services, in itself, is not. It is the doing of this work as part of a government programme which denotes a public function, rather than the provision of healthcare itself. In performing duties as part of the State programme of healthcare, a private organisation is assisting in performing what the State itself has identified as the State's responsibilities"[167]

By analogy, this links very neatly with disposal of the dead and therefore those making the policy affecting individuals – the PCC – can be argued to be brought under s6(3)(b) in regard to this function. This is demonstrated very clearly when the function itself is broken down into what this thesis argues are the identifiable and important points:

1. There is a common law duty to bury
2. The Church and the State work in close proximity to discharge this duty
3. Churchyards that are full cannot be used and the civic burial grounds will have to find space instead
4. Closed churchyards are handed over to the local authority for maintenance.

### *2.4 Wallbank*

Mentioned in the Seventh Report, *Wallbank* in the House of Lords was singled out for praise by government in the way that it had approached the task of providing a definition for s6(3)(b). It was said to have taken the correct approach and it was recommended within the Report that its approach should be followed.

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[167] As at footnote 157 para 140

Mr and Mrs Wallbank were owners of Glebe Farm. As the name indicates, the land was formerly church land. By a matter of historical fact, the landowner who possesses such land is required to pay for the upkeep of the chancel part of the parish church[168]. Mr and Mrs Wallbank disputed that they should have to pay the cost which amounted to several thousands of pounds, arguing, *inter alia*, that the imposition of this burden was contrary to their rights under Article 1 of Protocol 1 of the Convention. While the facts of this issue do not concern this chapter, in order to analyse the legality of the imposition of the liability, the courts had to address the issue of whether the PCC fell within the scope of s6(3)(b) of the HRA.

At first instance, the PCC was declared not to fall within the definition, but this was challenged by the Wallbanks in the Court of Appeal.[169] It is here that the first detailed discussion of how to define s6(3)(b) arose.

Sir Andrew Morritt V-C gave the single judgment. After argument from counsel that reference to Hansard under the rule in *Pepper (Inspector of Taxes) v Hart*[170] should be undertaken, the court refused stating that:

"The words are perfectly intelligible. The fact that there will be cases in which their application is problematical does not begin to bring them within the class of words for which Parliamentary debates have been held to be an admissible aid to construction." [171]

While this could be said to be a lost opportunity for some clarity in the matter, he went on to say that definition could be given from another source:

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[168] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* HC/95/03710: The Times, 21 February 2007
[169] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* [2001] EWCA Civ 713 Judgment of Sir Andrew Morritt V-C 17 May 2001
[170] [1993] 1 All ER 42
[171] As footnote 169 at para [29]

"It would be a mistake to attempt to abstract a definition. It is more useful first to look at the characteristics of a PCC and then to see how far they match the statutory concept (which is more than the two statutory words)."[172]

There is some discussion about the unique status of the Church with the implication about establishment leading to the conclusion that the Church is part of the State which leads Sir Andrew Morritt V-C to say:

"The successor of the vestry, the PCC is constituted not as a voluntary association but by law....Church of England Assembly (Powers) Act 1919, the Parochial Church Councils (Powers) Measure 1956 as amended provides for the discharge of the functions of the PCC and by s3 constitutes it as a body corporate. That a measure of its National Assembly can make every PCC a statutory corporation is an index both of the public character of the Church of England and (to some extent) of that of a PCC."[173]

This then provides a first step to addressing one of the key criteria which seems to have emerged in the case law – that the PCC has a statutory basis for its functions.

He then addresses how to define which public authority is a 'core' public authority.[174] The use of the term 'governmental function' as opposed to the other terms and phrases used in such cases, most commonly 'public function', may yet lead to expansion of the categories of organisations that would fall within the s6 definition of a pure public authority and accordingly, to those which are hybrid or functional public authorities under s6(3)(b), with the possibility of such a body or authority to acquire split roles:

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[172] As footnote 169 at para [30]
[173] As footnote 169 at para [32]
[174] The essence of this discussion is outside the scope of this thesis but this is another area that would form a useful future research area.

"Miss Asplin (counsel for the PCC) submits that the test of what is a public authority for the purposes of s6 is function based. There is plainly force in this in relation to the 'hybrid' class of public authority created by s6(3)(b), which depends on the performance of 'functions of a public nature'. But it does not follow that this governs the principal category of 'public authority', though it may well have a bearing on it."[175]

The assertion of the PCC was that the case law surrounding the definition of those public bodies that were susceptible to judicial review should apply for the purposes of defining those public authorities that would be caught under s6(3)(b). This was particularly important to the case in light of the decision in *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan*[176] where the possession of legal powers and the fact that the Committee was established by Royal Charter did not mean that the body was susceptible to judicial review. The case of *R v Panel on Take-overs and Mergers, ex p Datafin plc*[177] had previously opened the door to the possibility that such groups could be so susceptible.

Sir Andrew Morritt concluded:

"While the *Jockey Club* decision has not escaped academic criticism...the authorities as they now stand draw at least a conceptual line between functions of public governance and functions of mutual governance. Neither of these classes is defined, though each may be indicated, by the presence or absence of statutory authority; thus its absence did not protect the panel on takeovers and mergers from judicial review, and its presence does not render a limited liability company amenable to judicial review. It may be...that this analysis sits well with the concept of the state to which s6 of the 1998 Act seeks to give effect. It may also be – though there is room for debate about it – that the concept of a public

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[175] As footnote 169
[176] *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909
[177] *R v Panel on Take-overs and Mergers, ex p Datafin plc (Norton Opax plc Intervening)* [1987] 1 All ER 564, [1987] QB 815

authority is function- based. But neither proposition, in our judgment, comes to the aid of the PCC, for there is no surviving element of mutuality or of mutual governance as between the impropriator and the church in the lay rector's modern liability for chancel repairs, and no question but that the recovery of the costs of such repairs, like much else that characterises it, is a function of the PCC. The relationship in which the function arises is created by a rule of law and a state of fact which are independent of the volition of either of them.
In our judgment, it is inescapable, in these circumstances, that a PCC is a public authority. It is an authority in the sense that it possesses powers which private individuals do not possess to determine how others should act....It is public in the sense that it is created and empowered by law; that it forms part of the church by law established; and that its functions include the enforcement through the courts of a common law liability to maintain its chancels resting upon persons who need not be members of the church. If this were to be incorrect, the PCC would nevertheless, and for the same reasons, be a legal person certain of whose functions....are functions of a public nature. It follows on either basis by virtue of s6 that its acts, to be lawful, must be compatible with the rights set out in Sch 1 to the 1998 Act."[178]

This long quotation is included in full as it is supportive of the arguments within this Chapter and offers a clear exposition of how the test developed by this thesis can be founded.

The Court of Appeal would then lend support to the argument that using the Datafin test of amenability to judicial review is not conclusive of the extent of the scope of s6(3)(b) and there is acknowledgement that a function-based test is relevant. The decision of the Court of Appeal was firmly based on the conclusion that the PCC was part of a Church that was established in law, acting on statutory authority. The fact that the Wallbanks were not members of the church was also an important point that was not addressed in the House of Lords case

[178] As footnote 169 at paras [34] and [35]

(presumably because it was seen as irrelevant) but it is a point of some considerable relevance for the issues that arise from the tests applied in case law in Chapter Five relating to exhumation.

The matter was then referred to the House of Lords[179].

Lord Nicholls gave a relatively short speech which included his analysis of how the term public authority should be interpreted and again this is quoted in full to illustrate the importance of the approaches used to the development of the argument in this thesis that a new test has emerged:

"So, in the present case the statutory context is all important. As to that, the broad purpose sought to be achieved by section 6(1) is not in doubt. The purpose is that those bodies for whose acts the state is answerable before the European Court of Human Rights shall in future be subject to a domestic law obligation not to act incompatibly with Convention rights. If they act in breach of this legal obligation victims may henceforth obtain redress from the courts of this country.

Conformably with this purpose, the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression"...(He adds examples such as government departments, armed forces etc).

"A further, general point should be noted. One consequence of being a 'core' public authority, namely an authority falling within s6 without reference to section 6(3)(b) is that the body in question does not itself enjoy Convention rights. It is difficult to see how a core public authority could ever claim to be a victim...

[179] [2003] UKHL 37 at paragraph 6

Unlike a core public authority, a 'hybrid' public authority exercising both public functions and non-public functions, is not absolutely disabled from having Convention rights…

What, then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly, there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service."[180]

Lord Nicholls refers to the fact that the statute does not use the words 'governmental functions' but rather 'public functions' which, as has been said above in section 2.3.1, could have a rather wider meaning and context despite the fact that he refers to 'governmental functions' in the quotation above. Here is one clear example of how the language used by the courts has added to the difficulty of identifying with any precision which organisations may fall within the definition of s6(3)(b).

In deciding whether the PCC is a hybrid public authority (albeit for the purposes of this particular case involving liability for repairs to chancels) Lord Nicholls does refer to something that assists the theme of this Chapter:

"I turn next to consider whether a PCC is a hybrid public authority. For this purpose it is not necessary to analyse each of the functions of a PCC and see if any of them is a public function. What matters is whether the particular act done by the PCC of which complaint is made is a private act as contrasted with the

[180] As footnote 179 at para 12

discharge of a public function... As I see it, the only respect in which there is any 'public' involvement is that of marriage and burial services...."[181]

Here is an important but all too rare acknowledgement that in matters of burial or, more widely, disposal of the dead, the PCC could be argued to be acting as a public authority under s6(3)(b) and this provides support for the development of the new test later in this Chapter.

In the speech of Lord Hope, there is a different perspective on how to analyse whether the PCC is a public authority under s6(3)(b). He refers to *Clayton and Tomlinson, The Law of Human Rights,* (2000) paras 5.06 and 5.08 where such hybrids are described as " 'functional' public authorities" but he continues with the problem that the courts have been left to define on a case by case basis when this arises. Much of his speech sets out his opposition to the finding in the Court of Appeal that the Church is established by law and thereby enmeshed with the State rather than focusing on the function in question. In paragraph 61 he states that the Church has no legal status or personality, that there is no Act of Parliament that establishes the Church and refers to the case of *Marshall v Graham* where Phillimore J said "A Church which is established is not thereby made a department of the State." [182]

He dismisses the finding of the Court of Appeal by holding that the enforcement of what he calls a civil debt could not possibly be a public action. Lord Hope's speech (while Lord Scott of Foscote was dissenting on the point) offers part of a new method of investigating whether an organisation will fit within the definition of s6(3)(b) and 6(5) which is further examined in the discussion in 2.6 below.

It is important for the context of this thesis to reiterate that whether the Church, as the established Church in England, is part of the State, is a subject outside the

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[181] As footnote 179 at para 16
[182] *Marshall v Graham* [1907] 2 KB 112, 126 per Phillimore J

scope of this thesis. Were it the case that the mere fact of establishment achieved the aim, perhaps the courts would not have become so entangled with a definition of 'functional public authority'.

### *2.4.1 Wallbank ignored*

While cases subsequent to *Wallbank* have generally referred to the case in deliberations on the issue of finding a meaning of 'functional public authority', it is clear from these Court of Appeal cases that the general direction is still away from the wider context advocated in *Wallbank* and there was a return to the rather narrower interpretation of *Leonard Cheshire.* Whether this is an attempt by the courts to force the government to provide a workable definition or not, government has so far been unable to do so.

The consequence of these subsequent cases was a further intervention by government.

### *2.4.2 Government intervention 9th Report*

Following this further case law and the continuing problem of the definition of a functional public authority, the Joint Committee returned to the topic in a report in 2006-7[183]. The Report was a review of the case law following the earlier report in 2003 to see whether the perceived gap in human rights protection was closing.

In the Summary, the Committee stated that:

"....there has been little evidence of progress in the last three years to close the gap in human rights protection arising from the narrow interpretation of meaning

[183] House of Lords, House of Commons, Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act,* Ninth Report of Session 2006-7 HL Paper 77, HC 410 (Report together with formal minutes, minutes of evidence and appendices) 19 March 2007

of public authority, and makes further recommendations to bring about a solution which it now says is a matter of some urgency (paragraph 11)"[184]

The Report[185] returns to the narrow *Leonard Cheshire* definition (which it states is still being applied by the courts) that a private body is likely to be considered a 'functional public authority' if:

- Its structures and work are closely linked with the delegating or contracting out state body; or
- It is exercising powers of a public nature directly assigned to it by statute; or
- It is exercising coercive powers devolved from the State.[186]

In paragraph 16, it says:

'Beyond these categories, whether a body falls within s6(3)(b) remains extremely uncertain."[187]

The Report refers to *Wallbank*, restating that the approach of Lord Nicholls was to be preferred and stated that this was:

"...the House of Lords stressed that it was the nature of the function being performed that should determine whether a body was a functional public authority. Lord Nicholls of Birkenhead considered that there should be a 'generously wide' interpretation of public function so as to further the statutory aim of promoting human rights protection whilst still allowing functional bodies to

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[184] As footnote 183 Summary page 1
[185] The driver for the report is the fear that service providers will leave the sector if they are found to be liabile under the Human Rights Act, which does not directly affect this thesis. The Report is consulted purely for the purpose of further consideration of the meaning of a functional public authority
[186] As footnote 183 para 15
[187] As footnote 183 para 16

rely on Convention rights themselves where they acted privately. We consider that the approach of the House of Lords, in this case, would provide an effective basis for the protection of Convention rights. The analysis in this case is, we believe, preferable to that of the Court of Appeal in Leonard Cheshire."[188]

There seems little doubt that the meaning of s6(3)(b) is continuing to cause concern, particularly when the Report refers to the fact that Government advice to those who may be affected is to refer enquirers to specialist lawyers, but offering little else by way of guidance. It cannot be satisfactory that an area carrying so much potential responsibility and liability remains susceptible to lack of certainty. As Chapters Three, Four and Five will show, it is the fact that this uncertainty becomes the certainty which creates part of the labyrinthine nature of the law in this area.

### *2.4.3 Judicial review standards or a wider context?*

If judicial review case law is used to help shape what is meant by functional public authority within s 6(3)(b) of the HRA, then, as Francesca Klug indicates in her article referred to earlier,[189] it is argued that the development of the meaning of public authority under s6(3)(b) will not reflect the true intention of the legislators of the HRA. This is supported by the report from the Joint Select Committee referred to earlier.[190] This thesis argues that the purpose of a judicial review is rather different to the purpose of the HRA. Judicial review of a public body is for ensuring fair process, but actions under the Human Rights Act are for ensuring protection of Convention rights and that following the case law for administrative matters cannot give effect to the spirit of human rights frameworks and therefore the tests should not be conflated.

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[188] As footnote 183 para 17
[189] At footnote 143
[190] At footnote 157

On the other hand, Dawn Oliver suggests:

"The courts should be wary of treating services offered either to the general public or to individuals as public functions unless they involve the exercise of coercive power or special authority....."[191]

While it is plain that Dawn Oliver believes that too wide a definition of public authority would damage the civil society and potentially collapse the public/private divide, it is contended that the PCC in exercising functions such as burial contained within this chapter would fit comfortably within the definition of an authority that was exercising coercive power or having special authority.

A further paper was produced by Dawn Oliver in 2004.[192] This examined some of the early case law on the interpretation of s6(3)(b) by the courts and its focus is on the way that the courts were building the definition of 'functions of a public nature'. Her review leads her to state:

"I suggest that the only principled approach, and one which minimises (although no criteria can eliminate) anomalies and unfairnesses, is to treat as 'functions of a public nature' under s6(3)(b) of the HRA only those activities which involve the exercise by private bodies of specifically legally authorised coercion or authority over others which it would normally be unlawful for the private body to exercise. These are the features of a function that give the character 'of a public nature'".[193]

Oliver's article reviews the case law, concentrating on *Donoghue*[194], *Leonard Cheshire, Wallbank and Beer v Hampshire Farmers Markets Ltd*[195] and

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[191] At footnote 143
[192] *Public Law* 'Functions of a public nature under the Human Rights Act' Dawn Oliver (2004)
[193] As footnote 192 - Introduction
[194] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48

considers the various tests applied by the judges in each in an attempt to look for clarification of the term. The summary given in the article states that in *Donoghue*, the factors to be considered were:

"...[a] feature or combination of features which impose a public character or stamp on the act. This could include: statutory authority for what is done; the extent of control over the function exercised by a public authority; and a close enmeshing of the acts in the activities of a public body: The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public."[196]

Dawn Oliver's criticism of these factors is that they are not linked in all cases to the functions of the body, but to the institutional arrangements.[197]

With *Leonard Cheshire*, the list of factors given is:

"the extent of public funding of the activity, thought this was not of itself determinative of whether the function was public or private; whether the body was standing in the shoes of a public authority; whether the legislation provided a body with any powers; whether the body was exercising statutory powers."[198]

The article turns to consider *Wallbank*. Oliver sums up the findings of the court as that the PCC was not exercising a function of a public nature but rather enforcing a burden akin to a restrictive covenant.

In the article, Oliver states:

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[195] *R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056
[196] As footnote 192
[197] As at footnote 192 at footnote 8
[198] As footnote 192

"For our purposes, the importance of the case is that Lord Nicholls elaborated a policy in favour of a generous interpretation of function of a public nature... Lord Nicholls also identified the following "touchstones", factors that should be taken into account, for identifying functions of a public nature: the extent to which the body: is publicly funded in carrying out the relevant function, or is exercising statutory powers, or is taking the place of central government or local authorities or is providing a public service.

However, Lord Nicholls did not further elaborate on what the place of central government or local authorities was or should be, or when was the relevant time to identify that place, now or pre-privatisation, for instance. Nor did he further define public service or "function of a public nature".[199]

Turning to *Hammer Trout Farm*, Oliver states that the parties in the case agreed that the tests for judicial review and for HRA liability were, for practical purposes, the same and that the observations in *Donoghue* and in *Leonard Cheshire* were relevant to both tests. Oliver finds this a problematic approach and points to the wider context given by Lord Hope in *Wallbank* that was not used by the Court of Appeal in *Hammer.*[200]

From the case law, it is apparent that some of the confusion within this area is the fact that the language that is used interchangeably throughout. It is this interchanging language that Oliver focuses on to highlight the problems that this can bring. This is an important area to discuss within this Chapter, because interpretive exercises by the courts are necessary and unavoidable when dealing with s6(3)(b). The development of the law in this area is crucial for supporting individuals who believe that their Convention rights have been breached, as well as apportioning liability in a fair way and permitting groups such as the Church to retain 'victim' status where necessary.

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[199] As footnote 192 at footnote 17
[200] As at footnote 192 at footnote 23

### *2.4.4 The Importance of s7 and victim status*

The Ninth Report of the Joint Committee[201] also examines the arguments that were raised in *Wallbank* and commented upon in the earlier Seventh Report, in relation to the impact on organisations if the definition of 'functional' public authorities was to be widened from the *Leonard Cheshire* position when it comes to their rights under s7 HRA where victim status is set out. The Report says:

"In Aston Cantlow, the courts considered the question of how the application of the HRA to private service providers would affect the ECHR rights of private service providers themselves. Similar concerns have been raised on behalf of service providers and their representatives, and, particularly, by service providers who provide services on behalf of religious organisations. For example, the Archbishops Council argue that:

'To the extent that a private body was treated as a public authority under the HRA, it would not be a 'victim' for the purposes of the Act and would therefore not be entitled to the protection of the Convention articles itself. This would be a highly unsatisfactory situation. It would, for example, put in doubt a charity's right to bring a claim to secure the peaceful enjoyment of its property under Article 1 of the First Protocol in the event of a threatened compulsory purchase...And a religious charity, to the extent it was treated as a public authority, would not have the right to freedom of religion under Article 9, Article 14 rights protecting it from discrimination on the ground of religion in the enjoyment of its Convention rights more generally.'[202]

"We do not consider that these arguments carry much weight. Firstly, it is unlikely that domestic courts would prevent 'functional' public authorities from relying

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[201] House of Lords, House of Commons, Joint Committee on Human Rights The Meaning of Public Authority under the Human Rights Act, Ninth Report of Session 2006-7 HL Paper 77, HC 410 (Report together with formal minutes, minutes of evidence and appendices) 19 March 2007
[202] As footnote 201 at para 98 with footnote 111 Appendix 7, paras 32,33

upon their Convention rights. In Aston Cantlow, for example, Lord Hope indicated that 'pure' public authorities might be considered 'governmental organisations' with no standing in international law to bring a case under the Convention in the European Court of Human Rights at Strasbourg. Lord Nicholls also stressed that 'functional public authorities' would not be deprived of their rights to rely upon their Convention rights. Importantly, both Lord Nicholls and Lord Hope clearly recognised that the meaning of 'non-governmental' or 'governmental' body for the purposes of bringing a claim under the ECHR (i.e. the victim test in Article 34 ECHR) has its own autonomous meaning and should not be equated with the test for a 'public authority' of either type, 'pure' or 'functional".[203]

There are two further paragraphs of the Report that bear citing in full, and which support the development of the alternative test developed in this thesis. The relevance of the long quotation is given immediately following the extract. The paragraphs clearly spell out the position of the Joint Committee in relation to the arguments about potential loss of victim status under s7 for functional public authorities. It would seem evident that the Committee does not foresee a problem with an organisation or public body being designated as 'functional' and the protection of the organisation's rights, simply because by being labelled as 'functional' there is no loss of ability to make a claim. This is explained in paragraphs 100 and 101 which state:

"Second, identification in domestic law as a 'public authority' for the purposes of the HRA (or any other domestic public law purpose) will not necessarily prevent the relevant provider from being capable of consideration as a 'victim' for the purposes of bringing a claim under the ECHR (or under ss6 and 7 of the HRA). The first 'test' is a statutory one, laid down by Parliament to determine the scope of application of the HRA, a domestic statute, designed to ensure that the United Kingdom complies with its obligations in Article 1 and Article 13 ECHR. The second 'victim' test is a test primarily based in international law to determine the

[203] As footnote 201 at para 99

breadth of a right of individual petition accepted by the State. This distinction is clearly recognised by the analysis of Lord Hope in Aston Cantlow, where he compares the position in the German Constitution, which provides that individuals should have a right of action against any public authority, including either of the two main churches, where their rights are violated by that public authority. Lord Hope notes that these churches remain 'non-governmental organisations', capable of relying on their own Convention rights, despite their public status in domestic law and compares them to 'functional public authorities' for the purposes of the HRA. The two tests have different purposes, are not mutually exclusive and both should be given a broad and purposive reading.

We received a significant amount of evidence based upon the implications for the Convention rights of service providers under Article 9 ECHR and Article 14 ECHR. We have recently reported on the implications of the Sexual Orientation Regulations for service provision in light of the right to manifest a religious belief. These matters are of relevance for public policy in light of the increasing interest in the delivery of services by faith-based voluntary organisations. We reiterate that the right to manifest a religious belief – in contrast with the freedom of conscience to hold a religious belief – is not absolute, and must be weighed against the individual rights of service users. Proportionate interferences are in principle possible to protect the rights of others. Any exemption from recognition as a functional public authority for religious providers would need to be justified as necessary to meet the more narrow right of religious organisations to freedom of conscience."[204]

With these two paragraphs, the Joint Committee are able to dismiss one of the most strongly made criticisms argued by the Church of England to the possibility that *inter alia* the PCC should be seen as a functional public authority for the purposes of s6(3)(b)[205]. It relied on the fact that such categorisation would mean

[204] As footnote 201 at paras 100 and 101
[205] As footnote 201

that the Church would find itself outside of the scope of protection under the ECHR as a religious organisation. It would seem clear from the Joint Committee's point of view, that there is no reason to suppose that designation as a 'functional public authority' would lead to this conclusion.

The Archbishops Council memorandum (included in the evidence submitted to the Joint Committee) favours that the development of the definition of functional public authority is left with the courts, but as the Joint Committee point out, the response from the courts has been disappointing.

Following this Report, another case came through the House of Lords which considered this problematic area again.[206] In *YL* there were a number of interveners in the case, indicating its importance.[207] The ultimate decision was that the HRA does not apply to private care homes in England & Wales if residents are council-funded, as the private care home is not exercising a public function when it looked after people referred and funded by the local authority which, on the face of it, seems to imply that the courts are still not prepared to take the wider approach advocated by the Joint Committee. The case was decided on a 3-2 majority (Lord Bingham and Baroness Hale of Richmond dissenting) and, therefore, it is argued that it does not offer a conclusive decision as to the definition of a functional public authority. *YL* is referred to later in the Chapter for a different point.

Mark Hill, writing in an edition of the Ecclesiastical Law Journal[208], was obviously relieved at the finding of the House of Lords:

"Were it to be otherwise, and the component institutions of the Church of England were classified as 'public authorities' then, by virtue of the way the

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[206] YL (by her litigation friend the Official Soliticotr)(FC) v Birmingham City Council and others [2007] UKHL 27 on appeal from [2007] EWCA Civ 27 published on 20 June 2007
[207] The interveners were Secretary of State for Constitutional Affairs, Justice Liberty and BIHR, Help the Aged and the National Council for Ageing, Disability Rights Commission
[208] 7 Ecc LJ pg246 Editorial

Human Rights Act is drafted, those institutions would lose the status of 'victim'. This would prevent them from complaining of any violation of Convention rights, including that of religious freedom. This would have been an extraordinary conclusion since, as Lord Nicholls of Birkenhead pointed out, the Act goes out of its way in section 13 to single out for express mention the exercise by religious organisations of the Convention right to freedom of thought, conscience and religion."[209]

It is apparent that the Joint Committee do not support Hill's view and, in fact, refute that this would be the outcome, strongly dismissing the argument that the institutions of the Church would lose their victim status. Hill's relief could be misplaced, in that *Wallbank* did not rule out the possibility of the PCC being held as a functional public authority in matters relating to disposal of the dead and therefore the comments about victim status as related to the facts of the case could be distinguished. As was made clear in *Wallbank*:

"The House of Lords (with Lord Scott of Foscote dissenting on this point) also rejected an alternative argument that although a PCC was not a core 'public authority', its action in enforcing chancel repair liability was the exercise of a public function. Certain organisations, though non-governmental in essence, nevertheless perform activities of a public nature. When engaged in such activity (though not otherwise) these so called 'hybrid authorities' are required to act in accordance with Convention rights. Within the Church of England, for example, a priest when performing the solemnisation of a marriage would be so regarded. Here, [referring to Wallbank] however, the PCC was performing a private function as would any other beneficiary of a private property right. Not being classified as a public authority, the Church of England will remain free to engage in its mission and witness and, in doing so, it will be on an equal footing with all other denominations and faith communities in the United Kingdom."[210]

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[209] As footnote 208
[210] As footnote 168

It is contended that this sigh of relief from Hill made when the decision in *Wallbank* was against the finding of the PCC as a functional public authority may well be premature when applying the modern development of the definition of a hybrid public authority to the PCC in its role as policy maker in matters relating to disposal of the dead.

### *2.5 Analysis of YL*

The speech of Lord Bingham was a short approval of the speech of Baroness Hale.

Lord Bingham begins by referring to Lord Nicholls' approach in *Wallbank*, when considering whether an organisation is a functional public authority and states that this is dependant on a number of factors in each case and cannot be prescribed by a generally applicable test.[211]

He sets out that:

"...[I]t will be relevant first of all to examine with some care the nature of the function in question. It is the nature of the function – public or private? – which is decisive under the section"[212]

He then says that it is:

"relevant to consider the role and responsibility of the state in relation to the subject matter in question".[213]

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[211] *YL (by her litigation friend the Official Solicitor) v Birmingham City Council and others* [2007] UKHL 27 at paras 4 & 5
[212] As footnote 206 at para 6
[213] As footnote 206 at para 7

His list of considerations continues with the nature and extent of any statutory power or duty in relation to the function, the extent to which the state directly or indirectly regulate, supervise and inspect the performance of the function, whether the state is ultimately willing to pay for the function, directly or indirectly, and the risk that improper exercise of the function may violate an individual's Convention rights.[214]

Baroness Hale gave a full breakdown of the facts before turning to the interpretation of s6(3)(b). After reviewing the authorities that have kept the definition within its narrow *Leonard Cheshire* format, she refers to the wider test from *Wallbank:*

"The respondents argue that the concept should go no further than that (of the earlier authorities). The appellants, with the support of all the interveners including the Secretary of State for Constitutional Affairs, would go further. As Lord Nicholls of Birkenhead pointed out in *Aston*...'the phrase used in the Act is public function, not governmental function'. He went on, in paras 11 and 12: '...Giving a generously wide scope to the expression 'public function' in section 6(3)(b) will further the statutory aim of promoting the observance of human rights values without depriving the bodies in question of the ability themselves to rely on Convention rights when necessary'. What then, is the touchstone to be used in deciding whether a function is public for this purpose? Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these function are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service." [215]

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[214] As footnote 206 at para 12
[215] As footnote 206 at para 64

Baroness Hale says that the Court of Appeal was wrong to reach a different conclusion in *Leonard Cheshire* where the facts were similar to those in YL and shows her willingness to expand the narrow definition to those providers that she clearly thinks the government must have intended to come into the ambit of s6(3)(b).[216] On the tests applied, (those set out in Lord Bingham's speech above), it is relatively easy to see that, even though these tests differ from those given in *Wallbank,* it is possible to apply them to when the PCC are making policy decisions in relation to disposal of the dead, and demonstrates that the tests could be answered in the affirmative.

The majority in *YL* were not so persuaded however, and Lord Mance gives the most detailed speech but takes a very disappointingly narrow view of the tests discussed in *Wallbank*, applying an almost literal approach to the suggestions, rather than using them as guidelines, that were outlined in it. The opportunity was therefore lost to address what the Joint Committee saw as a 'gap' in human rights protection.

When considering the issue of disposal of the dead, and indeed, the way in which the graves can be formed or marked, in order to bring the decisions of each incumbent and PCC within the protections offered by the HRA is to argue that they are performing acts of a functional public authority for the purposes of s6(3)(b). To fail to establish this will mean that the Church will be able to argue that it is acting as a private provider and, therefore, its rules, regulations and decisions are not within the scope of the HRA.

*YL*, on this point, gave an opportunity to the court to embrace the wider contextual approach that was discussed in *Wallbank,* but the court did not choose that route. This decision appears to be a further example of the courts trying to explain to government that the definition should not be a matter left to the courts, perhaps as a matter of policy. Bringing potentially large numbers of

[216] As footnote 206 at para 73

organisations within the ambit of s6(3)(b) does, of course, have repercussions for those organisations that have been discussed. The main concern seems to be that many such organisations would then remove themselves from the vital arena of provision of services leaving gaps in provision. However, as Ian Leigh recognised early on in this debate, what is there to fear from being brought within the human rights framework? If policies and practices are of a sufficient standard, there is no reason to assume that being defined as a functional public authority brings any greater liability.[217]

## *2.6 Weaver*

The case of *Weaver*[218] follows a number of others and offers one of the most modern examples of the approaches adopted by the courts. The focus of *Weaver* is different to the cases that have come before in that it takes the starting point of s6(5) of the HRA in order to try and determine the question of precisely what a 'functional public authority' is. This then raises the question of whether the 'function' of an organisation is a wider concept than the 'act' which seems to indicate a particular activity of the organisation or whether again the words have been used interchangeably.

### *2.6.1 The role of s6(5) – Function or Act?*

The debate surrounding the classification of previously held private associations as bodies carrying out actions of a functional public nature has most recently been revisited in the Court of Appeal in *Weaver*, where Lord Justice Rix, Lord Justice Lawrence Collins and Lord Justice Elias heard an appeal from *London & Quadrant Housing Trust* after the housing association had been held to be a functional public authority by the High Court. Prior to this finding, housing

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[217] Note: YL has since been reversed by statute: Health and Social Care Act 2008 section 145(1) but this does not affect the analysis given in this Chapter.
[218] *London & Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587

associations that provided social housing had been held to be private in nature and therefore not within the scope of s6(3)(b).

Does this appeal show that the courts are developing a wider interpretation of s6(3)(b), perhaps because of some justified impatience at the lack of direction from Parliament? The Appeal Court found Quadrant to be a hybrid public authority in this matter by a 2.1 majority (Lord Justice Rix dissenting).
The primary question to be addressed in the appeal was whether, when terminating the tenancy of someone in social housing, housing associations in this market are subject to human rights principles. The arguments put forward and discussed in the appeal do support that the hypothesis of this Chapter is correct and that the PCC could, when creating policy for churchyards, be considered to be an organisation that falls within the scope of s6(3)(b).

Lord Justice Elias, in his judgment, stated that Mrs Weaver was arguing that she had a legitimate expectation arising out of the guidelines issued by the housing corporation. She also argued that eviction from her home would interfere with her Article 8 rights. Establishing the legitimate expectation point would depend on the housing corporation being found to be subject to judicial review of its decisions. The Article 8 argument depended on establishing that the housing corporation fell within s 6(3)(b) and that the act of terminating her tenancy was not a private act under s6(5).[219]

The housing corporation had managed to succeed on both grounds of argument at first instance, but in the High Court, there was a further discussion about the wider question about the public law status of Quadrant which resulted in the conclusion that its acts were not private in nature when terminating a tenancy and that Quadrant was a public authority under s6(3)(b) and susceptible to judicial review when exercising this authority. Quadrant then appealed this decision. Joining the appeal was the Equality and Human Rights Commission.

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[219] As footnote 218 at paragraph 2 & 3

This thesis takes these points and argues that Lord Justice Elias made a significant shift in his approach from any previous case law. He decided that in order to answer the question about whether an organisation is a 'functional public authority' the question was easy to answer. Are some of its' functions public in nature? If so, they are a hybrid authority, but the real starting place was with s6(5) and with the nature of the act complained of. This thesis argues that this demystification of the emphasis on 'public services' allows a completely different analysis to take place and has permitted the development of a new way to assess whether an authority is a functional public authority.

In giving an interpretation of s6(5), which Lord Justice Elias considers to be the crux of the argument for a definition, he states:

"Accordingly, once it is determined that the body concerned is a hybrid authority – in other words that it exercises functions at least some of which are of a public nature – the only relevant question is whether the act in issue is a private act. Even if the particular act under consideration is connected in some way with the exercise of a public function, it may nonetheless be a private one. Not all acts concerned with carrying out a public function will be public acts. Conversely, it is also logically possible for an act not to be a private act notwithstanding that the function with which it is most closely connected is a private function, although it is difficult to envisage such a case. Such situations are likely to be extremely rare."[220]

The judgment then considers both *Wallbank* and *YL* and cites these two cases as offering the analysis that is relevant to the appeal. Taking the hypothetical position, even if the relevant functions were public or private functions, was the particular act complained of an act that could be said to be public or private, is a completely different focus than that discussed in the previous case law and the

[220] As footnote 218 at paragraph 28

reasoning of Lord Justice Elias draws on the difference between the meaning of the 'function' and 'the act' complained of – are they one and the same or are they different? He then tested his analysis against the facts in *Wallbank* and found that no essential difference was made to the decision if his analysis was followed; in *YL* he showed that there was interchangeable reference to both act and function without real clarity.[221]

Lord Justice Elias feels that there is a distinct difference between an 'act' of a hybrid authority and a 'function' and sums this up in paragraph 41:

"I would draw these tentative propositions from this analysis. First, the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Second, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important. This leads to the third and related proposition, which is that the character of an act is likely to take its colour from the character of the function of which it forms part".[222]

He is, therefore, saying that the test of function may not be the proper question to focus on, but rather whether the act complained of is of a private nature under s6(5). If it is private, then the question of whether the body is a functional public authority does not need to arise. He does state, in paragraphs 55 – 57, that while the nature of the act is the primary question to be resolved, this must be considered within the context of the body's activities as a whole and that this consideration is highly material in *Weaver*. He finds that the Divisional Court gave relevant scrutiny to the housing functions of the trust as these were relevant to the question of whether the act of termination was private or not, but that this was not relevant to the question of whether the trust was a hybrid public authority.

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[221] As footnote 218 at para 39 - 41
[222] As footnote 218 at para 41

This analysis by Lord Justice Elias, while seemingly narrowing the approach down to a single or specific act performed by the organisation, does depend on taking a very wide contextual approach of the type advocated in *Wallbank* and, therefore, it is argued that the narrowing is illusory. In his conclusion, he mentions that focus on the context in which the act takes place is essential in reaching a decision:

"...the act cannot be considered in isolation"[223]

The analysis of that wider context uses the four tests that were set out in *Wallbank* and applies them to the facts of *Weaver* and finds that the tests to use when considering the act complained of are:

- public finance that allows the trust to focus on its publicly desirable objectives;
- the close working relationship with the local authority;
- the provision of social housing is a function that is governmental and achieves government objectives;
- provision of public service.

Then further considerations are examined, again with the emphasis on the contextual approach. Lord Justice Elias states that the trust is acting in the public interest and has charitable objectives which place it outside the traditional private commercial arena. He states that the legal regulation to which the trust is subject is in place to ensure that government policy is achieved and is somewhat intrusive and restrictive in part. The cumulative effect of all of this brings the trust within the scope of s6(3)(b).[224]

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[223] As footnote 218 at paragraph 66
[224] As footnote 218 paragraphs 70-72

The judgment then returns to consideration of the act complained of and whether this is a private or public act and considers that the earlier cases made rather too much of the fact that an act that came from contractual arrangements was necessarily a private act.

### 2.6.2 The contra-arguments from Wallbank, YL and Weaver

Having set out the arguments for this thesis that have appeared in the above case law, in order to produce a balanced and rational finding, this section considers the aspects of the three cases that show a challenge to the findings later in this Chapter. Each will be considered separately and a rationale for rejection of the challenges will be given before this Chapter explores whether a new direction has emerged for finding that an authority is a functional public authority for the purposes of s6(3)(b).

**Wallbank**

Lord Nicholls of Birkenhead gives the first speech and finds that the PCC is neither a core nor a 'hybrid' public authority. In paragraph 7 of his speech, he dismisses the argument that the PCC could be a core public authority, in contradiction to the finding in the Court of Appeal:

"Conformably with this purpose, the phrase 'a public authority' in section 6(1) is essentially a reference to a body whose nature is governmental in a broad sense of that expression. It is in respect of organisations of this nature that the government is answerable under the European Convention on Human Rights. Hence, under the Human Rights Act a body of this nature is required to act compatibly with Convention rights in everything it does. The most obvious examples are government departments, local authorities, the police and armed forces. Behind the instinctive classification of these organisations as bodies whose nature is governmental lie factors such as the possession of special

powers, democratic accountability, public funding in whole or in part, an obligation to act only in the public interest, and a statutory constitution..."

Within this paragraph is an indication of which factors need to be considered when assessing whether a body is a core public authority – creation by statute, regulation, public subsidy or funding and actions in the public interest. This thesis contends that these factors were linked to the finding of a core public authority as is explicitly referred to by Lord Nicholls. Nonetheless, even if they were intended to apply to a functional public authority, the PCC is created by statute, there is regulation of activities around burial and recording and the actions are clearly in the public interest. The main challenge to the thesis in these factors is public subsidy. This is developed below.

The other challenge put forward by the speech of Lord Nicholls focuses on the argument about victim status under s7 HRA and the fact that a core public authority cannot itself claim to be a victim. This has been tackled at 2.4.4 of the thesis where the thesis states that the PCC is a functional public authority rather than a core public authority which leaves actions under s7 HRA open to it.

Lord Hope divided his speech into three discrete parts, each one dealing with a different issue: firstly, retrospectivity (which does not concern this thesis); secondly, the public authority issue and thirdly, the incompatibility issue (which also does not concern this thesis). This analysis therefore considers only the second issue. Lord Hope begins his speech on the public authority issue at paragraph 34 of the judgment and deals with the s6(1) point first. This thesis does not contend that the PCC is a core public authority, but Lord Hope develops his speech to include the jurisprudence of the ECtHR and criticises the decision in the Court of Appeal for failing to take this body of case law into account.[225] The Court of Appeal was quite insistent that the HRA is a domestic statute and should be interpreted by reference to domestic principles, choosing the law of judicial

[225] At paragraph 52

review. In paragraphs 63 and 64, Lord Hope addresses the question of whether the PCC is a 'hybrid' public authority by saying:

"...As for the question whether it [the PCC] is a "hybrid" public authority, I would prefer not to deal with it in the abstract. The answer must depend on the facts of each case. The issue with which your Lordships are concerned in this case relates to the functions of the PCC in the enforcement of a liability to effect repairs to the chancel. Section 6(5) of the Human Rights Act 1998 provides that a person is not a public authority by virtue only of subsection (3) if the nature of the act which is alleged to be unlawful is private. The Court of Appeal said that the function of chancel repairs is of a public nature: [2002] Ch 51, 63, para 35. But the liability of the lay-rector to repair the chancel is a burden which arises as a matter of private law from the ownership of glebe land.

It is true, as Wynn-Parry J observed in *Chivers & Sons Ltd v Air Ministry* [1955] 1 Ch 585, 593, that the burden is imposed for the benefit of the parishioners. It may be said that, as the church is a historic building which is open to the public, it is in the public interest that these repairs should be carried out. It is also true that the liability to repair the chancel rests on persons who need not be members of the church and that there is, as the Court of Appeal observed at p 63B, para 34, no surviving element of mutuality or mutual governance between the church and the impropriator. But none of these factors leads to the conclusion that the PCC's act in seeking to enforce the lay rector's liability on behalf of the parishioners is a public rather than a private act. The nature of the act is to be found in the nature of the obligation which the PCC is seeking to enforce. It is seeking to enforce a civil debt. The function which it is performing has nothing to do with the responsibilities which are owed to the public by the State."

What these two paragraphs illustrate amounts to a challenge to this thesis, in that Lord Hope is arguing that public interest in the act complained of, has little to add by weight to the evaluation of whether the PCC is a functional public authority,

focusing instead on the specific act of recovery. This is a narrower view than this thesis contends in relation to burial which takes a broader perspective using 'function' as its basis.

Support for the view of this thesis is given in the sole dissenting speech of Lord Scott of Foscote (the case was decided on a 4 – 1 majority against the PCC being a functional public authority). At paragraph 130 he states:

"On this issue my noble and learned friends have come to the conclusion that the nature of enforcement of chancel repair liability is private. I have found this a difficult question but at the end have come to the opposite conclusion. I agree with Lord Hope that the answer to the question, whether an authority, not being a 'core' public authority, is, when exercising a particular function, exercising a function of a public nature, must depend on the facts of the particular case (para 63 of his opinion). The important facts and matters relevant to the question in the present case seem to me, in no particular order of importance, to be the following:

1. The parish church is a church of the Church of England, a church by law established.

2. It is a church to which the Anglican public are entitled to have recourse, regardless of whether they are practising members of the church, for marriage, for baptism of their children, for weddings, for funerals and burial and perhaps for other purposes as well.

3. Members of other denominations or even other religions are, if parishioners entitled to burial in the parish churchyard.

4. The church is, therefore, a public building. It is not a private building from which the public can lawfully be excluded at the whim of the owner.

5. The PCC is corporate and its functions are charitable. Its members have the status of charity trustees. Charitable trusts are public trusts, not private ones.

6. A decision by the PCC to enforce a chancel repairing liability is a decision taken in the interests of the parishioners as a whole. It is not taken in pursuit of any private interests. If it were so taken, it would I think be impeachable by judicial review."

From this set of facts, it could be argued that Lord Scott has not taken account of the factors that are mentioned in Lord Nicholls speech when assessing whether the PCC could be a public authority, but Lord Hope seems to draw a difference between assessing whether a body is a core public authority under s6(1) or a functional public authority under s6(3)(b) in paragraph 41 of his speech:

"The phrase "functions of a public nature" in section 6(3), on the other hand, does not make that assumption." (*where everything done by the core authority is public in nature)* "It requires a distinction to be drawn between functions which are public and those which are private. It has a much wider reach, and it is sensitive to the facts of each case. It is the function that the person is performing that is determinative of the question whether it is, for the purposes of that case, a "hybrid" public authority. The question whether section 6(5) applies to a particular act depends on the nature of the act which is in question in each case."

Potentially, this is what Lord Scott was setting out to achieve in his speech.

Lord Hope sets out and evaluates the statutory structure of the PCC and the statutory authority that it has to pursue a debt for chancel repairs and in paragraph 58 states that in a "very loose sense" the PCC may be a public rather than private body but he contrasts this in paragraph 50 with the requirements for victim status under s7 and article 34 of the Convention and to the expression

included in *Holy Monasteries v Greece*[226] "governmental organisations established for public administration purposes" which he states is indicative of the type of body which could not claim victim status under article 34:

"It indicates that test of whether a person or body is a "non-governmental organisation" within the meaning of article 34 of the Convention is whether it was established with a view to public administration as part of the process of government."

This thesis contends that this definition may well have application for the finding of a core public authority under s6(1) but it is too narrow for the scope of s6(3)(b) which the earlier academic discussion in this Chapter and indeed, in the earlier cited quotation from Lord Hope's speech at paragraph 41 above, indicates that a wider, fact based analysis of the function and/or act complained of is required.

Lord Rodger of Earlsferry was with the majority in finding that the PCC was not a functional public authority, with his emphasis on the fact that the Church and the PCC in turn have a religious function, not governmental function. The majority of the House of Lords had felt that categorising functions as governmental was a necessary for the finding that the PCC was a functional public authority. Lord Rodger referred to the Court of Appeal hearing in paragraph 169:

"The Court of Appeal did indeed consider that, even if they were wrong in holding that PCCs are core public authorities, a PCC should be regarded as a public authority when enforcing the common law obligation of lay rectors, who need not be members of the Church, to maintain the chancel of the parish church. Mr Beloff (counsel) reinforced this argument by pointing both to the duty of the minister under the relevant canons to hold certain services in the parish church and to the widespread belief, whether particularly well-founded or not, that any resident of a parish was entitled to be married in the church. These were

[226] (1995) 20 EHRR 1

indications of the public role of the parish church and, accordingly, of the public nature of the PCC's function in relation to the maintenance of the fabric of the church so that the minister could perform those public duties there. Enforcing the lay rectors' obligation was part of that public function."

This reference to the Court of Appeal judgment, it is argued in this thesis, supports the view of this thesis that the PCC acts in the public interest and has functions of a public nature and should, therefore, fall within the definition of a functional public authority for the purposes of s6(3)(b). Lord Rodger, however, continues in paragraph 169 and sets out why he does not agree:

"For the most part, in performing his duties and conducting the prescribed services, the minister is simply carrying out part of the mission of the Church, not any governmental function of the state. On the other hand, when in the course of his pastoral duties the minister marries a couple in the parish church, he may be carrying out a governmental function in a broad sense and so may be regarded as a public authority for purposes of the 1998 Act. In performing its duties in relation to the maintenance of the fabric of the church so that services may take place there, the PCC is doing its part to help the minister discharge his pastoral and evangelistic duties. The PCC may be acting in the public interest, in a general sense, but it is still carrying out a church rather than a governmental function. That remains the case even although, from time to time, when performing one of his pastoral duties – conducting a marriage service in the church, the minister himself may act as a public authority."

It is quite clearly stated here that the House of Lords find the PCC to be an adjunct to the minister, merely there to help him perform the required rites. As was referred to earlier in this Chapter, burial is argued to be at least on a par with conducting marriage ceremonies which are acknowledged as governmental in flavour. The PCC, in creating that regulatory framework, must then be acting in a

governmental way. This aspect of challenge to the thesis is explored in greater depth in the following analysis of YL and of Weaver.

Lord Hobhouse of Woodborough finds that there are three propositions to be established, the first of which is of relevance in this analysis: that the PCC is a public authority under either s6(1), (3) and (5). [The remaining two points are substantively relevant to the chancel repair point]. In paragraph 84, he finds that the PCC is created by statute. In paragraph 85 he states that to find the PCC to be a functional public authority requires "a two-fold assessment, first of the body's functions, and secondly of the particular act in question". He dismisses that the PCC is a core authority and that is not contended in this thesis, relying again on the definition from *Holy Monasteries.* He then moves to consider whether the PCC is a "hybrid" public authority by evaluating the act (collection of a civil debt for repair to the chancel) and finds that act to be private in nature. In paragraph 86, he poses a challenge to the thesis:

"...Thus the priest ministering in the parish may have responsibilities that are certainly not public, such as the supervision of the liturgies used or advising about doctrine, but may have other responsibilities which are of a public nature, such as responsibility for marriages and burials and the keeping of registers. But the PCC itself does not have such public responsibilities nor are its functions public; it is essentially a domestic religious body. The fact that the Church of England is the established church of England may mean that various bodies within that Church may as a result perform public functions. But it does not follow that PCCs themselves perform any such functions. Even the monasteries of the established church in Greece, which has strong legal links with the state, such as the presence of representatives of the state on its governing body and direct financial links with the State, has been held not to be an emanation of the state for the purposes of the Convention...."

There are two points to make in rebuttal of these challenges. Firstly, the PCC does have responsibility, along with the incumbent, in relation to burial and the management of the churchyard as is explicitly explored in Chapters Three, Four and Five of this thesis. Secondly, as outlined above, reference to the *Holy Monasteries* case is more appropriate when dealing with s6(1) – core authorities – rather than to those bodies which may be brought under s6(3)(b).

Lord Rodger of Earlsferry, in paragraphs 149 to 152 sets out his objection to the finding by the Court of Appeal that the PCC were created by statute by drawing a difference between legislation created in Parliament and the creation of PCCs by Assembly Measure:

"On closer examination, therefore, the process by which the PCCs were constituted and received their powers is really very different from the way in which a public body such as the Equal Opportunities Commission is created and given its powers by statute. In a case of that kind, the fact that the body owes both its existence and its powers to statute may well indicate that it has been called into existence to carry out some function that relates to the government of the country in a broad sense. By contrast, the PCCs were not constituted by statute but by the Church. They then became bodies corporate and received their powers not by virtue of an Act of Parliament but by virtue of an Assembly Measure, having the force and effect of an Act of Parliament. These factors suggest that, in reality, PCCs were constituted by the Church to carry out functions to be determined by the National Assembly, later the General Synod, of the Church."

This thesis argues that this difference is artificial. The Church of England retained the power to legislate for itself in Parliament because of its historic position in the machinery of state. A Measure has all the force and effect of Parliamentary legislation and binds all who may fall within its ambit – be they Church members or not. Measures can be applied in the secular as well as consistory courts and it

is therefore difficult to understand why Lord Rodger is making the distinction. The basis for the Parochial Church Councils (Powers) Measure 1921 comes from a Parliamentary statute – Church of England Assembly (Powers) Act 1919.

In paragraph 156 of the judgment, Lord Rodger moves to consideration of the lack of a public nature to the functions of the PCC:

"The key to the role of the PCC lies in the first of its general functions [set out by Lord Rodger in paragraph 155 and taken from Parochial Church Council (Powers) Measure 1956 s2(2)]: co-operation with the minister in promoting in the parish the whole mission of the Church. Its other more particular functions are seen as ways of carrying out this general function. This mission of the Church is a *religious* mission, distinct from the secular mission of government, whether central or local."

Lord Rodger also highlights in this paragraph that even though the Church has links with the State, those links do not include any funding. It is perhaps an interesting point that state funding, while mentioned by Lord Nicholls, was not given more of a priority in the finding against the PCC being a functional public authority in the other speeches. Potentially, this is because of the nature of the PCC but as will be explored below, public funding or subsidy becomes more of a key challenge to this thesis in *YL* and *Weaver*.

**YL**

*YL* was decided on a 3 to 2 majority against the body in question being categorised as a functional public authority. In this case, the subject matter was a decision to terminate a resident's agreement to occupation of a care home and while the subject matter is not related to this thesis, the deliberations of the House of Lords covers much of the same ground as the House in *Wallbank*. However, the case also gives the opportunity to develop certain of the *Wallbank*

tests, this opportunity being taken by the dissenting two Lords – Lord Bingham and Baroness Hale. Within the judgment, the factors to be considered when evaluating whether a body falls within s6(3)(b) are arguably clearer than they were in *Wallbank* with the House having the advantage of the *Wallbank* discussions to assist them.[227]

In paragraph 4 of his speech, Lord Bingham states:

"Section 6 is a provision in a domestic statute, to be construed as such. Its meaning is not to be found in the Convention. The provision is found in a measure intended to give effective domestic protection to Convention rights as defined in a scheduled to the Act. It is accordingly appropriate to give a generously wide scope to the expression "public function" in section 6(3)(b), as Lord Nicolls of Birkenhead observed in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, para 11."

Lord Bingham continues in paragraphs 6 – 11 to set out the factors that he considers will be relevant to take into account in the assessment as to whether a body falls within the scope of s6(3)(b). These are:

- The nature of the function in question – is that public or private.
- The role and responsibility of the state in relation to the subject matter in question – it will be necessary to consider the nature and extent of the public interest in the function considered.
- The nature and extent of any statutory power or duty in relation to the function in question
- The extent, to which the state, directly or indirectly, regulates, supervises and inspects the performance of the function in question and imposes

[227] *YL (by her litigation friend the Official Solicitor) (FC) (Appellant) v Birmingham City Council and others (Respondents)* [2007] UKHL 27 at paragraph 5 as per Lord Bingham of Cornhill

criminal penalties on those who fall below publicly promulgated standards in performing it.

- Whether the function in question is one the state would assume and pay for either directly or indirectly
- The extent of the risk, if any, of improper performance creating a breach of an individual's Convention rights

He also states that it will be 'wholly or largely' irrelevant whether the body in question is open to judicial review stating that s6(3)(b) has a wider scope. Lord Bingham finds that the care home at the centre of this case is within the definition of a functional public authority in a succinct speech which draws heavily on the vulnerability of the people for whom the home provides and the social necessity of its role.

Lord Scott of Foscote finds the opposite on the grounds that the care home is carrying on a 'socially useful business for profit' and it is neither a charity nor a philanthropic organisation. The essence of this argument builds on the point in *Wallbank* focused on the importance of identifying some public funding or subsidy and a public interest in the service provided before a body can be drawn into the scope of s6(3)(b). Echoing Dawn Oliver, earlier cited in this Chapter, Lord Scott is concerned about where the liability will end. In paragraph 30:

"As it seems to me, the argument based on the alleged similarity of the nature of the function carried on by a local authority in running its own care home and that of a private person running a privately owned care home proves too much. If every contracting out by a local authority of a function that the local authority could, in exercise of a statutory power or the discharge of a statutory duty, have carried out itself, turns the contractor into a hybrid public authority for section 6(3)(b) purposes, where does this end? Is a contractor engaged by a local authority to provide lifeguard personnel at the municipal swimming pool a section 6(3)(b) public authority?...."

At paragraph 32:

"It has been suggested that vulnerable elderly residents in care homes are in need of the extra protection that potential liability of private care home managers under section 6 of the 1998 Act would provide, and that, section 6(3)(b) should be given a wide and generous construction accordingly. There is nothing, in my opinion, in this suggestion...."

These two partial paragraphs indicate that there is little sympathy with the view expressed in this thesis that public interest or a greater social argument carries much if any weight. This thesis strongly argues in Chapter Three that the importance of social and historical significance in a headstone or other grave markers is a key element of bringing the PCC within the ambit of s6(3)(b). Below in the analysis of *Weaver* this thesis is able to demonstrate how the factor which becomes identified as 'providing a public service' can support the conclusions that are drawn.

Baroness Hale asserts in paragraph 61 that although European case law can assist in the assessment of which bodies will be brought into the ambit of s6(3)(b):

"This is a domestic law concept which has no parallel in the Convention jurisprudence although extracts quoted above give some indication of why it is in the act. It is common ground that it is the nature of the function being performed, rather than the nature of the body performing it, which matters under section 6(3)(b)..."

In paragraph 62, Baroness Hale discusses the difference between public functions and private acts and says that "the contrast is between what is 'public' in the sense of being done for or by or on behalf of the people as a whole and

what is 'private' in the sense of being done for one's own purposes." Baroness Hale draws on Lord Nicholls' speech in *Wallbank* at paragraphs 11 and 12 and specifies that the wording of the act is public function, not governmental function and in specific reference to the words of Lord Nicholls repeats:

"...Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service".

This is a breathtakingly wide interpretation offering a variety of factors to consider with the use of the word 'or' instead of 'and'. Applied to this thesis, it is much clearer that the PCC could indeed be brought into the definition of a functional public authority as even if there is no public funding involved in burial in churchyards per se (although see later in this Chapter), the PCC is arguably taking the place of local authorities and providing a public service.

Lord Mance introduces another possible challenge to this thesis when he discusses the liability of the State when it has delegated responsibility for a function to a private body. The obvious challenge here is that the State has not delegated to the Church in respect of burial. If anything, the 'delegation' has been the other way around. Historically, the Church was the major provider of burial services (dissenter churches would also offer such a service) to the public. Churchyards are generally small parcels of land and over time, they could not cope with public demand. Eventually the State had to step in and provide additional and alternative services, while not entirely replacing the private provider. Does this 'reverse delegation' negate the hypothesis put forward? It is argued strongly that it does not. Many other services which are provided by bodies that do fall into the scope of s6(3)(b) existed in some private capacity before the State stepped in – one example is care homes. The State assumed a responsibility to meet social expectations and to give effect to government

policies. That the State now needs to re-delegate back to the private sector has not impeded the development of s6(3)(b). In paragraph 95, Lord Mance refers to the case of *Costello-Roberts v United Kingdom*[228] where an independent school was operating a corporal punishment regime. He states:

"The court concluded however that in "the particular domain of school discipline, the treatment complained of although it was the act of a headmaster of an independent school, is none the less such as may engage the responsibility of the United Kingdom under the convention if it proves to be incompatible with article 3 or article 8 or both." The basis was said to be the State's duty to secure to its children their right to education, including an appropriate school disciplinary system, which "cannot be said to be merely ancillary to the educational process", the co-existence of independent and state schools, in circumstances where the right to education is guaranteed equally to pupils in both and the State's inability to "absolve itself from responsibility by delegating its obligations to private bodies or individuals."

This analogy has some sympathy with the PCC and the State. If the Church can be deemed independent, it co-exists alongside the State system for burial. There is a duty on the Church and the State to dispose of the dead and should the Church be unable to bury a deceased person, the State must step in.

Lord Neuberger has a focus on the difference between 'acts' and 'functions'. In paragraph 130, he states:

"Section 6 is, at least in some respects, not conspicuous for the clarity of its drafting. Thus, there was some debate before your Lordships as to whether there was a distinction between "acts" and "functions" in the section. In my view, both as a matter of ordinary language and on a fair reading of the section, there is a difference between "functions", the word used in section 6(3)(b), and "acts", the

[228] (1993) 19 EGRR 112 as summarised by Lord Mance at paragraph 95

word used in section 6(2), (5) and defined in section 6(6). The former has a more conceptual, and perhaps less specific meaning than the latter. A number of different acts can be involved in the performance of a single function...."

This is undoubtedly correct and is the agreed position. However, in relation to whether s6(3)(b) applies in *YL* Lord Neuberger states at paragraph 135:

"It was also said that it is in the public interest that the old and inform are cared for, and that there are charities which offer the sort of services which are homes provide. In my opinion, that feature does something, but relatively little, to justify the view that section 6(3)(b) applies where care and accommodation are provided in a privately owned care home. The fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature...."

In paragraph 136:

"It was also suggested that the fact that it will almost always be the vulnerable who are provided with care and accommodation indicates that such provision falls within section 6(3)(b)...."

These two points are an indication that public benefit and/or public interest are still difficult tests to overcome in tipping the balance in favour of a body being within the definition of s6(3)(b) and is a challenge to the thesis which asserts the importance of public interest in headstones or grave markers. Were the thesis only predicated on this public interest aspect, it could be argued to be flawed, but as has been shown, this is only one of a number of factors which indicate that the PCC, in matters of disposal of the dead, can be within the scope of s6(3)(b).

In paragraph 155, Lord Neuberger states:

"For the reasons so far given, I consider that each factor, at least if taken individually, would be insufficient to render the provision of car and accommodation by Southern Cross in its care home to Mrs YL a "function of a public nature". However, it must be right to consider the effect of the various factors together, and, indeed, the broader policy context. There is no doubt that, if one takes the various factors which I have summarised together, rather than examining the effect of each one separately, Mrs YL's case looks significantly stronger, but I still do not find it very persuasive. Each factor has some force, but for the reasons already given, not very much force, at least in my opinion. Without some other, more powerful, wider, or policy, consideration to support the contention that s6(3)(b) applies, I do not consider that the combination of the factors so far discussed serves to establish that Southern Cross is performing a function "of a public nature" in providing care and accommodation to Mrs YL in its care home."

This thesis contends that it does supply a more powerful, wider, policy consideration to support the contention that s6(3)(b) applies. The socio-historic benefit of public reflection on the dead will serve future generations and provide identity, knowledge and understanding of the people resting there, as is developed in Chapter Three of this thesis.

Lord Neuberger deals with two other challenges to the thesis from the case law. The first relates to public funding or subsidy, in whole or in part. The second relates to statutory or regulatory power in the hands of the body in question.

At paragraph 165 of the judgment, Lord Neuberger turns to public funding:

"As already mentioned, it seems to me much easier to invoke public funding to support the notion that (sic) service is a function of "a public nature" where the funding effectively subsidises, in whole or in part, the cost of the service as a whole, rather than consisting of paying for the provision of that service to a

specific person. Section 6(3)(b) is primarily concerned with functions and what is entailed with them (eg statutory powers and duties) rather than to whom they are provided, or indeed who provides them. Thus, it appears to me to be far easier to argue that section 6(3)(b) is engaged in relation to the provision of free housing by an entity all of whose activities are wholly funded by a local authority, than it is in relation to the provision of housing by an independently funded entity to impecunious tenants whose rent is paid by the local authority."

Of course it would be a relatively simple matter where the whole service is funded publicly to point to such a body falling within s6(3)(b) or even to s6(1), but for this thesis the issue of public funding is problematic. Instead of looking for the direct funding that is indicated in this judgment, the research has had to look at indirect forms of public money being incorporated in the function of disposal of the dead. This is dealt with later in this Chapter.

In paragraph 166:

"In my judgment, it is of particular importance in relation to the issue which we have to decide that a proprietor of a care home is not given significant, or indeed (as far as I am aware) any, coercive or other statutory powers, over its residents, whether they are in the care home pursuant to an arrangement with a local authority or otherwise. If proprietors had such powers, that would be a powerful reason for justifying the conclusion that a function was "public in nature".

This is the final challenge from *YL* that has the potential to impact on the thesis. The challenge can be rebutted in the words of Lord Neuberger in the very next paragraph 167:

"I accept that the fact that some statutory power is attached to a function may not always determine that the function is "of a public nature". Indeed, if it were, *Aston Cantlow* [2004] 1 AC 546 may well have been differently decided...

At the conclusion of the analysis of *YL* it then appears that statutory regulation, public funding or subsidy either in whole or in part, the nature of the function, and whether the act complained of is of a private nature are the primary tests to establish. The public interest which appeared more in *Wallbank* was less successful in *YL* but this appears to be because of the way it was argued earlier in the litigation – where it seems to have conflated with the provision of a public service. This is explored further in the analysis of *Weaver* which now follows.

**Weaver**

Weaver was decided in the Court of Appeal. It was decided on a 2 – 1 majority (Lord Justice Rix dissenting) for the authority being a functional public authority. The facts are not, again, directly related to this thesis, but the discussion of the scope of s6(3)(b) makes the judgment relevant and helps to clarify the direction of the courts in attempting to define when a body will fall within the section.

Lord Justice Elias states in paragraph 8, that the provision of social housing is government policy and social housing providers carry out that policy. In paragraph 9, he indicates that the registered social landlord (RSL) in this case and all others are regulated by the Secretary of State. In paragraph 12, the funding of RSLs from governmental bodies is mentioned. These points pick up on the factors mentioned in *YL.* In paragraphs 10 – 18, he sets out the statutory framework and powers for RSLs, again an indication that the factors set out in *YL* have been accepted as necessary for the assessment of whether the body in question is a functional public authority under s6(3)(b).

In paragraphs 27 and 28 he states:

"The effect of these provisions [section 6(1), (3), (3)(b), and (5)] is that some bodies, conventionally referred to as "core authorities", are public authorities for

all purposes...subsection (5) is inapplicable to such bodies. By contrast, subsection (3)(b) identifies and brings within the scope of the Act what is termed a "hybrid authority" i.e. one which exercises both public and private functions. Where its acts are in issue, the relevant question is whether the nature of the act is private. If it is then subsection (5) provides that it will not be deemed to be a public authority with respect to that particular act.

Accordingly, once it is determined that the body concerned is a hybrid authority – in other words that it exercises functions at least some of which are of a public nature – the only relevant question is whether the act in issue is private...."

In paragraph 34, Lord Justice Elias then refers to both *Wallbank* and *YL* and states:

..."The real issue lies not in identifying the principles, but rather in determining the result of their application to the particular circumstances of this case."

In paragraph 35, he then sets out what he thinks the principles from the two cases are which amount to nine in number. They are summarised as:

- S6 exists to identify the authorities whose functions engage the responsibility of the UK before the ECtHR
- That the phrase 'governmental' function should be read as per the statute as 'public' function
- That a factor based approach should be used – the weight of each factor may vary from case to case
- That a broad or generous interpretation should be used for s6(3)(b)
- The extent of public funding
- Statutory or special powers given to the authority in question
- That the body in question is standing in the shoes of the State

- That the body is providing a public service – not to be confused with something that is in the public interest or for public benefit

In paragraph 36, Lord Justice Elias refers to the factors that will have little, if any, weight in making the determination. These are summarised as:

- A function carried out by a public body does not mean that it is a public function when carried out by a hybrid
- It is of no real relevance if there is detailed statutory regulation
- Amenability to judicial review has limited weight
- He dismisses *Donaghue*[229] for defective reasoning – no factor test was applied

In paragraph 39, Lord Justice Elias indicates that the difference between 'function' and 'act' was not really acknowledged by all of the House of Lords in *Wallbank* but that he finds this a crucial part of the test. In paragraph 41, this is developed:

"I would draw these tentative propositions from this analysis. First the source of the power will be a relevant factor in determining whether the act in question is in the nature of a private act or not. Second, that will not be decisive, however, since the nature of the activities in issue in the proceedings is also important. This leads on to the third and related proposition, which is that the character of an act is likely to take its colour from the character of the function of which it forms part."

This thesis contends that here, Lord Justice Elias is developing more of the spirit of *Wallbank* in taking the emphasis away from statutory power or other prescribed factor and moving it more towards the nature of the thing done.

[229] *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48

Paragraphs 51 – 57 cover the Divisional Court hearing and the analysis undertaken there. Lord Justice Elias is very clear that once the concession had been made at the Divisional Court that the RSL was a functional public authority, the only question that should have been addressed was – was the act complained of a private act? He states in paragraph 57:

"...The important point, in my view, is to consider the act of termination in the wider context of the housing function being carried on by the Trust, whatever shorthand is used to describe that context."

After reviewing the facts against particularly *YL* Lord Justice Elias reaches his conclusions in paragraphs 66 – 84 where he reviews the issues against the nine factors he earlier identified and as are summarised above. He states that there is a significant reliance on public finance to enable the Trust to meet its publicly desirable objectives (para 68). The Trust operates in close harmony with the local authority, assisting the local authority to meet its objectives (para 69). The Trust is meeting governmental objectives to house those that need subsidy (para 70). The Trust is acting in the public interest and has charitable objectives and regulation of the Trust is designed to meet government objectives and is intrusive in nature (para 71). When taken cumulatively, these factors give a public flavour to the actions and support the wider construction of s6(3)(b) indicated in *Wallbank* and *YL* (para 72). Lord Justice Elias makes it clear that none of the factors individually would work on their own to find the Trust is within the scope, and for this thesis, as is summarised in the next section, it can be demonstrated that the PCC can be drawn into the definition with the exception of direct public subsidy. That matter is dealt with in the next section.

In paragraphs 73 – 79, Lord Justice Elias' focus is on the act in question – here a termination notice. He indicates that on a certain reading of both *Wallbank* and more particularly *YL* (which also involved a termination notice) it would appear that the act was a private one but in paragraph 75 he states:

"In my judgment, that would be a misreading of those decisions. The observations about private acts in *Aston Cantlow* and *YL* were in a context where it had already been determined that the function being exercised was not a public function. I do not consider that their Lordships would have reached the same conclusion if they had found that the nature of the functions in issue in those cases were public functions."

This adds considerable support to this thesis, which argues that the PCC are undertaking a public function in disposing of the dead. In *Wallbank* all their Lordships are quite explicit in saying that in relation to the act of recovering a civil debt, the PCC are acting in a private capacity but they allude to the fact that in other functions, the reverse may be true.

Lord Collins of Mapesbury concurs with Lord Justice Elias so the section will turn to the dissenting judgment of Lord Justice Rix.

Lord Justice Rix finds himself 'perplexed' by the case (para 104, 115).[230] His starting point for trying to understand it was to look at the Strasbourg and domestic case law. He takes reference from *Wallbank*[231] and states in paragraph 117:

"As Lord Hobhouse observed in the same case (at para 87), "The relevant concept is the opposition of the "victim" and a "governmental body".

He finds that there is no case law from Strasbourg that helps so he turns to the domestic case law to assist him in seeing how a multi functional test should be applied. He takes a chronological approach which acknowledges that the law is

[230] There was some peculiarity about how the case came to appeal at all. The Trust had wanted the appeal to help it understand why it was a functional public authority and the original claimant had no remaining interest in the case.
[231] Speech of Lord Hobhouse in particular

in development in this area. On the question of public funding, in paragraph 127, Lord Justice Rix refers to the speech of Lord Woolf in *R (Heather) v Leonard Cheshire Foundation* [2002] All ER 936 where Lord Woolf stated:

..."While the degree of public funding of the activities of an otherwise private body is certainly relevant as to the nature of the functions performed, by itself it is not determinative of whether the functions are public or private..."

Lord Justice Rix notes from *Wallbank* that when considering whether the PCC was a functional public authority, their Lordships seemed to focus on the particular act rather than the functions of the PCC in order to reach a determination so the focus was more on 6(5) than on 6(3)(b) which he contrasts with *YL* where he finds the focus is firmly on s6(3)(b) rather than on 6(5). He then analyses both minority and majority speeches in order to assist him understand the 'factorial' approach.

In his conclusions he has 10 points for discussion which lead him to the opposite conclusion to Lord Justice Elias and Lord Collins. It is this part of his judgment in which challenges to this thesis can be located.

In paragraph 148 he states:

"First, Strasbourg jurisprudence does not suggest that the Trust is amenable to Convention liability or that the United Kingdom's liability can be invoked in respect of such an act."

This is a surprising finding when earlier in his judgment, as referred to above, he found no case law of any relevance from Strasbourg.

In paragraph 149, Lord Justice Rix states that the domestic authorities do not support the case. He points to *Wallbank* as holding that s6(5) is an important part

of the analysis, which he finds lacking in the case in hand and to *YL* as showing very strong statutory underpinnings, lacking in the case in hand.

Paragraphs 150 – 153 cover Lord Justice Rix's concern that the wider test under s6(3)(b) has not allowed proper consideration of the effect of s6(5) on the term 'management' of the property. He appears to be dissatisfied that when compared to the analysis undertaken in *YL* the act of termination has been lost as a relevant factor because of the assumption that 'management' is a catch-all term which includes the act of termination by implication because the approach has been to find a public function via s6(3)(b). This is in clear opposition to the statements by Lord Justice Elias that the intention of Parliament in drafting s6(3)(b) was to draw in those authorities whose functions were of a public 'flavour'. Lord Justice Rix may have a point in this argument as *YL* did come to the opposite conclusion to this case on a similar point by evaluating 6(5). This is not a fundamental problem for this thesis, based as it is on how the court in question chose to evaluate the nature of the Trust but it does highlight the potential confusion in applying a 'function' based test together with an 'act' based test when the two seem to be fluid and rather difficult to distinguish. For this thesis, focus on the tests for 6(5) taken in the context of the PCCs overall function of burial has shown a possible new direction for such assessments.

Lord Justice Rix raises a point in paragraph 155 that could be seen to challenge the findings of this thesis:

"Seventhly, there is nothing about the nature of the Trust, or the typical RSL, to promote the concept that in the everyday administration of its tenancy agreements it is performing functions of a public nature. Although it is a charity, it has independent corporate status and is conducted by an independent board of directors and owned by its private shareholders. As a charity, it operates for the public benefit rather than for the commercial profit, but its operations are essentially in the private and business world, rather than in the world of

government, for all that. Richards LJ in the court below and Elias LJ in this court consider that the Trust's charitable status places it outside the sphere of commercial providers. In my judgment, however, the world of charity is essentially private, and, although a charity does not operate for profit in the ordinary way, nevertheless when its function is to provide a service such as housing in return for the payment of rent and to do so on a substantial scale (the Trust owns 33,000 dwellings), it has to operate according to (for want of a better word) business disciplines or else it is very likely to fail. It seems to me that what Lord Neuberger said about charities at para 135 of *YL* puts them into a private world rather than into the world of those performing functions of a public nature..."

Lord Neuberger had said:

"It was also said that it is in the public interest that the old and infirm are cared for, and that there are charities which offer the sort of services which care homes provide. In my opinion, that feature does something, but relatively little, to justify the view that section 6(3)(b) applies where care and accommodation are provided in a privately owned care home. The fact that a service can fairly be said to be to the public benefit cannot mean, as a matter of language, that it follows that providing the service itself is a function of a public nature. Nor does it follow as a matter of logic or policy. Otherwise the services of all charities, indeed, it seems to me, of all private organisations which provide services which could be offered by charities, would be caught by s6(1). It is in the public interest that health, educations, housing, indeed food, is available to everyone. That cannot mean that those who provide such commodities on a commercial basis (including private hospitals, private schools, private landlords, and food retailers and distributors) therefore fall within the scope of s6(3)(b)."

In *Wallbank* it was argued that the charitable status of the PCC could be a factor taken into account in the assessment of whether it falls into the scope of s6(3)(b).

There are some rebuttals that can be advanced to this argument from Lord Justice Rix. Firstly, the PCC may well have charitable status, but is in a markedly different position to the corporate feel of the charity in *Weaver.* The PCC does not inhabit the business world, having a more societal and philanthropic basis to its everyday functions. It does not operate for profit and does not have a commercial aspect which allows this point to be distinguished. A PCC would not fail in the way indicated by Lord Justice Rix. As for the reference to Lord Neuberger's speech in *YL* here is an example of where the courts have allowed the tests for s6(1) and s6(3)(b) to become conflated when it is apparent from *YL* and from *Wallbank* that there is a substantial difference in the tests to be applied under s6(1) and s6(3)(b). This thesis argues that Lord Justice Elias has taken the correct approach to that interpretive exercise.

Lord Justice Rix continues in paragraph 155:

"To similar effect is Lord Mance at para 110 of *YL* where he quotes Lord Woolf CJ in *R (Heather) v Leonard Cheshire Foundation* at para 15:

'If the authority itself provides accommodation, it is performing a public function...However, if a body which is a charity, like LCF, provides accommodation t those whom the local authority owes a duty under s21 in accordance with an arrangement under s26, it does not follow that the charity is performing a public function.'

There is no suggestion in *YL* or *Heather* that a charity is other than in the private world."

This is correct on the surface, but all Lord Woolf is stating is that the tests of public function and, if found in the affirmative, the act complained of needs to be undertaken rather than the tacit assumption that such a link with a local authority would mean the charity would be within the scope of s6(3)(b). As has been

demonstrated above, the parallels between the charity in *Weaver* and the PCC are very few.

In paragraph 156 and 157, the question of public subsidy is raised. Lord Justice Rix states that both in the lower court and this one, public subsidy is a significant factor in determining that everything done by an RSL around social housing is a public function. This point is not a strong contra-argument because as has been made clear above, while public subsidy is argued as one factor that may indicate that a particular body is within the scope of s6(3)(b), it is neither sufficient nor necessary to that finding on its own. Interestingly, Lord Justice Rix ends paragraph 157 by stating:

"...Whereas I accept that public finance is an element in the equation, I would be sceptical about allowing it, or any particular form of it, to play a dominant role in the assessment."

This view offers support to the argument contained within this thesis and which is explored in the following section.

Lord Justice Rix concludes his speech with reference to public policy and public interest. He finds that Lord Neuberger in *YL* at paragraph 152 holds that because of the competing views around policy, the point is neutral and does nothing to strengthen the case. He also dismisses public interest (which he calls public welfare concern) as being covered by statutory regulation, public subsidy, charity status and the links with local authority. This is, of course, not the approach taken by Lord Justice Elias who finds the public policy and public interest to have become immersed in the activities of the Trust. Lord Rix concludes by finding the act of termination a private act under 6(5) and therefore the Trust is not a hybrid or functional public authority.

This section has involved a very detailed analysis of three cases in order to demonstrate the contra-arguments to the propositions put forward in this Chapter of the thesis. The arguments have been rebutted strongly and in the next section, this thesis will summarise the key tests from the speech by Lord Justice Elias and demonstrate how this thesis has been able to develop a clearer way to determine whether the PCC should be found to be a functional public authority for the purposes of s6(3)(b) when it is dealing with disposal of the dead.

At this point in the evaluation of the effect of *Weaver*, consideration should be given as to how this decision affects the PCC in relation to its role in disposing of the dead.

**Public subsidy/funding**

This area remains one of the substantial challenges to the hypothesis in this Chapter, in that the PCC are not directly subsidised by the public purse being, as it is, a council set up at the grass roots level of the Church structure and dependant on diocesean funds for the work that it undertakes. As has been clearly stated in Weaver, the matter of the source of subsidy is still held to be a crucial one that may affect the finding of whether the body is a functional public authority for the purposes of s6(3)(b).

It appears from Lord Justice Elias's conclusion that the fact there is no obvious public subsidy could be fatal to the arguments put forward in this Chapter:

"The determination of the public status of a body is fact sensitive. For example, a potentially important difference is that apparently some RSLs have not received any public subsidy at all, and arguably, and I put it no higher than that – their position could be different."[232]

[232] As footnote 218 paragraph 84

This thesis argues that these words of Lord Justice Elias indicate that although public subsidy or funding would be strongly indicative of the finding that the organisation was a functional public authority, what Lord Justice Elias says demonstrates that it is neither a sufficient condition nor a necessary condition to that finding. This thesis, however, takes the position that a source of public funding needs to be identified within the wider context aspects of the function test. For the PCC, the function that is being examined is disposal of the dead, which includes the management and maintenance of the churchyard in order to be able to carry out this function. In this regard, there is a stream of public money that can be identified as relevant to the function in two particular situations.

Firstly, in Chapter Three this thesis will argue that there is an identifiable stream of government funding subsidy to be found in the fact that when a churchyard is closed, there is statutory authority for it to be handed back to the local authority for maintenance thereafter. While the legal basis for this arrangement is challenged in the Chapter, the arrangement is currently in place.

Secondly, financial assistance with maintenance to certain churchyards is also granted through the Department of Culture, Media and Sports which fulfils a publicly desirable outcome which is that churchyards are not left in disrepair to attract undesirable public behaviour or criminal activity and that heritage is preserved. There is a further publicly desirable outcome which is explored later in this Chapter which is the socio-historical benefit of the societal records that churchyards and, more particularly, the headstones or monuments bring.

The tests from *Weaver* are analysed and applied to the PCC below.

**Close working relationship with the local authority**

This test from *Weaver* is easily met. While there is a common law duty on the Church to bury anyone found dead in the parish, this responsibility is often assumed by the local authority. It is clearly in the public interest to dispose of the

dead quickly and efficiently and negotiation about the responsibility for doing so between the parish church and the local civic burial ground takes place as a matter of course. There is also the facility under statute for the PCC and incumbent to hand the churchyard over to the local authority for maintenance once the churchyard is deemed to be closed.

**Statutory regulation**

This requirement, it is argued, is met by the Parochial Church Council (Powers) Measure 1956 that creates and empowers PCCs and which was referred to earlier in this Chapter and in the Introduction to this thesis. Measures are held to be primary legislation, taken through Parliament by the Ecclesiastical Committee. While there may be some argument that this places Measures into a category outside of public law, Measures are deemed to be the law of the land, to be treated as any other primary statute, and part of general Parliamentary business.

**PCC taking the place of government or local authorities**

This requirement has been said to mean that the body in question should be 'standing in the shoes of government' (in much of the case law earlier referred to but particularly in *Weaver*). There is a common law duty to bury the dead and clearly this is an act that is governmental in flavour. As Oliver discusses in the articles earlier referred to in this Chapter, an act that if undertaken by a private body would be an offence clearly has public purpose. While there are privately managed burial grounds, any authority or organisation burying people has statutory duties such as accurate recording. The PCC formulate policies that regulate the management of the churchyard and in so doing, they are standing in the shoes of government and meeting government objectives by disposing of the dead.

**Providing a public service**

This thesis takes the widest possible interpretation of this element and, in opposition to this wider interpretation, Oliver provides examples of how, if taken widely, this could lead to the breakdown of civil society. While her examples are not envisaged in the case law at all, it is clear that disposal of the dead is providing a public service on health and safety grounds, if not in helping members of the public to come to terms with the death of their loved one, and in the social recording of the life for whom the grave is made and marked. The case law has discussed the definition of 'public' in this context and links it closely with achieving government objectives rather than simply a service that the public can use, as Oliver's examples indicate. Disposal of the dead and marking of graves would fall into this category of achieving government objectives. While there is no common law duty to provide marking for graves, but rather simply a duty to bury, there is considerable force in the argument that epitaphs have a public record element to them and are more than simply personal statements. They give local historical and factual information about the society in which the churchyard is set. Language used on gravestones is an important indicator of the nature of that society.

**General factors taken from the circumstances**

As has been made clear in the case law, with the latest and probably clearest, being *Weaver*, not only must factors such as those above be considered by any court when deciding whether a body is a functional public authority for the purposes of s6(3)(b), it must also look at the specific facts of each case when making this assessment. This is where the act which is referred to in s6(5) is so important. By taking the *Weaver* approach of looking closely at the act itself to ascertain whether it is a public act of itself, rather than a private act, the court is able to consider this question before having to deal with the complicated and complex issue of whether the body is a functional public authority first, which potentially leads to the wrong decision. As was the case in YL, had the court taken this approach, the decision may well have been different because, as

referred to by Baroness Hale, the provision of care in that case was an act of public service, even if the provision of accommodation was not. (This case has since resulted in legislation that has remedied the outcome in Health & Social Care Act 2008).

By taking this wide contextual approach and evaluating the acts of the PCC in relation to disposal of the dead, it is hard to see how the PCC could not be found to be a functional public authority for the purposes of s6(3)(b). It is contended in this Chapter of the thesis that this would be the likely outcome.

While the wider aspects of the link between establishment of the Church of England and, therefore, indivisibility of Church and State are not for consideration in this thesis, within this aspect of the tests from *Weaver,* this thesis argues that this link is relevant to demonstrate the public nature of the roles of those officers of the Church that are automatically opted onto the PCC.

### 2.6.3 *Weaver* + *Wallbank* = a new direction?

This Chapter has robustly defended the views of the House of Lords in *Wallbank* and *Weaver* and in doing so, has demonstrated that there is a new direction being taken by the courts when approaching the definition of 'functional public authority'.

The emphasis that was given in *Weaver* to s6(5) by Lord Justice Elias has come closer than any other case to giving effect to the spirit of the law as was advocated in *Wallbank* as the correct evaluative tool for assessing whether an organisation was a functional public authority. This approach from *Weaver* also ties in closely with the view of government as evidenced by the support given to the *Wallbank* reasoning in the reports of the Joint Committee.

While there is still a focus on particular terms and expressions, something which is a by-product of the literal approach adopted by the judiciary, there is a strong element of judicial deference at play in the earlier case law that is replaced by judicial creativity in *Weaver.* This thesis argues that a contextual approach permits the correct development of responsibility under s6(3)(b) and brings the protections under the Convention to those who use the services provided by the PCC in relation to acts that form part of the day to day business of the churchyard.

By combining the *Wallbank* and *Weaver* tests it has been possible for this Chapter to demonstrate that not only are the PCC susceptible to judicial review tests for their role in regulating the churchyards, if the old style formulae are applied, but also that the PCC fits comfortably within the newly expanded definition of 'functional public authority' in this regard.

This thesis now develops an argument that takes the new combined *Wallbank* and *Weaver* contextual approach and which results in a powerful socio-historical argument for why the policies of the PCC should be set against a human rights framework.

Robert Pogue Harrison, whose work was referred to in the introduction to this thesis, writes about how the living are reliant on their dead for their culture, language and society. One of the social records that enable social scientists to evaluate a society is the headstone or memorial and funerary furniture at a grave. This encompasses not only the words that are written on the headstone to identify and commemorate the life of the person in the grave, but also the form and style of the grave which reveal a wealth of information about our recent and long past ancestors.

The strength of the argument about the importance of this social record is recognised by Tom Whipple and Fran Infante in their article on the subject.[233] In this article the Chief of the National Association of Memorial Masons, Ian Gostling, is claiming that in order to save money, there are countless rules and regulations about the form of graves which necessitate that they all conform to a regulation type and style producing a uniformity that produces only the bland.

This thesis argues that this dearth of individualisation happens because it is allegedly safer and more cost effective to control freedom of expression in the churchyard than to allow creativity and originality for the bereaved. The claim of safety is examined in Chapter Four of this thesis. When visiting a churchyard in the future, the headstones will reveal nothing other than this era must have been a utilitarian society or, perhaps, a mass society with nothing to distinguish one individual from the other. While this regimentation may be suitable for military graves, and indeed reflects the nature of their occupation, the same is not true for the majority in this society. If the policies of the PCC are permitted to obstruct any personalised information, all that the future generations will see is that a named person was born, lived and died, and if we are very lucky, that the person was someone's son or daughter - something that even the chancellors say is to be avoided.

The PCC argue, and are supported by the Guidance from the Church, that having a more regulated churchyard creates the correct ambiance, is not a health and safety nightmare and keeps costs under control.

This thesis argues that ambiance is a transient thing which follows fashion. It is only necessary to look at the graves left behind by the Victorians to see that their society had a fascination with death which was given full expression by statuary of the most elaborate kind, but the fashion for weeping angels has been

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[233] Tom Whipple and Fran Infante *Here lies the body of no-one special* The Times Monday June 28 2010

surpassed by the modern generation's own sentimentality and there is no reason why this should be a threat to ambiance.

Health and safety must of course be taken into account, but this should not result in the bland. If we must have headstones that conform, what is wrong with allowing the personalisation to come through the language used on the headstone? This thesis argues that the Church and PCC are taking an aesthetically elitist approach to the wishes of people when it denies them the use of the words they would like to remember their dead. It is argued that we will lose the 'gardens of death' so lovingly created by the Victorians and replace them with something resembling storage where no one would like to spend time remembering their dead.

By applying the new combined approach using *Wallbank* and *Weaver* this Chapter has been able to demonstrate that taking a wide contextual approach to the issue of whether an organisation is a functional public authority and whether the act complained of is public or private, has resulted in a clear conclusion that the PCC must be a functional public authority while making decisions about the style and form of headstones and graves and, therefore, their rules and regulations should be subject to a human rights framework.

## 2.7 *Conclusions*

This Chapter has demonstrated that the struggle to find a determinative definition for the term 'functional public authority' is far from over, although this Chapter has developed an approach that demonstrates that there is now a much clearer way forward. While there was a proposal by the last Labour government to have a further attempt to clarify the area, this has not materialised under the current government and is unlikely to in light of the work being carried out on reform to the human rights structure through a potential bill of rights to replace the HRA.

The case law has been indicative of the attempts by the courts to provide some clarity but with conflicts between the Court of Appeal and the Supreme Court, criticism from the Joint Committee and a problem with the confusion in the language, a certain measureable set of criteria still prove elusive.

For the purposes of this thesis, this confusion has offered an opportunity to explore whether the PCC fits within such criteria as there are. The hypothesis is that the PCC does fit within the spirit of both *Wallbank* and *Weaver* and it is these two cases that should shape the further development of the area, giving, as they do, a rational and achievable definition for s6(3)(b) by moving the emphasis from that section and on to s6(5). This hypothesis is supported by Helen Fenwick in her chapter on the issues[234], although Dawn Oliver has concerns that this will interfere with civil society and potentially collapse the public/private divide.

The early indications were that susceptibility to judicial review would be the indicator against which the courts would measure which bodies would fall within the ambit of s6(3)(b) but this was criticised in *Wallbank* and by the Joint Committee as being demonstrably too narrow to achieve the aims behind the legislation. *Weaver* has given this credence, with Lord Justice Elias making it clear that although susceptibility to judicial review may be an indicator of liability under s6(3)(b), it is certainly not determinative of that point. It is interesting then, that so many of the tests as they apply to susceptibility to judicial review, also apply in s6(3)(b) cases, even though the objectives of each are clearly different, with one linked to administrative issues of procedure and the other to protection of human rights.

This chapter has been able to demonstrate that by using the principles and tests from *Wallbank* and *Weaver* together that a new formulation can be applied that more appropriately reflects the legislative intention behind the inclusion of s6(3)(b) in the HRA.

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[234] As footnote 120

This Chapter is also a plea to the PCCs and incumbents up and down the country. So much has been learned about the previous generations from the chosen marking of death. If Pogue Harrison is to be believed, future generations will need to take from this era important guidance about how to fashion their own society. If the PCC continue to exercise such restrictive practices in the churchyards, there will be little advice that will be left to guide them.

The findings from this chapter will be applied in Chapter Three, Four and Five to demonstrate how the status of the PCC as a functional public authority can result in liability under a human rights framework for the PCC in relation to burial, management and maintenance and exhumation when its policies and practices are shown to be in conflict with Convention rights for users.

## Chapter Three: Burial and the marking of graves

### *3.1 Introduction*

In Chapter Two of this thesis, it was demonstrated that the PCC can be brought within the definition of a functional public authority when exercising their role in disposing of the dead bringing its policies, rules, regulations and decisions within the protections offered by the Convention. Disputes in matters which are the subject of this Chapter will be resolved by the consistory court system. The HRA is explicit that the consistory courts fall within the jurisdiction of s6 HRA and, therefore, human rights standards and frameworks are to be applied in its decision making.

In this Chapter of the thesis, the law and policy applicable to the inhumation process in churchyards will be examined. While it is true that burial is no longer the most popular method of disposal (70% of people are cremated[235]), this still leaves 30% of people who prefer to be buried, with burial taking place in either municipal cemeteries, churchyards or in private burial grounds. Each of these has their own method of regulation, although most private burial grounds are subject to no regulation at all apart from the provision of a burial record. Outside the scope of this thesis, the lack of regulation of private cemeteries is an area for future research projects indicated in Chapter Six of this thesis.

The emphasis of this Chapter is the existing policies and regulatory structure for churchyards, with some comparison between these and local authority burial grounds. The thesis is applying the human rights framework of the ECHR to the regulatory structure which is created by the Church, incumbents and PCCs and to decisions that have been made by the consistory courts when a dispute emerges.

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[235] Institute of Burial & Cremation general statistics

The potential to engage Article 10 of the Convention arises in this area but reference will be made to other articles that could potentially be argued to arise. There is a right to freedom of expression under the Convention that is limited by the rules that appertain to regulation of the churchyards in particular which this thesis argues is an interference with this protected right, and this Chapter explores the legitimate aim of the regulatory structure, the effect of proportionality and whether such interference is necessary in a democratic society as prescribed by article 10(2).

Furthermore, there is a relationship between the availability of land and burial but, while this may be touched on in this part of the thesis, the ownership, and responsibility for upkeep, use and disputes that involve property law are the subjects of Chapter Four in the work.

### *3.1.1 Regulatory structure*

The day to day working law relating to the use of the churchyard for burial is not contained in a statute specifically designed for that purpose but rather is a matter for discretion by the incumbent and PCC. There is guidance available about how this discretion should be exercised, and, as will be seen, this guidance is relied on in the cases that come before the consistory courts. This is one of the areas where the labyrinthine nature of the regulation of disposal of the dead becomes apparent. Not only does each incumbent and PCC have a discretion to exercise for their own churchyard, but also no decisions of one incumbent and PCC will bind another, leading to a piecemeal and ad hoc approach to what is acceptable within each particular churchyard. It is the consistory court that eventually hears disputes that could add a level of certainty to the decisions being made at local level, but as will be demonstrated by this chapter, the decision of the consistory court is more often than not that the local policy will apply and therefore there is little or no certainty for a claimant other than that the case will inevitably result in defeat.

### *3.1.2 The guidance*

For the guidance of both the incumbent and PCC, the Council for the Care of Churches, Churchyards Handbook[236] sets out the law that governs this area.

This handbook sets out to up-date earlier guidance to incumbents for use, care and regulation of churchyards. The first edition was produced in 1962 with the 3rd edition being produced in 1988 indicating the lapse of time between editions. While this may not have been a problem in the past when the word of the incumbent was the end of the matter, the same cannot now be said. The rise of the 'individual society', where individuals feel more able to challenge decisions that do not result in an outcome that they agree with, and in an era of human rights where individuals are more aware that decisions can be challenged using the human rights framework, the guidance offered to incumbents and PCCs can be criticised for the long periods between up-dates which can exacerbate the tension when a disagreement arises.

The handbook is a collaborative work and has areas of repetition but essentially sets out the legal position as well as offering wide ranging guidance ranging from how to deal with aggrieved parties when a decision has been made about their desired memorial to their loved one, to the more mundane - setting up maintenance teams for example.

It is the language in which the handbook is written which is of particular interest because it demonstrates the level to which the regulatory structure is out of kilter with a human rights era. The current edition purports to modernise the approach taken in previous editions, which itself recognises that the language used could be said to be condescending in style. Nonetheless, it still takes a robust attitude to defending its position in particular to the style and form of graves and inscriptions. This indicatively pre human rights era approach is explored in this

[236] Council for the Care of Churches Edited by Thomas Cocke FSA The Churchyards Handbook 4th ed Church House Publishing 2001

Chapter as a basis for mapping against a human rights framework, particularly when reviewing decisions made by the consistory courts.

The book is an invaluable 'insider' view of the all the topics covered within the thesis that extends the knowledge and understanding of the regulatory framework beyond that which could be found by analysis only of what happens in the court room. It has demonstrated the attitudes of the Church towards areas that legally could be held to be contentious but which to incumbents are represented as much more of a fait accompli. It is demonstrated in this Chapter that the strict following of the guidance, leads incumbents into problem areas that they would probably rather avoid if they could. The book has enabled the development of further lines of argument regarding the position of the Church that otherwise would not have been so obvious precisely because it is not a legal text as such. It has underpinned this Chapter on burial in particular.

### *3.2 Securing a burial plot*

Finding a burial plot for the deceased is becoming increasingly difficult as space is running out.[237] Attempts to reserve plots may not be successful, particularly in the churchyard where, should a party wish to reserve a plot, there is a requirement that this is done by petition to the consistory court for a faculty (which means permission). Petitioners to the consistory court for a grant of faculty may find that they are treated differently depending on whether they are resident in the parish at the time of death or not or otherwise 'entitled' to be buried in the churchyard.[238] This could lead to discriminatory treatment under article 9 and 14 of the Convention, particularly if a person who merely dies in the

[237] This is the topic of a great many newspaper articles in 2010/2011 which refer to the use of allotments for burial but is also mentioned repeatedly by government and its advisors. See for example Environment Subcommittee of the House of Commons Select Committee on the Environment, Transport and Regional Affairs Eighth Report 21 March 2001 HC 91-1. See also footnote 33 in Chapter 1 of thesis.

[238] Legal Opinions Concerning the Church of England 8th edition Church House Publishing Part 9

parish can take priority. The opening rule in the Legal Opinions is that any person who dies in the parish is entitled by law to be buried in that parish "irrespective of the length of time he or she has lived there – e.g. the victim of a motor accident who may have entered the parish only minutes before death occurred."[239] If there is only one space left in the churchyard it is difficult to see who would take priority in these situations. However, all of this comes with the caveat discussed further below in this Chapter that any application for a faculty to reserve space can be refused if that is the policy of the particular incumbent and PCC.

There is less regulation of the municipal cemetery and space is usually less of a problem (but not in metropolitan areas where in some London boroughs in particular there is an urgency surrounding the issue. See further discussions in Chapter Four of this thesis) and this enables easier reservation of plots. The costs are also less – there is no judicial procedure to be endured but rather an administrative procedure. Here is evidence of another complication in the regulatory structure of disposing of the dead. For those wishing to reserve a plot in a churchyard, and for many people there is the idealistic wish to be put among the peace and tranquillity and beauty of the English churchyard, there is a costly and time consuming process that has to be endured in the application for a faculty to 'book your space'. Even then it is not possible to reserve a particular plot, but rather, just the right to be buried in the churchyard. It is at the discretion of the incumbent as to where exactly the applicant will rest. One way to avoid this is to donate land to the Church because, under the Consecration of Churchyards Acts 1867 and 1868, it is possible to reserve part of the churchyard personally. There are far fewer complications with reservation in municipal cemeteries and there is only an administration fee rather than court costs and delays.

Once a burial space is obtained in a churchyard, there are myriad rules about the size, shape, depth, outward dressing and headstone (this list is not exhaustive). Expressions of grief, loss and mourning through the headstone or style of grave

[239] As footnote 238 at page 247 item 1

are strictly controlled in churchyards by the individual incumbent and PCC which could leave the Church open to actions for breach of articles 8, 10, 14 and article 1 of Protocol 1 as is developed further in this Chapter.

This is because of the particular nature of the legal structure that operates within the Church. What is acceptable in one churchyard may not be acceptable in the next one down the road, even if in the same diocese. What one incumbent previously agreed as acceptable in his churchyard may not be permitted by the next incumbent of that same churchyard. This lack of legal certainty underpins much of the case law in this area with questions around legitimate expectation. The guidance is remarkably off-hand about this, and as will be seen in this Chapter, advises the incumbent to allow time for the expectations of the aggrieved party to settle.

### *3.3 The identification of complexities in a human rights era*

In 2004, the then Labour government decided that a new policy for burial law was necessary and it began the task of consultation.[240]

In the Foreword to the consultation document produced by the Home Office, the then Home Secretary, David Blunkett said that "Our burial law is out of date and needs reform".[241]

In the introduction, it was stated that:

..."Government agreed that there was a need for all aspects of burial law to be reviewed, and proposed that the issues to be considered included rationalisation of regulation across the public and private sectors, the management of

[240] Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach January 2004 (Home Office)
[241] As footnote 240 Foreword by the Home Secretary

cemeteries, enforcement of the legislation and exhumation or disturbance after burial."[242]

It is an interesting omission in this report that marking of the grave was not included in this review bearing in mind the number of cases that have arisen in this regard. This Chapter will examine some of that case law against a framework of human rights to assess whether sufficient consideration is given to the protections offered by the Convention within the topic of burial.

The 2004 consultation followed a report on cemeteries that had been carried out because of a concern about lack of available space. That report[243] had uncovered the diversity of regulation that made a survey of available space almost impossible. Part A of the 2004 consultation document considers the need for uniform legislation in the area and commented:

"The law relating to burial (including exhumation and the disturbance of human remains) is not to be found within a single statute or coherent body of legislation. It has evolved in a piece-meal fashion in response to the social and public health concerns of the day, with little apparent regard for setting the broad framework for the provision of burial facilities, determining service standards, or regulating burial practice or procedure. In particular, throughout the latter half of the nineteenth century, a raft of burial laws was enacted. These sought to get to grips with the public health problems arising from the substantial population increase and the urbanisation of British society, together with the evolving role of local authorities. Much (but not all) of the nineteenth century legislation was repealed and replaced with enabling powers resulting in the Local Authorities' Cemeteries Order 1977 (LACO), which set the general parameters under which municipal cemeteries operate today. LACO allows considerable management discretion to such cemeteries, but otherwise regulates matters such as:

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[242] As footnote 240 at Introduction
[243] Environment Subcommittee of the House of Commons Select Committee on the Environment, Transport and Regional Affairs Eighth Report, 21 March 2001 HC 91-1

- Provision of chapels, mortuaries and biers
- Plans and record keeping, registration of burials and disinterments, and storage of records
- Grant of exclusive burial rights, rights to erect memorials and agreements for maintenance of graves and memorials
- Fees and other charges
- Maintenance, including removal of memorials
- Depth of burial and special provisions in relation to walled graves and vaults; and
- Offences and penalties."[244]

While this legislation regulates municipal cemeteries, it does not apply to the Church of England churchyards nor does it apply to private cemeteries.[245] The churchyards are regulated by ecclesiastical law, or at least they are until they are declared closed, at which time they pass to Local Authority management even though ownership of the land does not change – see Chapter Four of this thesis but the private cemeteries are either subject to old private Acts or to no regulation at all.[246]

If, at this early stage of investigation of the law in the area, it is possible to see that the law is inconsistent in the most general of ways, it is no wonder that Professor Norman Doe said:

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[244] As footnote 240 at page 4
[245] As footnote 240 at page 6
[246] Footnote 6 from *Burial Law and Policy in the 21st Century* "Private companies will be subject to normal company law, while the Registration of Burials Act 1864 creates a general obligation to keep registers of all burials in any cases where such a requirement is not otherwise provided for in any other legislation.

"The disposal of human remains is regulated by a complicated tangle of state-made and church-made law"[247]

### *3.4 Common law duty to bury*

The general position in relation to burial within the churchyard is that there is a public law duty on the Church of England to bury the dead in the circumstances set out below which therefore creates a common law right[248]:

"Every parishioner and every person dying in the parish is entitled to be buried in the parish churchyard or burial ground if there is one, regardless of whether he is a member of the Church of England or even Christian.[249]

Such right, which is said to crystallize on death,[250] is conditional on there being sufficient space in the ground for burial.[251] There is no right to be buried in any particular spot in the churchyard[252] and, in the absence of a faculty, no tombstone may be erected, nor may a person be buried in the church itself.[253] The common law right of burial now extends to include the interment of cremated remains.[254]

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[247] Norman Doe *The Legal Framework of the Church of England "A Critical Study in a Comparative Context"* Clarendon Press, Oxford 1996
[248] Mark Hill *Ecclesiastical Law* 2nd ed, Oxford as discussed at page 140/141
[249] As at footnote 248 at page 175 para 5.51
[250] As at footnote 248 at footnote 198 *Re West Pennard Churchyard* [1992] 1 WLR 32, [1991]4 All ER 124, Bath and Wells Cons Ct per Newsom Ch at 33 and 126 respectively
[251] As at footnote 248 at footnote 199 "The right is enforceable by the personal representatives. For an example of a dispute as to the availability of space see *Re Brightlingsea Churchyard* (2004) 8 Ecc LJ 233, Chelmsford Cons Ct
[252] As at footnote 248 at footnote 200 "save where a space has been lawfully reserved but see further in the chapter for the very narrow availability of such right to reserve. See also P Sparkes, 'Exclusive Burial Rights' (1991) 2 Ecc LJ 133
[253] As at footnote 248 at footnote 201
[254] As at footnote 248 at footnote 202 "Church of England (Miscellaneous Provisions) Measure 1992, s3(1). This right does not extend to churchyards or burial grounds which have been closed by Order in Council, in which case a faculty is required; and a faculty may set aside an area there for the burial of cremated remains generally:s 3(1) proviso.

### 3.5 *Duty on local authorities*

Where no one else has made arrangements for the disposal of the deceased, the duty falls to the Local Authority to make arrangements.[255]

In municipal cemeteries, burial can happen on production of the relevant authority – usually a certificate from the Registrar of Births and Deaths or a coroner's burial order. The right of burial in municipal cemeteries can be granted for, but must not exceed, 100 years and if it is not exercised for 75 years, the right may be extinguished (note the time is less in London and decreasing all the time because of lack of available spaces).[256]

### 3.6 *Reservation of graves in churchyards*

It is possible to reserve grave space in churchyards through the grant of faculty for this purpose, however, it is often the policy of the PCC and incumbent that such reservations are opposed and the consistory court are likely to support such policy unless it can be shown to be *mala fides* or is wholly unreasonable.[257] The discretion as to when such petitions can succeed is entirely that of the consistory court, but the chancellor will give weight to a policy from the parish against reservations.[258]

As is shown below, this common practise of following the policy decisions of incumbent and PCC leads to some very contentious decisions when the outcome is mapped against a human rights framework.

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[255] Public Health (Control of Disease) Act 1984, s46
[256] Guide for Burial Ground Managers Department for Constitutional Affairs November 2005 para 2.27 and 2.29
[257] As at footnote 248 at page 272 para 7.114 and footnote 405
[258] As at footnote 248 and see footnote 197 Legal Opinions Concerning the Church of England 8th Ed 2007 at page 248 para 9

The problems that could be caused by the consistory court exercising its discretion in such cases can be shown in the case of *Re St Peter, Wrockwardine*[259]

"The petitioner was a parishioner who sought a faculty for the reservation of a single grave space adjoining the grave of her daughter for the establishment of a 'family grave'. The petition was opposed by the incumbent and the PCC on the grounds that there was a parish policy against the reservation of grave spaces which had been applied since at least 1980. The policy had been reviewed and upheld in 1999. The Chancellor stated that there was a strong argument for the court giving significant weight to the existence and terms of a parish policy when exercising its discretion in these circumstances, but expressed unease about giving excessive weight to such a policy. The chancellor referred to the Human Rights Act 1998 and stated that it was necessary to review the stated reasons for the formulation and implementation of the policy in order to assess whether upholding the policy was proportionate interference with the petitioner's rights under Article 8 and Article 9. The petition was dismissed".[260]

This case is a demonstration of some of the problems that this Chapter seeks to explore. The PCC, despite their 'grass roots' position in the Church of England hierarchy, hold a significant power within the structures of the Church of England to create policy decisions for regulating the churchyards that exist within their particular area of jurisdiction. Policies made and rules applied are created at local level and are therefore subject to varied influences. There is nothing to say that all PCC decisions will be the same or similar which can lead to differences in policy approaches to issues such as reservations of grave space. As is highlighted by the chancellor in *Wrockwardine,* in the post HRA era there is unease when blanket rules are used seemingly excluding the discretion which can be challenged as disproportional (and indeed this has been shown by cases

[259] Lichfield Consistory Court per Shand Ch, June 2003
[260] Ecclesiastical Law Journal Recent Ecclesiastical Cases edited by Justin Gau, Ruth Arlow and Will Adams 7 Ecc LJ at page 366

such as *R (Daly) v Secretary of State for the Home Department*[261]). Nonetheless, in the case, the consistory court acted to uphold the policy decision despite the fact that the use of family graves is encouraged within government policy as a way of making the best use of remaining space.[262]

It is apparent that, unusually for a consistory court, the chancellor in *Wrockwardine* considered articles 8 and 9 in his findings, with evidence of some recognition that the policy rules followed strictly could result in a claim under the HRA. It is very unusual to see references to the HRA or Convention rights in cases in the consistory court, and, therefore, the chancellor in *Wrockwardine* took something of an enlightened step by doing so. If the petitioner had decided to take a case on the basis of breach of her Article 8 and 9 rights, she would have to have demonstrated that her right to respect for private and family life and her right to manifest her religion had been unlawfully interfered with. This thesis argues that she could have reached the threshold required easily in this regard. It would then have been for the court to decide whether the Church could justify the interference as a proportionate response to the harm envisaged, which fulfils a legitimate aim and which was necessary in a democratic society.

On the analysis given from the court above, the harm appears to be that space is at a premium and therefore no reservation is permitted, so presumably operating a first come, first served system. A blanket ban on reservation is unlikely to be found to be a proportionate response to this harm, particularly when there is an underlying right to reserve spaces and a governmental policy in favour of doing so. The legitimate aim has to be based on certain legal structure and, as has already been explained above, there is only uncertainty surrounding the legal structure. There seems to be little to support the argument that such a ban is necessary in a democratic society and, therefore, there is a likelihood that such a claim would have succeeded in the secular appeal court.

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[261] R (Daly) v Secretary of State for the Home Department [2001] UKHL 26
[262] As at footnote 259

### *3.7 Legal interests in grave spaces*

While this Chapter is focused on burial, there does need to be a reference to the commonly argued points around property issues and grave spaces. Further property issues are explored in Chapter Four of this thesis.

Once secured, what legal rights are there in a grave space? As asked by Remigus N. Nwabueze[263] in the introduction to his article examining the law in Nigeria, England and other common law jurisdictions in critique of the case of *Egbe and Onogun*[264], "are they statutory, contractual or proprietary?" The historical position in English law, i.e. pre the Burial Acts (1852 – 1900) was decided by ecclesiastical and common law. Nwabueze *inter alia*, looks at the position at common law in England and states that:

"...at common law, a right of burial, strictly construed, is a bare right of interment and did not carry any proprietary or other interest. In *Bryan v Whistler* characterisation of such right as an easement was rejected in later cases especially *London Cemetery Co Ltd v Cundey* for want of a dominant tenement. This outcome results from the fact that the (property)...including the churchyard, its occupation, and possession, is vested in the rector or incumbent ... [which] allows the rector to maintain an action for trespass in respect of the church or its cemetery."[265]

Once the Burial Acts were passed, cases were brought which tested the extent of any proprietary rights that there could possibly be in the grave space in municipal cemeteries, once such a space had been purchased with *McGough v The*

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[263] Property interest in a burial plot Conveyancer and Property Lawyer 2008 CONVPL 517 accessed via Westlaw 06/03/2008

[264] [1972] 1 All NLR (Part 1) 95 (Nig Sup Cut)

[265] As at footnote 263 using footnotes 19 20 and 21 – respectively: Bryan v Whistler [1828] 8 B & C 288; London Cemetery Co Ltd v Cundey [1953] 1 WLR786 and St Luke's Holbeach Hurn, Re,[1991] 1 WLR 16 at 22

*Lancaster Burial Ground*[266] giving what is still the leading authority in the area. The case was taken on the basis of an alleged trespass to the grave space. McGough had purchased the permanent exclusive right of burial in a grave space for his daughter and had obtained a faculty for the provision of a headstone with which to mark the grave. He later placed an ornamental wreath in a glass box on the top of the grave which was in contravention of the regulations for the cemetery. McGough brought an action in trespass when the box was removed by the cemetery management.

The action was defeated on appeal, with Lord Bowen drawing a parallel between the intention of the statute and that which happens with ecclesiastical law, finding that no proprietary right is created in the purchase of grave space, with the only right being merely the right to be buried.

This was extended to claims of rights to enter a vault other than for the purposes of interment,[267] where it was held that the only right was that of burial subject to the rules and regulations of the cemetery management as dictated by the Burial Acts.

In *Re West Norwood Cemetery*, the same finding was reached when the law of trusts was explored in the associated case of *Re West Norwood*[268] leaving the position as it always had been; that there was no legal right in a burial space beyond that of burial itself. In Chapter Four of this thesis, the issues of ownership, management and maintenance further explore the proprietary issues.

### *3.8 Style and Form of graves and memorials in consecrated ground*

Once a burial space has been secured and occupied, the regulatory structure plays an important part in the appearance of the grave through the Churchyard

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[266] [1888] LR 21 QBD
[267] Hoskins-Abrahall v Paignton Urban District Council [1929] 1 Ch 375, (1928) All ER 57
[268] Re West Norwood Cemetery [2005] 1 WLR 2176

Rules – found in the Churchyards Handbook,[269] resulting in disparity between decisions on several levels. There are the differences as between consecrated and unconsecrated land itself, but there are also differences as between individual churchyards themselves and again between churchyards and municipal cemeteries. This is because style and form are again a matter for each incumbent who is reliant on the policy of the PCC or in relation to municipal cemeteries, the manager. Permitting individual and local level decisions to operate in such matters is one of the underlying problems for legal certainty and fairness. Alternatively, allowing local level responses could also permit the sociological and historical argument made throughout this thesis, that decisions should tolerate the accurate reflection of the societal use of the particular churchyard or cemetery as an important record for the generations that follow. (See Chapter Four of this thesis on this point).

### *3.8.1 The Churchyard Handbook Rules for style and form*

The position of the law in relation to monuments and headstones, style and form, is complicated and confused. Because the decision of the incumbent dictates the style and form for each churchyard, the Church of England have produced a handbook that offers an interpretation of the law and guidance for decision making for this area of the law. The book itself acknowledges that the advice is less certain than it used to be in recognition that society has changed since the publication of the first edition in 1962.[270] This supports the argument within this thesis that there is a recognised measure of uncertainty in the application of the law which can result in breaches of Convention rights and which does not sit comfortably within a human rights framework.

Chapter 4 of the Handbook relates directly to how the incumbent should approach the issue of memorials with those seeking to erect them. Bearing in

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[269] As at footnote 236
[270] As at footnote 236 at page 3 of the Introduction

mind that there is no right to erect a memorial or headstone without a faculty in the first place, it is for the incumbent to decide whether or not to agree with the wishes of the purchaser.

There is a delegated authority to the incumbent in relation to memorials which indicates that as long as the memorial requested meets the requirements of the current incumbent and the PCC policy, then the incumbent can give authority for a memorial to be erected and there is no need for a specific grant of faculty. It is only when the desired memorial does not meet the standard requirements of the particular churchyard that the incumbent must refer the matter to the consistory court for grant of faculty.[271] If an incumbent gives permission for a memorial that is outside of the standard form, and a complaint is made, then a consistory court can order the removal of the memorial.[272] The costs of the removal will fall to the bereaved who erected it unless the incumbent is found to have acted wilfully in disregarding the rules, in which case, the incumbent could be called upon to pay for the removal and the court costs. It is also true that a monumental stone mason who disregards the rules can be held liable.[273]

The diocese holds information on what is the standard within its area although each incumbent may impose special rules for their particular churchyard.[274] It should be noted that just because a memorial of a particular type has been permitted in the past, this does not mean that it will be permitted again. Thus, the delay in permitting the erection of a memorial (usually between 6 months to one year) is said to give time for the bereaved to be properly informed of what is permitted in order to avoid the distress that can be caused by refusal of certain types of monument. This will be examined further in the case examples below in this Chapter of the thesis.

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[271] As at footnote 236 at page 24
[272] As at footnote 236 at page 25
[273] As at footnote 236
[274] As at footnote 236 at page 26

The Churchyard Handbook refers to the National Association of Memorial Masons recommendations as to the size of the boundaries to a plot[275]. The recommendation is that:

"...they should not have unsightly bases that can damage mowing machines"[276]

This effectively rules out the use of kerb stones that have been common in the past. It is also an interesting point of view that the ease of mowing the grass takes priority over the wishes of a purchaser of a memorial, headstone or other grave marking. This aspect of concern is further explored in Chapter Four of this thesis.

### *3.8.2 Photographs on memorials or headstones*

The Handbook also outlines the strict position on the use of photographs on memorials:

"An even firmer line has been taken against the incorporation of photographs in a memorial, common enough abroad but not part of the British tradition. For one thing the climate tends to cause the deterioration of both frame and photograph. However, the recent development of etching computer-generated images from photographs direct on to the stone has created a rather different situation."[277]

This guidance may be applicable to yesteryear England, but in a multi-cultural Britain, Christians in the worldwide Anglican community may find this a rather arcane view of the way that society remembers its dead today. As is acknowledged in the quotation above, the use of a photographic image is

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[275] As at footnote 236 at page 27 ".. dimensions between 750 mm (2ft 6") and 1200 mm (4 ft) high; between 500 mm (1ft 8 in) and 900 mm (3ft) wide; and between 7.5mm (3 in) and 150mm (6 in) thick.
[276] As at footnote 236 at page 27
[277] As at footnote 236 at page 28

commonplace in much of Europe and beyond. It is also apparent that while the newly available technology is acknowledged as removing some of the objection to the permitting of photographic images, the implication is still that photographic images are to be refused.

### *3.8.3 Article 10 implications and use of photographs*

The issue of the use of photographs on memorials is one that crops up often enough to be used as an example of parishes falling out of step with the expectations and habits of modern life, where the rules do not fit within a human rights framework and offers a particular example of where Article 10 rights could be argued to be engaged. With a large number of people applying for a faculty to have a photograph or image included on the grave stone, a blanket refusal begins to appear as a disproportional response to the rule.

In *Re Christ Church, Timperley*[278] a faculty was sought. In order to understand the competing views of the incumbent and the petitioner, the quotation is in full:

"to place a black granite vase tablet with a small, oval, ceramic photographic plaque attached to commemorate a young man killed in a road accident. The proposed photograph was described by the chancellor as a 'holiday snapshot'. The DAC (Diocesan Advisory Committee) declined to recommend the petition and the PCC opposed it on four bases; the Diocesan Churchyard Regulations, the consistency of the photograph that, by definition represented but a moment of a life lived with the Christian theology of death and resurrection, the durability of any photograph and concerns about setting a precedent. The petitioners argued that the photograph would help them grieve, that it was of good quality and that it would be a worthy focus of recollection, especially for younger relatives. The chancellor reviewed the case law identifying the fact that no reported case

[278] Chester Consistory Court: Turner Ch, January 2004 as stated in Ecclesiastical Law Journal Recent Ecclesiastical Cases, 7 Ecc LJ at page 496

existed permitting a photographic plaque in the churchyard. The chancellor accepted that the petitioners would be afforded a real measure of comfort by the faculty being granted, that the plaque was of good quality and he was not persuaded that there were any fundamental theological reasons precluding a photographic image. He was not however convinced that a photograph would be useful to younger relatives. The chancellor concluded that this was not a case however, in which a clear departure from Diocesan Churchyard Regulations was justified. The regulations serve to create fairness, equality and consistency of treatment for all. They exist to promote peace, dignity and good order in churchyards where it is necessary to balance concerns of the past, present and future. He refused the petition."[279]

As the interpretation of the Churchyard Rules happens in a court room and fall to be decided by a chancellor, there is no possibility that these regulatory instructions can be argued to be anything less than quasi-law. This means that the court must interpret them to give effect to the rights protected by the Convention. Article 10 offers a protection to freedom of expression that can only be legitimately interfered with by a public authority if that interference is proportional and necessary in a democratic society.

There is also a legitimate expectation that commonly used practises in municipal cemeteries both in England and across the world would be recognised within churchyards and that the grounds for denial are based on a legitimate aim rather than something which is more akin to a fleeting aesthetic taste.

While there is arguably a certainty in the law in that such requests are always denied, the very fact that this is a blanket ban leaves the rule open to challenge within a human rights framework, where such rules have been successfully challenged as outside a proportionate response. There was no reference to a human rights framework in the decision and this thesis argues that this is

[279] As at footnote 260 as edited by Justin Gau.

indicative of the approach taken by the Church in relation to the regulation of its churchyards.

### *3.8.4 Inscription*

The guidance contains rules regulating inscriptions on memorials and starts by acknowledging that:

"The question of inscriptions on memorials can prove even more contentious than the choice of materials or design"[280].

The fact that the area is contentious will be borne out by the case analysis later in the Chapter, but it is in this area that the PCC have notably failed to 'move with the times' by accepting the language and terminology of modern society.[281] Interestingly, the guidance says that the decision to adopt a policy towards language on memorials should be discussed by the PCC and should be reconsidered frequently, although no specific time frame or explanation of what would be considered to be frequent is mentioned. This would imply that there is an acknowledgement that language and societal habits do change with time and perhaps these changes should be taken into account when setting the policies in this regard. As will be seen later in the Chapter, the cases reveal that once a policy is adopted, it seems to remain in place over a long period of time.

The Handbook concludes its advice on the inscriptions for memorials with:

"Maintaining the standards of earlier years can be misinterpreted as snobbery or insensitivity. It is vital that any restrictions are imposed consistently. A practice may be forbidden in one particular churchyard, even if it is permitted elsewhere in

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[280] As at footnote 236
[281] As in the case of In re Holy Trinity Churchyard, Freckleton and No 2 of that case in 1994 and 1995.

the diocese, but any exception will seen unfair to those who have previously been denied it. It is similarly embarrassing if practice varies greatly between neighbouring parishes or dioceses, whether concerning inscriptions or other details such as the use of gilded lettering. The only answer is to inform and educate the community, both within the congregation and outside, as to why restrictions are desirable."[282]

This passage highlights the essence of what this chapter explores. The potential for conflicting views, uncertainty of application and confusion of meaning can lead to an allegation that there has been a breach of Convention rights. The legitimate aim of the rule and whether that rule is necessary in a democratic society is open to criticism which could engage Article 10 and/or Article 8 on behalf of a complainant. Of course, the purchaser of such a memorial or headstone will want to remember the person who is to be commemorated to be recognised for the person that they were by the use of appropriate language, but language is a tool subject to fluctuation and change and by denying this, the PCC are interfering with a freedom to express, with words, the wishes of the individual. This thesis argues that the era of human rights has created an individualistic society rather than a generalised one but the position taken by the PCC achieves the utilitarian approach by avoiding the individualisation of memorials and headstones. This argument is further explored in Chapter Four of the thesis.

As will be shown, the language used in the Churchyards Handbook has, it claims, been considerably modified in this, its 3rd edition. Previously, strongly worded, censorious language was included within the directions offered to incumbents and PCCs which is now deemed to be inappropriate, with some recognition that we are living in an era of human rights law and an individualistic society but a robust approach is still noted:

[282] As at footnote 236

"The same trend towards deregulation has affected people's attitude to rules governing matters of taste. The way in which former authors of this handbook were able to insist on certain standards for the design of monuments and for inscriptions upon them, might now be thought condescending, rather than authoritative. The reaction of people to any objection to a monument they have chosen can be: 'Why shouldn't we have what we want?', even if, as members of a local history society or an amenity group, the same people might deplore the result as a blot on the landscape. The free market created by the European Union may in time cause tensions in this area, as firms based on the Continent compete on the British market offering a range of designs for monuments developed for very different aesthetic and religious traditions. If chancellors refuse to sanction such designs, they may be challenged by appeals to the principles of commercial competition or even of human rights."[283]

For this thesis, the key points from the quotation that demonstrate a lack of a human rights framework are the references to 'educating those within the congregation and without' and to 'taste'. While the Handbook claims to be an updated version of what has gone before, it is more than apparent that the Church still believes that a modern wish to remember using a variety of media is in poor taste and that people need to be told or educated, to see that the way they wish to remember their loved ones is somehow tacky and inferior.

There is a brief mention of the possibility of breaches of Convention rights which shows a limited understanding that the approach advocated within the advice does leave the potential for the engagement of Article 10 at the very least and that the jurisprudence of European law does have a role in relation to memorials and headstones which is explored within this chapter.

Supporting the position of the Churchyard Handbook, Hill states:

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[283] As at footnote 236 at page 4

"Permission is required before any monument may be erected over a grave.[284] It is for the incumbent to ensure compliance with the chancellor's guidelines which delegate to him the authority to authorize the introduction of certain classes of monument.[285] Proposed monuments that fall outside the guidelines, or which the incumbent considers merit consideration by the chancellor, are dealt with by a faculty application in the normal way.[286] Churchyard regulations generally do not permit the inclusion of photographic images, and faculties are routinely refused for such proposals.[287] Any permission given by the incumbent for the erection of a memorial which falls outside the type specified in the instrument of delegation will be a nullity. The chancellor should ensure that a consistent approach is adopted within the diocese and, more particularly, within each churchyard to ensure that all bereaved relatives are treated fairly.[288] He may also have to balance the competing wishes of those who knew the deceased, such as spouses, former spouses and partners, be they heterosexual or homosexual.[289]"

Within this quotation, Hill is using the language of a human rights framework in that he talks about balancing competing interests and treating all bereaved

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[284] As at footnote 248 at page 273 para 7.115 at footnote 409 See Re Woldingham Churchyard [1957] 2 ALL ER 323, Southward Cons. Ct. Items unlawfully introduced, such as kerb stones or chippings, may be made the subject of a faculty requiring their removal: Re St Paul, Drightlington (2006) 9 Ecc LJ 239, Wakefield Cons. Ct. See also Re North Wingfield (2002) 7 Ecc LJ 238, Derby Cons Ct. In relation to an unlawful memorial concerning cremated remains see Re Holy Cross, Greenford Magna (2005) 8 Ecc LJ 378, London Con.,Ct.

[285] As at footnote 248 at footnote 410 – They are enjoined not to accede to unsuitable requests from bereaved relatives out of justifiable motives of sympathy: Re St Mary, Fawkham [1981] 1 WLR 1171 at 1175G, Ct of Arches. A petition was refused for the introduction of a heart-shaped memorial which had been fabricated but was contrary to churchyard regulations, and had not been authorised: Re Small deceased (2005) 9 Ecc LJ 238 Manchester Cons Ct.

[286] As at footnote 248 at footnote 411: See e.g. Re St Mary, Kingswinford [2001] 1 WLR 927, Worcester Cons Ct.

[287] As at footnote 248 at footnote 412: Re Christ Church, Timperley (2004) 7 Ecc LJ 496, Chester Cons Ct. A memorial which included a ceramic plaque with a black and white photograph of the deceased was ordered to be removed because it did not comply with the churchyard rules: Re St Nicholas, Remenham (2006) 9 Ecc LJ 238 Oxford Cons Ct. See also Re St James, Braithwell (2002) 7 Ecc LJ, Sheffield Cons Ct refusing permission for a porcelain portrait, following Re Christ Church, Harwood [2002] 1 WLR 2055, Manchester Cons Ct.

[288] As at footnote 236 at footnote 413: See, eg, Re Christchurch, Wheelock (1996) 4 Ecc LJ 766, Chester Cons Ct.

[289] As at footnote 236 at footnote 414: See, eg, Re St Mark, Haydock (No. 2) [1981] 1 WLR 1167, Liverpool Cons Ct.

people fairly and the need for consistency, but behind the language used is still the implacable message that the rules will be applied in blanket fashion.

This broad interpretation of the position is followed by a more tolerant view by Hill when considering the position for the types of inscriptions that will be deemed as acceptable:

"Any inscription on a monument or headstone must be reverent and seemly.[290] It will be read by future generations that may know nothing of the person to whom it relates. The use of pet names, nicknames or other familiar terms is widely discouraged."[291]

"However, Chancellor McClean has indicated 'provided there is nothing scandalous or open to theological objection, I take the view that the bereaved should express their love and respect for the deceased in the language which comes naturally to them.'[292] The content must be accurate and not such as to mislead."[293]

While showing a more open and progressive view, the case law discussed in the above paragraphs demonstrates that this is a highly contentious area of the law and the number of cases that arise is indicative of a real problem. However succinctly the law can be noted, the volume of case law indicates that this area is far from clear to those end users of the churchyard.

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[290] As at footnote 236 at para 7.116 at footnote 415: As to concerns about the absence of any Christian content, see Re Byron Memorials, St Mary Magdalene, Hucknall (1996) 4 Ecc LJ 767, Southwell Cons Ct; and Re Plaxtol Churchyard (1999) 5 Ecc LJ 306, Rochester Cons Ct.

[291] As at footnote 236 at footnote 416: Re Holy Trinity Churchyard, Freckleton [1994] 1 WLR 1588, Blackburn Cons Ct. Note however, Re Holy Trinity, Freckleton (No 2) (1995) 3 Ecc LJ 429, Blackburn Cons Ct., in which a petition for exhumation was granted by Spafford Dep Ch so that the deceased might be reinterred in a municipal cemetery where a less restrictive approach was adopted.

[292] As at footnote 236 at footnote 417: Re St Thomas, Kimberworth (1998) 5 Ecc LJ 302, Sheffield Cons Ct. See also Re Holy Trinity Seghill (2000) 6 Ecc LJ 85, Newcastle Cons Ct.,and Re Edward Charles Lee, deceased (1995) 4 Ecc LJ 763, Sodor and Man Cons Ct.

[293] As at footnote 236 at footnote 418: See Re St Mary, Oldswinford (1998) 5 Ecc LJ 302, Worcester Cons Ct. See also Re St John the Baptist, Bishop's Castle (1999) 5 Ecc LJ 487, Hereford Cons Ct.

Article 10 of the Convention governs the freedom of expression which applies to the written as well as spoken word. Any interference must be proportional and necessary in a democratic society and this thesis argues that there is an abundance of evidence that the PCCs are not taking into consideration this Convention right when creating and applying their regulations to this area, leaving themselves open to challenges from disaffected claimants. A detailed review of case law takes place below in this Chapter, but it would seem that in summary, a similar challenge to that above in relation to reservation of grave space can be made out here. Much seems to depend on the long standing policy of the incumbent and PCC which will be based on his and their understanding of the Churchyards Handbook regulations as they apply in the particular parish. Once established, it is shown from the case law that the rules will apply in blanket style, even though there is discretion (as indicated by Hill in the quotation above).

In any disputed or unusual case where a faculty is deemed necessary before agreement is given to the erection of the desired monument or headstone, the discretion is that within the jurisdiction of the chancellor of the consistory court who will, in an extraordinary 'circular argument' fashion, be guided by the policies of the incumbent and the PCC as to the suitability of the memorial or headstone rather than using an independent and objective approach.

The matter of jurisdiction and discretion was addressed in *Re West Norwood Cemetery (No 2)*[294] where the:

"...[A]rchdeacon of Lambeth petitioned for the amendment of the South Metropolitan Cemetery (West Norwood Cemetery) Scheme of Management 1997 which had been approved by the court on 3 February 1997. The Scheme

[294] Southward Consistory Court per George Ch. October 1997. As cited in Ecclesiastical Law Journal 5 Ecc LJ 265 at page 71

provided for the Archdeacon's Official to have delegated authority to grant a faculty in the future in respect of new monuments in the consecrated part of the cemetery so long as the proposed monument complied with the Diocesan Churchyards Regulations as amended. The Scheme was supplemented by a Practice Direction couched in terms readily understandable by funerary masons and the bereaved. The Chancellor summarised that '[i]n the interests of both the living and the dead, the intention was to reverse the trend by which a magnificent historical cemetery risked becoming an unplanned and tasteless rag-bag of funerary offerings'. However, the Scheme had proved too strict in practice and was misunderstood in its operation. Accordingly, certain amendments were approved. These included the permitting of a wider variety of stone; inclusion of integral flower holders; erection of temporary wooden crosses and cremation tablets; planting of trees; and permitting certain alterations to existing monuments by way of additional inscription. More contentious matters namely the use of polished granite, monuments of untraditional shape (such as hearts) and headstones incorporating photographs were regarded as inappropriate for the exercise of discretion by the Archdeacon's Official and future petitions would continue to be determined by the Chancellor on their individual merits. The Chancellor stated in clear terms that were he to permit the incorporation of a photograph on a headstone, it should not be regarded as a precedent elsewhere in the diocese, 'where such applications will almost certainly be refused." [295]

This strongly worded judgment of the Chancellor indicates the extent of the belief of the Church, incumbents and PCCs, that personal expression has no place in the churchyard, even when it comes to a choice of stone or the look of the grave for the bereaved. This is supported by *Re St Thomas, Kimberworth*[296] where the widow and other relatives of the deceased:

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[295] As stated by Mark Hill in Ecclesiastical Law Journal Recent Ecclesiastical Cases 5 Ecc LJ 265 at page 72

[296] Sheffield Consistory Court, McClean Ch, November 1998

"...[s]ought a faculty for the erection of a memorial over his grave. The proposed memorial fell outside the chancellor's approved churchyard rules being heart shaped and of polished blue pearl granite. The PCC and the DAC were against granting permission and the chancellor noted that there were neither heart shaped headstones in the churchyard nor any of blue stone. In rejecting the petition the chancellor commented that whilst not wishing to impose absolute uniformity of headstones he felt it important not to encourage inappropriate memorials with some competition to be 'different'. Noting that other chancellors disapproved of the use of pet or nick names and of familiar terms such as Dad or Grandee (as had been proposed here) in epitaphs the chancellor did not share that restrictive approach, stating 'provided there is nothing scandalous or open to theological objection, I take the view that the bereaved should express their love and respect for the deceased in the language which comes naturally to them'.[297]

Nonetheless, the application was refused.

This judgment of the chancellor expressly acknowledges that there will be differences of opinion between chancellors leading to potential differences of treatment which could lead to an argument that Article 10 cannot be differently interpreted without the accusation of a disproportional approach by those chancellors seen as more 'hard line' in their interpretation of the Churchyard Rules. Such uncertainty does little to ameliorate the feelings of those parties whose petitions for faculty are refused.

Reference is made to the problems associated with a PCC policy that remains unchanged over a long period of time and the lack of comment on that in the Churchyards Rules in the report of *Re Holy Trinity, Seghill*[298] taken from the Ecclesiastical Law Journal[299] which stated:

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[297] As footnote 295 at page 302 edited by Mark Hill and Lindsay Yates
[298] Newcastle Consistory Court: McClean Ch, August 2000 – note the same chancellor as in Kimberworth
[299] Lexis access Ecclesiastical Law Journal Web page under Case Reports extracted on 18/06/02

"The widow and children of a parishioner petitioned for the erection of a headstone. The proposed inscription included the words 'Forever in our hearts'. Permission for this had been refused by the late vicar, the sequestrators, the churchwardens and the rural dean. The chancellor identified two main, not wholly separable issues – one 'of principle' as to the appropriateness of the phrase (phrases similar to the offending one were found in other churchyards in the diocese); and one of 'consistency' (in that the petition challenged a well settled parish policy). Since 1966 the church council had adopted a set of Churchyard Rules based on the Churchyards Handbook first published in 1962. The late vicar had adopted a consistent and unchanging policy as to the language of inscriptions. In relation to the current petition he had formed the view that the words were objectionable since the Rules recommended that inscriptions should record details of the deceased rather than the personal feelings of the bereaved and that the words were not 'actually true' of those who grieved. The churchwardens objected on the basis that the unchanging policy for 25 years had been to refuse applications made in identical terms, one very recently to the present application. They were concerned that there should be no appearance of arbitrariness or bias. They were further concerned that granting the petition would make future administration of the churchyard even more difficult. The chancellor, in investigating the parish Rules for consistency identified one particular anomaly where there had clearly been a change in policy to take account of changes in public taste. He noted that the diocesan guidelines were silent in relation to the content of inscriptions. The Churchyards Handbook relied on in drafting the parish Rules had been through three editions, the most recent in 1988. The current edition offered advice which was directly contrary to the parish Rules. He concluded the documents relied on did not provide a secure basis for the parish policy. In turning to the change in policy and the effect on the running of the churchyard the chancellor considered *Re Holy Trinity Churchyard, Freckleton* [1994] 1 WLR 1588. Accepting that the decision was not binding, he noted that the policy identified in *Freckleton* was only a few years old and was

that of a recent incumbent. The chancellor was persuaded by the arguments in a letter from the widow petitioner, that identified her own feelings of grief and quoted phrases used in memorials that had the same meaning although expressed in different terms (described by the chancellor as differences of 'taste rather than essential meaning'). In relation to the concern expressed by the churchwardens, the chancellor clarified that the Rules of the parish were subject to his decision, particular or general. He emphasised that decisions taken on previous applications were properly and conscientiously taken, and it was the consideration of the issue by this court that had precipitated the change. He reaffirmed the rule that a churchyard is governed by different considerations from those applying in a municipal cemetery and concluded that wording that was seemly and consonant with Christian faith would be allowed on memorials, and that those factors did not require a ban on expressions of grief".

This long extract has been taken verbatim from the report because it indicates the problems with the approach of the Church on several areas which can be summarised as follows:

1. It is clear that the church acknowledges that there will be differences in the approach taken to what is 'compatible' with the Churchyard Rules even internally within the particular diocese, which will only come to light if the parties affected wish to challenge the decision of the incumbent and PCC on a human rights basis, which can lead to the permitting of interference with Article 10 that will result in inconsistent decisions that will not necessarily be proportionate in their effect.

2. That decisions given by the consistory court in such matters are not binding on those incumbents from other dioceses which can only mean that disparate practices and applications of the law will arise creating a system based on uncertainty.

3. That once established, the Rules as applied by an individual incumbent and his PCC seem to be fixed and unchanging for long periods of time, despite changes in the society around that particular church. There is no reference to the HRA and any impact that the Act or the Articles of the Convention may have discussed within the case indicating a tacit acceptance of the practice of reliance on outdated principles, rather than an acceptance that the Convention needs to be interpreted as a living document against which all law needs to be read. This is an extraordinary oversight at a time when the HRA was creating a new landscape for law.

4. That forward looking as this Chancellor seems to be, he returned to case law that was decided pre the HRA (*Freckleton*) in order to reach his decision thereby avoiding any consideration of a human rights framework.

### *3.8.5 Freckleton – an example of attitudes and approaches*

In *Freckleton*, a long and detailed exposition of the area was considered by Judge John Bullimore, Chancellor, sitting in the Blackburn Consistory Court. The case deserves some detailed examination because it considered the issue of the legitimate expectations of a family as to the wording on the gravestone which had arisen due to existing gravestones in the Holy Trinity Churchyard. Here, the incumbent had refused permission to a family to erect a headstone that contained the words 'dad' and 'granddad' even though gravestones in the churchyard from earlier dates had these same terms on them. A number of excerpts are taken from the case as indicative of the approaches taken by the consistory courts, chancellors and incumbents and PCC which are then critiqued.

The incumbent, the Reverend Stephen Brian, had refused permission for the inscription on the basis that he was following the guidelines set out in Burman and Stapleton, *The Churchyards Handbook,* (3rd ed) 1988 and the policy

established by the PCC and himself and followed by him since 1991. The judgment set out the legal position *inter alia* in relation to gravestones as:

"The right to be buried however does not include a right to erect a memorial to the deceased. A gravestone placed in the churchyard without permission constitutes a trespass. Equally, a gravestone not complying with the terms of the permission granted is also a trespass. When a churchyard is consecrated, legal authority in relation to it is placed in the ordinary (the bishop of the diocese) and he has authority to decide issues concerning memorials. He exercises his authority through his chancellor, that is, the judge of the consistory (diocesan) court."[300]

The practicalities of the matter mean that the incumbent will exercise this authority for his churchyard and it is only when there is a conflict that the matter is directed to the court. The policy of each incumbent as to what is acceptable and therefore requires no recourse to the court is determined via a number of sources, including discussions with the PCC, the Churchyards Handbook and others. The chancellor stresses that the clergy should be aiming to provide clear boundaries so far as is possible. He concludes this section of his judgment by saying:

"It goes without saying that the clergy will be sensitive to the pastoral situation of a grieving family and so far as possible endeavour to accommodate the family's reasonable wishes."[301]

With each diocese having its own discretion, the chancellor points out that this decision only binds this particular churchyard and these applicants only. He then turns to the sources that provide guidance on the wording for headstones in this diocese:

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[300] In re *Holy Trinity Churchyard, Freckleton*, [1994] 1 WLR 1588 from the introduction to the judgment

[301] As footnote 300 when discussing the Diocesan churchyard regulations

"What do the chancellor's directions in the Diocese of Blackburn say about inscriptions? The following extracts, from pp 22-24 give the essence:

'Every inscription is unique…Advice must, of necessity, be general and any particular inscription will have to drawn and judged on the merits of the unique purpose for which it is written. Since nearly all the inscriptions…will endure after our generation has gone and recollection of the person or event commemorated will have faded they deserve to be composed with care. The following advice is given, not by way of direction, but as a guide to those who draw the words of the inscription and to the way in which the chancellor's discretion will probably be exercised when considering petitions for faculties: i. Any inscription, however brief, should be written by a poet or master of language. This ideal can but rarely be obtained but it is always wise to enlist the help…of one experienced in communication by language,…iii. An inscription should be drawn with the reader of the next generation in mind. Not all phrases which express present grief will read well in 30 years time when the living presence of the deceased referred to can no longer be recalled. Iv…An inscription commemorating a parishioner should tell a reader as much about him or her as possible. Then those to come may look back on us as real living people and not know us as mere names and dates…'

The current, third edition of Burman and Stapleton *The Churchyards Handbook* says at pp 104-5:

"..the objects of a modern epitaph will usually be some or all of the following: to identify the resting place of the mortal remains of a dead person; to honour the dead; to comfort the living; to inform posterity…In sanctioning them an incumbent cannot offend conscience. He must hope that his influence will protect the dead and mourners alike from faults of taste, but canons of taste cannot be made as strict as the rules of grammar. The wise priest will, when in doubt, err on the side

of charity, for epitaphs are expressions of love,...accordingly, it should very seldom be necessary to forbid an inscription outright."

After advice about names and dates, it continues, at p. 106:

"An epitaph is a public document, and not a cosy one at that. Nicknames or pet names ('Mum', 'Dad', 'Ginger') inscribed in stone, would carry overtones of the dog-cemetery unsuitable for the resting place of Christian men and women."

Under the heading "Comfort the living" is found, at pp 108-9:

"A church...cannot, in charity, be too restrictive in the advice it gives to mourners who wish to discharge their feelings in epitaphs...The wise incumbent will wish to protect mourners and dead alike from solecisms; and he may see his way to discourage the use of cliché...It is depressing, and ultimately unconvincing, to come across the same half-dozen [biblical] texts again and again. The same holds true of such phrases such (sic) as 'the dearly loved wife'. Sincerity cannot well convey itself through worn-out language. But this point should not guide conduct too strictly. Nothing could be more unfortunate than wrangling over matters of taste, at the very graveside, when the purpose of the enterprise is consolation. If mourners insist on clichés, they must have them."

At p. 110 the following test is outlined:

"The golden rule is the usual one. The priest should always ask himself whether he would care to be commemorated, or to commemorate others, in a given form of words: he should ask himself if he would *seriously* object."

This long excerpt from the case is helpful in providing the basis of the argument this thesis takes on these points. Guidance would seem to support the petitioners (Mr and Mrs Brown) in that the wording that they were hoping to use, while in

common usage, was unlikely to be so disused in the coming years that it could be said to be a passing whim. The words Dad and Granddad are the common forms of address and have been so for a considerable period of time, unlike Father or Grandfather which, while still used, are, and again have been for some time, deemed to be formal. How these terms could be alleged to be reducing the tone of a churchyard to that of a 'dog-cemetery' is completely at odds with society both past and, it is argued, future when language could again change. It is also a return to the language that the newer edition of the Churchyard Handbook hoped to update. Within its own text it refers to avoiding the snobbery that could be implied by such actions and it completely contradicts the spirit of the Rules as set out above.

Much of the central argument in the case put forward by Reverend Brian implies that the use of the terminology 'Dad' and 'Granddad' would open to door to pet names such as "Cuddles" or "Squidgy" which could not be refused if the words wanted by the Browns were permitted. This is patently ridiculous (and indeed within the case, the chancellor says "That is pushing the argument a little too far!") and shows a very narrow approach to the changing language of our society. However, the chancellor finds that if 'Dad' or 'Granddad' are permitted then there is nothing to stop people asking for 'nana' or 'mam' or the like. Quite astonishingly, given the weight of authority used against the decision to refuse the application of the Browns by Reverend Brian, the chancellor dismisses the faculty on the grounds that the 'greater good' is served by following the regulations and practice of the *Churchyards Handbook.*

The Browns went on to apply for the grant of faculty for exhumation of Mr Brown senior so that he could be moved to the municipal cemetery where the form of words that they wished to use would no longer present a problem. As is indicated in Chapter Five of this thesis on exhumation, there are very strict guidelines to be

observed in such cases, but in *Freckleton (No 2)*[302] there is a very limited case report of the outcome.

Taken in full from the above reference, the Blackburn Consistory Court issued a grant of faculty for the exhumation to take place:

"The petitioner's first petition, concerning the inscription proposed to be placed on the monument upon the grave of the male Petitioner's father, was dismissed. Thereafter the Petitioners sought leave to exhume the father's remains from the churchyard where they were buried, and to transfer them to a municipal cemetery where the designed inscription was acceptable. The Chancellor held that when:

(a) a Petitioner had been inadvertently misled as a result of action (or inaction) by the Church of England or by one or more of its members, as had happened over the permitted wording on the gravestone; and

(b) such misleading had caused the Petitioner to act (or not to act) to his or her detriment, as had happened over the choice of place of burial; and

(c) there was not likely to be adverse 'pastoral damage' if a petition were allowed in whole or in part, as was the position if exhumation were allowed in the instant case;

He was strongly of the opinion that a Consistory Court should attempt to correct or to mitigate the results of such inadvertent misleading. Accordingly, a faculty for exhumation was granted."

This report contains no detail of the hearing itself and, therefore, it is difficult to reconcile its findings with what was stated in the judgment in the first instance case. There was little if anything said about 'misleading actions' on the part of the

[302] *Freckleton* (No 2) 3 Ecc LJ 429

church in the first hearing, although the petitioner did believe himself to have been misled by the fact that earlier gravestones contained the words 'Dad' and 'Grandad' and recent amendments to existing gravestones had included these words. This was only fleetingly dealt with by Chancellor Bullimore in that he discussed the availability of the policy in a document prepared by Reverend Brian which could be found at the church and which supported the policy of formality.

The only evidence as to what was adduced in *Freckleton (No 2)* comes from an article in the Independent Newspaper which stated:

"Yesterday, another consistory court ruled that the Brown family...had been 'inadvertently misled' by the fact that other gravestones in the churchyard bore the words (*at issue* author's addition).

Judge George Spafford, Chancellor of the Church of England's Manchester diocese, ruled at the hearing in Burnley Crown Court that Mr Brown would not have buried his father there if he had known that the inscription would be banned. 'If this exhumation is allowed it will mitigate to some degree the harm caused by them being unintentionally misled', he said.

"When I first went into the churchyard and saw other gravestones with the words on it never occurred to me it would be an issue."

"Diocese communications officer, the Rev Richard Steel said: "One of the problems was what people knew and didn't know".[303]

From this, came the decision that clergy should be encouraged to provide information for bereaved relatives about the rules at individual churches.

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[303] 'Family in gravestone row can exhume body' (no by line) The Independent Newspaper, April 13 1995

The case is of interest in both the matter of burial and exhumation. It is unlikely, in the post *Alsager* and *Blagdon* era [both cases referred to in detail in Chapter Five of this thesis], that this case would have resulted in the same outcome. Although mistake about the place of burial is one reason for exhumation to be permitted (as both above cases show) the cases seem to indicate that this will be linked to not knowing that consecrated ground is involved but rather to the belief that a certain inscription will be permitted. Could the fact that Mr Brown involved the national press in his campaign have had any bearing on the fact that the Church conceded in this case? The presence of the press in this case was alluded to by Chancellor Bullimore when he was considering the evidence of a PCC member, Mr Scholtz, when he stated:

"If the policy were not confirmed, people would just say 'more fool you for co-operating with the vicar', or 'get what you want – contact the press' and similar things. He suggested that if I overturned the incumbent's ruling, I would be saying that he was not only wrong but that he had acted unlawfully."[304]

This does seem to imply that some oblique pressure was being brought to bear to support the aged policy of Reverend Brian.

### *3.8.6 The subjective nature of decision making*

Another problem that arises from cases like *Freckleton* and the others referred to above when deciding what will constitute an acceptable inscription is that petitioners are always dependent on the view of an individual incumbent, the PCC and the policy agreed between them. As is stated above in *Freckleton,* the priest must ask himself whether *he* would care to be commemorated in a certain way and *he* should also ask *himself* if *he* would *seriously* object. This subjective test of what is to be permitted by way of inscription will naturally then depend on

[304] As at footnote 302

the nature of the individual asking himself those questions and will involve that person's character, including age and background.

As will be seen in Chapter Five on exhumation, the use of subjective tests led the consistory courts into a real muddle when determining the questions to be posed when assessing whether an exhumation order should be awarded. It is contended here that this dependence on a subjective test to determine whether an inscription is in good taste also leaves the Church with a potentially damaging approach when the human rights framework is applied to such cases. Such subjectivity does not lend itself to the framework where proportionality is a key objective in decision making.

### *3.8.7 Article 10 implications arising from Freckleton in relation to inscriptions*

**Legitimate Aim**

Are the rules and regulations relied on by the incumbent and PCC and consistory court to applications for wording on gravestones fulfilling a legitimate aim? As stated in *Freckleton*:

"The incumbent seeks to maintain what he considers the level of dignity and formality appropriate to inscriptions on public display, in accordance with the chancellor's regulations and the advice in Burman and Stapleton, The Churchyards Handbook, 3rd ed. He has sought over the last three years to be faithful to that policy, even when it has caused upset to others, at least initially, when their requests for similar wording has been refused. To go back on that now will cause renewed upset with those families, but will equally leave him in the position of not knowing if any line at all can be drawn."[305]

[305] As at footnote 302

From this, it is apparent that the legitimate aim claimed, is to provide dignity and formality for public records based on the rules in the Churchyards Handbook and the individual policies created by each incumbent and PCC. As has been shown in the discussion above, this thesis demonstrates that reliance on rules and regulations that are not updated regularly in either time or content cannot form the basis of a consistent or fair set of laws when its subject matter surrounds the developing language of the society it serves. It is the argument of this Chapter of the thesis that this is not a legitimate basis from which to create laws and, therefore, interference with Article 10 rights will not be valid.

### 3.8.8 Proportionate response

Even if the argument about validity of the legitimate aim does not survive scrutiny, as this thesis argues it must, it is further argued that the responses of the incumbent, PCC and consistory courts are not proportionate to the aim. As was quoted earlier in the thesis:

"...An inscription commemorating a parishioner should tell a reader as much about him or her as possible. Then those to come may look back on us as real living people and not know us as mere names and dates...."[306]

If the legitimate aim of the rules and regulations is to provide dignity and a recording method when dictating the style and form of words to be used in an inscription, while the recording aim is achieved by the use of the name and dates pertinent to the individual, dignity is not achieved by stifling the use of personalisation and individualisation of the inscription. It appears from the case law that dignity can only be achieved by the use of formal if not bland wording but whose dignity is at the heart of this approach? It is apparent from the *Freckleton* case law that it is the impression of dignity decided by the incumbent, PCC and consistory court that is paramount, despite support from more forward looking

[306] As at footnote 300

chancellors that it should be the decision of those who commission the marker even though those same chancellors then support the refusal by the incumbent.

It is the argument of the thesis that this is not a proportional response to the 'harm' caused by allowing language to indicate its current societal norms and therefore the refusal to allow perfectly normal terminology cannot be a proportionate response.

### 3.8.9 Necessary in a democratic society

Is it necessary, in a democratic society, to limit inscriptions on headstones or memorials so that they conform to the perceived good taste of an incumbent, PCC or a chancellor in a consistory court? The cases state that there is a general fear that if more modern words or expressions are used, the ambience of the churchyard will be destroyed. While it is true that there have been many cases reported in the newspapers within the last 2 years where bereaved families have brought items into the churchyard such as wind chimes to hang from trees, a more lenient approach to inscriptions is unlikely to have the same distraction factor and rules of 'good taste' that may apply to items brought into the churchyard should not apply to the inscriptions permitted on the headstone.

While respectful and thoughtful terminology is to be preferred to the obscene or heretical in a churchyard, the restriction of words in common usage such as 'Dad' cannot be held to be necessary in a democratic society. There are some signals in more recent case law that a more lenient approach is making an appearance in the decision making process.

The family of Andrew Barlow who died aged 25, were told by the Vicar of St Anne's Shevington, that his gravestone, featuring the crest of his local football team, Wigan Athletic, was unacceptable and that messages from his sister and

girlfriend were 'too sentimental'. It took a visit from the Archdeacon of Lancaster to persuade the vicar to accept the tribute:

"My soulmate. Love always Natalie xxx".[307].

This tacit acceptance of a more proportional approach did not have any explicit reference to a human rights framework, but perhaps there is hope that one is being recognised.

### *3.9 Style and form of graves and memorials in municipal cemeteries*

As a comparison with the over regulation and restrictive approach adopted by the Church in relation to the marking of a headstone or memorial, the approach to regulation of the municipal burial ground is so flexible that of itself, this lack of direction still results in disputes. From the 'Guide for Burial Ground Managers' the information given is of a much less structured nature when the style and form of graves and memorials is mentioned. It would be easy to see why people may be confused about the extent to which they can 'personalise' the headstone and grave.

"3.23 Informal memorialisation can present particular difficulties for managers. Decoration of graves (and the surrounding area) with soft toys, musical ornaments and unauthorised boundary markers may serve to commemorate the deceased in an individualistic way which brings comfort to the family concerned, but can appear garish and out of place for others, detracting from the intended ambience of the burial ground. Too rigid and austere a policy towards such memorialisation can attract criticism and encourage flouting of what may be regarded as petty bureaucracy. Equally, an entirely laissez-faire approach may only aggravate the incidence of inappropriate and perhaps hazardous decoration. Solutions may include:

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[307] "No place for the tacky and the sentimental" *Ben Hoyle* The Times Monday June 30 2003 page 7

- Better information to families about permitted memorialisation and decoration on the grant of grave spaces or burial rights (including the reasons for the limitations)
- Notices to this effect within the burial ground to discourage post-burial memorial additions
- Provision of separate, dedicated areas within the burial ground for informal memorialisation, coupled with strict enforcement of prohibitions outside these areas."[308]

This would seem to be the extent of the information given and it is clear that this is vague and less than specific. There do not seem to be the same restrictions stated in the Guidance handbook in relation to the use of photographs, the content of inscriptions or type of stone or shape of grave stone as there are in Church of England churchyards. The issue of what is acceptable seems to be left to the individual Manager and the primary concern would be health and safety issues when it comes to memorials caused by items brought into the cemetery. From this it follows that municipal cemeteries do accept that the language of inscriptions is a personal matter for the bereaved to decide (again within the laws of decency) and that modern expressions of grief are welcome.

It is, perhaps, this 'freedom to express' that has resulted in concerns that if the Church were to take a more open position, the churchyard would have to permit extremes of personalisation that do distract others from the quiet reflection that the churchyard often engenders. As an example, an article in a daily newspaper[309] covered the story of a family's outrage and grief when the vicar removed a silk flower arrangement from their baby's grave leaving a note in its place that said the silk flowers had been removed because such flowers were banned due to diocesan policy. Some 22 years later, having spotted silk flower arrangements in other churchyards, the grandparents of the dead child put

[308] As at footnote 248 at page 23 para 3.23
[309] 'Fake flowers at a baby's grave and the family at war with a vicar who says they're vulgar' Daily Mail Tuesday January 18, 2011

another silk arrangement at the child's grave. This was also removed but no explanation was given.

The newspaper spoke to the vicar who confirmed that the place of real flowers in the churchyard was symbolic because they withered and died and the 'metaphor would be lost' if artificial flowers were permitted. The paper refers to other examples of this rule and adds a quotation from Reverend Stephen Mayes from St Peter's and St Paul's in Water Orton, West Midlands who said that artificial flowers were 'in bad taste' and that places which had permitted them had become 'tacky' and 'grotesque'.

If this is the response to a simple bunch of artificial flowers, the thesis argues that there is a long way to go before a human rights approach will be adopted by the Church.

### *3.10 Memorials for cremated remains in consecrated ground*

**The Churchyard Handbook**

Cremation is a far more recent method of disposal in England and as such, the Church of England has formulated fewer rules when it comes to memorials in this area. The Churchyard Handbook acknowledges that people may want more than the knowledge that their deceased loved ones are in consecrated ground; rather they would like to be able to visit the place where the ashes are interred.[310]

"As with burials of bodies, there is no right to provide a memorial in respect of cremated remains but permission to do so may be obtained by faculty from the chancellor or through delegated power from the incumbent. However, some

[310] As at footnote 236 at page 30

dioceses as a matter of policy do not allow individual memorials for cremated remains and restrict commemoration to an entry in a Book of Remembrance."[311]

The handbook acknowledges that memorial stones for cremated remains have caused problems in a similar way to headstones at graves and therefore encourages the use of the Book of Remembrance for cremated remains instead. Common alternatives are columbaria or memorial stones used as pathway edgings. While case law has not emerged, the emphasis of these alternatives is aimed at protecting the look of the churchyard and avoiding an over-crowding of the space, rather than a real consideration for the feelings of the bereaved.

### *3.11 Conclusion*

When it comes to the style of the grave, particularly with regard to inscriptions and photographs, it appears that the Church is at most risk of all the providers of burials to be breaching Convention rights. The strict and sometimes blanket approach to the appearance of the grave is set in policy, often decades old, which is adhered to rigidly. While incumbents are encouraged to take this approach from the guidance given to them by the Churchyards Handbook (in order to avoid seeming biased if a deviation is granted) it is this very rigidity which brings the approach under scrutiny. In an era of human rights it is no longer acceptable to have a "one size fits all" approach from public bodies. Individual cases are to be judged on their merits with the appropriate tests applied.

In this Chapter, this thesis argues that here is a right to freedom of expression which will be engaged if a petitioner is forbidden to remember their deceased loved one in words of their choosing. In order to legitimise that interference, the rule relied on must be certain and, as has been discussed, this is far from the case. The interference must also be proportional to the legitimate aim and again,

[311] As at footnote 236 at page 30

it has been shown that this can now be challenged. The aim seems to be uniformity in the churchyard with an acknowledgement that individual design should be encouraged within certain boundaries. What is 'in keeping' as far as society is concerned has changed and to try and impose a historical perspective in modern Britain takes the decisions made outside of a proportional response.

This Chapter of the thesis also argues that the role of the PCC in forming policy should also raise concerns. Whilst the PCC was not a public authority for the purposes of imposing liability for chancel repairs, it has been strongly argued in Chapter Two of this thesis that when examining the role of the PCC in relation to disposal of the dead and, thereby, in this Chapter, to imposing a blanket policy in relation to gravestones and inscription, it is acting in a public capacity with some far reaching consequences for a large number of the local public. The policy of the PCC is therefore open to challenge as imposing conditions that have a disproportionate effect to the legitimate aim.

The policies of many PCCs are not reviewed frequently and in this Chapter, the consequences in a human rights framework of out-dated and out-moded regulations has been explored.

The number of cases that have been brought in relation to the area of graves and inscriptions is indicative of uncertainty and interference with legitimate expectations of the end users of the churchyards when it comes to the law. If, as the Churchyard Handbook says, the incumbent should make sure that all funeral directors, congregation and local people know of the local policy, the number of cases shows that this is not being achieved. This Chapter has demonstrated by using examples from case law that many chancellors are not applying a human rights framework when considering their verdicts. The obvious circularity of hearing a case brought against the guidelines and policies which then uses those very same sources without reference to any other external source, and, despite criticising the policies as out-dated, then goes on to reach a decision which

supports the sources, leads to the only possible conclusion that the decision making process is flawed within a human rights context.

## Chapter Four: The responsibility of management and maintenance in churchyards

### *4.1 Introduction*

In Chapter Three of this thesis, the regulatory structure of burial in a churchyard was examined against a human rights framework which highlighted where the Church is at risk of breaching Convention rights. In parts of that Chapter, reference was made to issues that arise again in the context of this Chapter which considers the different responsibilities, liabilities and consequences which appear in relation to the management and maintenance of churchyards.

This chapter will continue the evaluation and comparison of local authority burial grounds and churchyards with reference to maintenance, upkeep, and responsibility for the long term arrangements for closed churchyards which demonstrate the favourable conditions that exist. The Chapter has two distinct sections. The first will deal with the issues raised relating to maintenance and property rights in a churchyard; the second will deal with the responsibility of maintenance for churchyards.

The Chapter will consider a number of important and politically sensitive issues that have arisen within this context. It will consider the over-arching issue of burial space surveys carried out for government and discuss the potential consequences of the findings; it will look at the legal responsibility for the safety and maintenance of churchyards and burial grounds and the consequences of failure to do this effectively, both to people and to property, and it will consider the legality of the position most recently enacted by the Local Government Act 1972 s215, which passes responsibility for safety and maintenance of closed churchyards from the Church of England to the Local Authority. In particular, this Chapter of the thesis will examine the historical reasoning behind this arrangement, arguing that the basis for the arrangement is erroneously founded

and that there is a potential cost saving of many millions of pounds for local authorities. The Chapter has a strongly historical flavour, tracing back responsibility for up-keep and maintenance of both Church buildings and the churchyards in order to demonstrate that the maintenance of churchyards, when closed, should not pass to local authorities but rather, the responsibility lies with the Church and congregation. This thesis argues that the current position of the passing of maintenance responsibility to the local authority is not based on a sound legal principle, but rather attached to the assumption that as the established Church, the Church of England has been given favourable treatment that is not justified on any other basis.

This Chapter will also consider property rights in headstones, gravestones, monuments and tombstones, building on the findings in Chapter Three. In this context, this thesis argues that there has been an error in law as to where ownership lies and the Chapter explores the history of this decision and makes an assertion that the current understanding of the legal position must be adjusted accordingly.

The Chapter continues to apply a human rights framework to the decisions made by the PCC, incumbents and the consistory courts as they affect the issues that arise.

### *4.2 Burial Space surveys*

A problem that has been identified in Chapter Three of this thesis is that there is a lack of available burial space. As the Centre for Architecture and the Built Environment (CABE) point out in their report of 2007,[312] the growth in the popularity of cremation may be partly because there simply is not enough space for burial, rather than because it is preferred. This is not a new problem[313] but it is

[312] Commission for Architecture and the Built Environment *Cemeteries, churchyards and burial grounds* Published 2007

[313] See earlier reference to Catherine Arnold *Necropolis London and its Dead* Pocket Books where the lack of suitable burial space led to the development of cities of the dead outside of

one that has recently come in front of government, again as notified by the Environment Sub-Committee of the Environment, Transport and Regional Affairs Select Committee in its Eighth Report[314]. The government's response[315] was to undertake a survey into the number of burial spaces available throughout England and Wales and also to consider their management and maintenance.

The CABE report was published one month after the Ministry of Justice Report[316] - CABE are the Government's advisory body on architecture, urban design and open space but are one of the advisory bodies to be abolished under the current round of cuts to the cost of central government. While the Ministry of Justice report takes the actual space count as its focus, CABE also looks to the history of burial grounds as public spaces, stating that they are within the same category as parks.

The CABE report has some interesting links to the theoretical writing in 'Dominion of the Dead', by Robert Pogue Harrison cited earlier in the introduction to this thesis,[317] and it is this report that is the focus of the early part of this Chapter.

CABE, from the outset of their report, indicate that they believe that local cemetery strategy should link these places into green space strategy[318]. This again is not a new concept. When the Open Spaces legislation (Open Spaces Act 1887 and 1906) was passed, it was envisaged that burial grounds could and

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London in particular. An interesting alternative was suggested by Sir Francis Seymour Haden FRCS as cited in Arnold's text – to deal with disposal when the graveyards were full, he suggested that bodies were used to bring the low lying land next to the Thames out as far as the coast, up by several feet so that the lowlands of Kent and Essex could be raised and reclaimed. (page 160).

[314] HC 91-1 Cemeteries – The Government's Reply to the Eighth Report from the Environment, Transport and Regional Affairs Committee, cm 5281

[315] HC 91 Cemeteries – The Government's Reply to the Eighth Report from the Environment, Transport and Regional Affairs Committee, cm 5281

[316] Ministry of Justice Burial Grounds The results of a survey of burial grounds in England and Wales June 2007

[317] As at footnote 312 at footnote 23

[318] As at footnote 312 at footnote 1 at pg 2

should be used as open public parks, with families passing their leisure time there. While modern tastes may not agree with this view today, CABE point out that there are a number of cemetery friends groups springing up around the country, illustrating that there is a public wish to be involved with the local burial grounds.

Taken from the CABE report, there is a surprisingly high amount of green space taken up by cemetery space:

"The amount of green open space taken up by cemetery land varies from Authority to Authority. In parts of London, for historical reasons, the legacy of past burial practices is enormous. If you consider that in a borough like Newham in London over 60 per cent of public open space is made up of cemetery land (the figure for Kensington & Chelsea is 49 per cent), the lack of care and maintenance can have a particularly depressing or debilitating effect on surrounding communities.

Yet today the very same inner London boroughs are running out of burial space and in some cases – Hackney and Islington for example – have none left at all. This means that burials happen in cemeteries at some distance from the community in which the deceased once lived, breaking the connection between the living and the dead."[319]

This part of the report has a resonance with the theoretical work in 'Dominion of Dead' in which Robert Pogue Harrison discusses the need to keep the dead close, literally building our new generations on top of them, in order to maintain our identity and sense of belonging. But, as the CABE report points out[320], there are many people who would find the use of burial grounds as a form of open park land contrary to their beliefs. The report cites the example of Jewish cemeteries that are considered as closed spaces, literally locked unless in use for an

[319] As at footnote 312 at footnote 1 at pg 4
[320] As at footnote 312 at footnote 1 at pg 6

interment. This indicates part of the dilemma surrounding the use of cemetery land (and included in this is the churchyard) in that there is a competing need being evidenced – the need for open space, particularly in built up areas and the need for a 'sacred' space that is somehow separate and reserved for respect to the dead.

The CABE report also refers to the clash of public/private ownership. While the land may be in public ownership, in property law terms, the grave space and monuments that mark the graves are privately owned by the person who paid for them. If public money was to be spent turning burial grounds into public parks, a considerable expenditure would be required to render them safe and suitable for public use. The enhancement, if indeed that is what it is, would be beneficial to a number of private individuals by the assumption of the cost by the local authority in undertaking that work. The report does not suggest any answers to these issues, it simply highlights them.

One of the main issues that this Chapter aims to examine is related to the legal responsibility for the upkeep and maintenance of burial grounds and particularly the peculiarity that for the Church of England, when a churchyard becomes full, it is formally closed and the responsibility for upkeep and maintenance passes to the local authority. This anomaly in the legal responsibility appears to have come under little scrutiny up until now. The Chapter will also examine the methods of ensuring safety, with 'topple-testing'[321] being particularly examined through the case law. Safety in burial grounds may seem an unlikely issue, but there have been 3 deaths in recent times plus 18 serious accidents[322] caused by falling masonry in local authority cemeteries. The figures for such deaths or accidents in churchyards is not easily available, but in the revised document produced in the

[321] A method of using weights to test for the stability and safety of memorials
[322] Special Report: Memorial Safety in Local Authority Cemeteries Guidance from the Local Government Ombudsmen March 2006

Diocese of York[323] there is reference to at least one death which was that of a child in Harrogate public cemetery caused by falling masonry from a memorial. Whether this was in consecrated ground or not is not clear, but the Notes of Guidance were a response to the press coverage of that death. The role of the PCC in these issues will be at the centre of the discussion.

## *4.3 Closure of Churchyards and transfer of maintenance to the Local Authority*

### 4.3.1 What is a 'closed' churchyard?

From the Legal Opinions of the Church of England[324]

"1. A closed churchyard is generally taken to mean a churchyard which has been closed for burials by an Order in Council under the Burial Acts…A churchyard may have been entirely disused for many years but it would not on that account be described as a closed churchyard, nor would a churchyard where all further burials have been prohibited by a local Act of Parliament."

It would, however, seem that even if closed, some churchyards may be still be partially open for the burial of relatives of those already buried there (subject to the amount of soil between the coffin lid and surface of the ground). It is true that an individual case may also be a special exception to the effect of closure as are some burials in vaults.[325]

Tracing whether an Order in Council has been issued in respect of a particular churchyard is not an easy process. Each church affected should have a record,

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[323] Diocese of York Notes of Guidance: Churchyards: Broken and Dangerous Gravestones 2003 revised 2009
[324] Legal Opinions Concerning the Church of England 8th edition 2007 Published by Church House Publishing at page 217 para 1
[325] As footnote 324 at footnote 8 from page 217

including a copy of the Order and/or a copy of the London Gazette in which it appeared. Reference can be made to the index of the London Gazette for Orders made before 1884, quarterly indices to the London Gazette cover Orders from between 1884 – 1891; for Orders made post this date, a reference will be included at the end of the annual volumes of Statutory Rules and Orders, or Statutory Instruments (but as the Legal Opinions volume says unless the approximate year of the Order is known to the enquirer, this can be a time consuming and frustrating search); as a last resort, enquiry can be made of the Home Office.

It is not possible to revoke an Order in Council closing a churchyard.

"The Secretary of State has received advice from the Law Officers of the Crown to the effect that it is not possible to revoke an Order in Council closing a churchyard. The Law Officers' reasons are that there is no express statutory power to do so and that the power under section 1 of the Burial Act 1855 to 'vary' a previous Order in Council does not extend to revoking the Order altogether, although it can be used, for example, to redefine the boundaries of the churchyard where they have been inaccurately described, or to change the categories of burial which are still allowed."[326]

### *4.3.2 Closure of the churchyard*

In the guide issued by the Church of England[327] it is stated in paragraph 1:

"1. Although the legal ownership of a churchyard, either open or closed, is usually vested in the incumbent, his own rights and obligations in respect of it are

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[326] As at footnote 238 at footnote 9 at paragraph 10

[327] Responsible care for Churchyards; A brief practical guide for parishes. Originally prepared by Church Commissioners' Pastoral Division in 1993, published under the title hereby given in association with Council for the Care of Churches, a companion guide to 3rd edition, Churchyards Handbook.

very limited. Today, under Canon F13, responsibility for maintaining the churchyard in good condition and maintaining fences rests with the parochial church council (PCC), except in the case of a burial ground which has been closed by Order in Council and where the obligation has been passed to the local authority....but the PCC can seek financial help from local authorities and other public bodies....."

This would indicate that once a churchyard is deemed to have met one of a number of conditions, responsibility for the maintenance of that churchyard can be passed to the local authority, while legal title to it remains with the Church.

The reasoning behind this arrangement is not explained, nor is it easy to find. As will be demonstrated later in this Chapter, this thesis examines the historical root of the decision and finds that the current position cannot be correct. That the Church of England should enjoy this benefit both in terms of finance and in terms of responsibility and liability seems somewhat anachronistic when other denominations do not have these benefits. The involvement of the PCC in the decision as to whether to close a churchyard offers a further opportunity for this thesis to analyse the role of the PCC against a human rights framework following the finding in Chapter Two that the PCC is a functional public authority for the purposes of s6(3)(b) in its role relating to disposal of the dead.

In paragraph 14[328] the guidance says:

"If an incumbent and PCC wish a churchyard to be closed, so that responsibility for maintenance may be transferred to the local authority or so as to terminate the incumbent's responsibility for providing future burial space, an appropriate Order in Council under the Burial Act 1853 s1 has to be sought from the Home Office.... Nearly 500 such Orders were made in the last ten years. An application will be successful if one of the following conditions is met: the churchyard is full;

[328] As at footnote 327 at footnote 8 at para 14 pg 4

the continuing use of the churchyard for burials may constitute a risk to public health or be contrary to decency; or the discontinuance of burials may prevent or mitigate nuisance. An application will not normally be considered if it relates to part of the churchyard only."

It is clear from this paragraph that Orders in Council for closures and the resulting subsequent transfer of responsibility for maintenance to the local authority that comes with it are relatively common events and, with almost 500 such transfers occurring in a ten year period, the costs implications to local authorities are substantial. The fact that many local authorities, particularly those in urban areas, are stretched to their limit for funds (as highlighted in the earlier cited CABE report), this may go some way to explaining why churchyards often become areas where vandalism and anti-social behaviour are experienced. The costs of on-going maintenance will be reasonably low on the spending priority list.

Contained within the Legal Opinions Concerning the Church of England[329] under paragraphs 6 and 7 it states:

"Most of the Orders in Council for the discontinuance of burials (with or without exceptions or qualifications) in churchyards were made in the middle of the nineteenth century for the protection of public health at a time when open sewers and the absence of a piped water supply made it particularly important to prevent the seepage of offensive matter from decomposing bodies into wells or streams likely to be used for drinking water. But section 1 of the Burial Act 1853 does not in fact restrict the making of closing orders to cases where this is necessary for the protection of public health. The legal advisers of the Ministry of Housing and Local Government (as it then was) agreed with this view of the law, but in practice, the Minister will almost invariably only make representations to Her

[329] Legal Opinions Concerning the Church of England, Published by Church House Publishing with copyright The Archbishops Council May 2007 part 8 page 217

Majesty in Council for the making of a Closed Order where the Minister is satisfied that discontinuance of burials, with or without exceptions or qualifications, is necessary for reasons of public health, thus adhering to the practice of his predecessors, namely the Ministry of Health, the Local Government Board and the Home Secretary.

This does not mean that no Closing Orders are made today, but orders never have been made for the sole purpose of relieving the ecclesiastical authorities of the burden of maintaining a churchyard."[330]

There is clearly a conflict between the two sources cited. One is stating that almost 500 such Orders have been made in the last ten years, which by any definition does not make them rare, while the other is stating that most Orders were made in the nineteenth century and implies that Orders are rarely made today unless public health is an issue.

Further on in the Legal Opinions, at paragraph 12, it is stated:

"The justification for the provision of section 18 of the Burial Act 1855 and the way in which it has led to the transfer of responsibility for closed churchyards to local authorities is not intended to confer any privilege upon the Church of England but was a recognition of the fact that until the Burial Acts of 1852 and 1853 churchyards or additional churchyards were the only burial places available, apart from commercial cemeteries and a few denominational burial grounds belonging to trustees. More important, churchyards were (as they still are) the common burial places of the parishioners of any denomination and none. As the churchyard was available for the whole community, and in the first half of the nineteenth century had sometimes been provided, or extended by means of a compulsory church rate, it was considered reasonable that when it was closed in

[330] As at footnote 238 part 8 at page 217

the interest of the community, the expense of keeping it in decent order should be reimbursed to the churchwardens from what was then the poor rate."[331]

This section from Legal Opinions gives some brief information of the history behind the agreement that transfer of upkeep to the local authority was as just recompense for the church undertaking a duty of the state to dispose of all-comers at a time when local authorities (or burial boards) had little duty to do so. Further on in this Chapter, this link between the historical positioning of the Church as sole disposer is examined in greater detail. The section also links the agreement to the fact that the church community paid a tax by matter of compulsion for which they assert the Church is entitled to re-imbursement via the transfer arrangement.

The re-imbursement came from the:

"'relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses".[332]

The underlying reason that has thus far emerged for the agreement by local authorities to take on the expense of the maintenance of closed churchyards is the tax arrangements between church and government. However, also referred to in section 12, is the conclusion that this must not be seen to be a special privilege for the Church of England but rather a form of pay-back based on historic provision. This conclusion is hard to defend when this arrangement is not extended to any other provider of burial services, including other religious groups, and that the arrangement is now set in statute and therefore clearly intended to last in perpetuity or until the law is reformed.

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[331] As at footnote 238 at para 12

[332] As at footnote 238 at footnote 10 at para 13 Section 18 of the Burial Act 1855 (amended for Greater London) repealed by the Local Government Act 1972 s272 Schedule 30 (except as to the City of London)

The modern law is referred to in paragraph 15:

"15 From 1 April 1974, section 215 of the Local Government Act 1972 has provided a much simpler procedure for a PCC to request a local authority at three months' notice to take over the maintenance of a closed churchyard, and section 18 of the Burial Act 1855 (except in its application to the City of London) as been repealed from that date."[333]

It therefore seems that the arrangement that transfers the considerable expense to the local authority from the PCC is based on an historic tax that is no longer applicable and, therefore, the question arises as to whether the arrangement should be reviewed. While the Legal Opinion clearly states that there is no question of the Church of England having a privilege through the arrangement, it is difficult to see how this is justified in the period since the poor tax was removed. It is also true that in *Responsible Care for Churchyards – A brief practical guide for parishes* produced by the Church of England in the final paragraph it is stated:

"...If the churchyard is full, it may be particularly desirable for it to be closed formally by Order in Council and transferred to the local authority so that it may be looked after at public expense."[334]

This quotation is highly indicative that the fiscal benefit to the Church of England is acknowledged openly.

The three month period that is referred to as the required notice to the local authority for assuming the responsibility for maintenance has, by agreement,

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[333] As at footnote 238 at para 15
[334] As at footnote 327

been extended to 12 months where appropriate e.g. where there is extensive repair required.

### *4.3.3 How is it determined that the churchyard is full?*

This is also not easy to find, again indicative that this area of the law is a labyrinth of unknown or undiscoverable rules that have some historical basis but which are not clearly recorded for the modern human rights era. There does not seem to be any reference to precisely how it is ascertained that the churchyard is full – apart from one reference in Hill, taken from the case of *Re Brightlingsea Churchyard,* which states:

"The closure of a burial ground by Order in Council under the Burial Act 1853 will only be ordered after a full investigation as to whether any parts of it already used for burial may be reused."[335]

### *4.3.4 Difference between a closed churchyard and disused churchyard*

There is a difference between a churchyard that is closed because it is full and a churchyard that is 'disused'. Closure requires a faculty to be issued for an Order in Council, while disused churchyards can be transferred to the local authority after grant of a faculty under the Open Spaces Act 1906.[336]

## *4.4 Historical root of the agreement*

Research for this Chapter has revealed a long history of legislation in relation to responsibility for churchyards and burials therein. In order to try to find the route of the passing of responsibility to local authorities, it has been necessary to go back beyond the passing of the 1852 and 1853 burial legislation to the

[335] As at footnote 248 at footnote 326 *Re Brightlingsea Churchyard* (2004) 8 Ecc LJ 233
[336] As at footnote 248 at Chapter 7 para 7.94

parliamentary debates that occurred before the passing of the Acts and some early case law. While there does appear to be a legitimate root to this decision, in that the Burial Acts refer to the passing of responsibility for maintenance, there was also some considerable controversy at the time that the decisions were reached. This part of the thesis will draw on all the available sources and reach a conclusion as to whether this transfer agreement was what was intended by the Acts.

The conclusions reached offer two possible explanations for the controversy in this area. Firstly that there is a legitimate basis for the agreement and therefore this offers an opportunity to prove the public subsidy test outlined in Chapter Two of this thesis as one of the essential components for the finding that the PCC is a functional public authority for the purposes of s6(3)(b). Secondly, that there is not a legitimate basis for the agreement and therefore s215 should be repealed and the costs of maintaining churchyards should be returned to the Church and its congregation rather than the local authority.

### *4.4.1 History of the legal background for passing responsibility to Local Authorities*

In order to set the scene, it is necessary to return to a time at the turn of the 1800 when it was becoming apparent that there was a growing problem with disposal of the dead in local churchyards. This was due to a rapid rise in population numbers and to outbreaks of plague and other epidemics that coincided with the population growth that created an urgent and extreme need for suitable burial space for the thousands of additional dead.

Churchyards simply could not cope with the numbers, being as they were, and often still are, relatively small areas of land directly connected to the church building and in 1816 'An Act for enabling Ecclesiastical Corporate Bodies, under certain Circumstances, to alienate Lands for enlarging Cemeteries or

Churchyards' was passed.[337] This Act allowed the clergy to claim from the Governors of the Bounty of Queen Anne, a fund set up to assist the clergy with their duties to *inter alia* the poor, the cost of purchasing additional land for the purpose of burial.

At this point in history, the focus was on London where burial space was notably short and disease notably rampant. From this time onward, there were separate laws governing the metropolis and the rest of the country.

In her book, Necropolis, London and its Dead, Catharine Arnold gives a gloriously gruesome account of the conditions that prevailed in London churchyards, with bodies barely covered by soil, so that their decomposition was visible to passers-by with the attendant physical by-products of putrefaction including the noxious smell.[338] In Chapter 6, she recounts the position from 1842:

"However, 1842 was a significant year, as it finally saw the Government recognise the scale of the problem of what to do with the dead. A Select Committee was appointed to investigate the capital's noxious and overcrowded burial grounds, but this only came about after a series of scandals, a wave of cholera epidemics and a long campaign by public health reformers Sir Edwin Chadwick and George Alfred Walker."[339]

It is telling that in 1850, there was heated debate in the House of Commons in relation to the Metropolitan Interments Bill,[340] an indication of the lack of pace with which Government reacted to the pressing social and public health problems. The House was considering the Bill for a second time when the proposal was made that it be referred to a Select Committee (as the Bill had been presented very late and therefore time for consideration was limited). It

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[337] AD 1816 56 George III C.140, 141, 142 CAP CXLL
[338] Catharine Arnold *Necropolis London and its Dead* Pocket Books History 2006 chapter 6
[339] As at footnote 338 at footnote 18
[340] HC Deb 03 June 1850 vol 111 cc677-710 Hansard

became apparent during the debate that the issue of disposal of the dead was a contentious topic, particularly in regard to who was to be paid for the task.

The Interments Bill, as it was drafted, proposed the creation of a Government board that would oversee development of churchyards and graveyards in or around the metropolis. The feeling was that burial of the dead should not occur within the metropolis any longer. This would obviously cause some concern for those whose constituencies were in close proximity of London. The payments for running this board were hotly contended. The Bill also proposed multiple payments to the clergy from the parish rates for disposal – something that was vehemently opposed by Lord D Stuart.[341]

Sir B Hall, in his submission to the debate worried about the handing over of self-government so far as burial was concerned. He said "there were two persons in the metropolis of whom the inhabitants entertained great suspicions, and these were the Bishop of London, as regard ecclesiastical matters, and Mr Chadwick, as regarded sanitary matters. Through the one they were in danger of having fixed upon them fees in perpetuity to pay the clergy; and the other was establishing a board, of which he was the prime mover, and of which perhaps he would hereafter be the head."[342]

Mr Hume made an impassioned speech and said that he had intended to vote for the Motion that the House go into Committee but blamed himself for not paying closer attention to the detail. He said he would never have allowed the Bill to be read a second time had he examined it more closely:

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[341] "By this Bill they were going to pay the church incumbents out of the rates of the parishes. That was in the nature of a church rate, and was objectionable. It was also proposed to pay the chaplains of the new cemeteries."
[342] As at footnote 340

"One of his main reasons for objecting to the measure was, that it would take out of the hands of Englishmen that principle of self-government which was one of the main causes of their freedom."[343]

Suspicion of the idea of the board is clearly evident – the inference being that this was a loss of autonomy and of centralisation of power, let alone the suspicion that funds would be somehow misappropriated. Sir G. Grey tried to alleviate some of these fears:

"Sir G. Grey said, he could remove the misapprehension that existed with regard to the perpetual existence of the board. It was necessary in order to enable the board to hold property to constitute them a corporation, but that could only be during the continuance of the Board of Health. When he introduced the Bill, he stated that the Board of Health, unless renewed by Parliament, would expire in 1853. The subject must necessarily come under the consideration of Parliament again before that period elapsed, and if it were requisite to take away these powers, Parliament could take them away. As regarded the expenses of the board, it consisted now of three members...."[344]

This shows that the Board was not intended to run in perpetuity but was to have a temporary existence, presumably until the public health problems that existed because of the over-crowding of churchyards had been brought under control.

Sir G Grey continues:

"A great deal has been said about the principle of centralisation, and that it would be quite enough to pass a short Bill to prevent future interments in the metropolis, and that it would be sufficient to give the parish authorities power. But

[343] As at footnote 340
[344] As at footnote 340

without a central power, the parish officers might refuse to carry the Act into execution....

Then if they had to make voluntary arrangements, per se, it was not probable that they would close the burial grounds that now disgrace this metropolis, the only one in Europe which was so disgraced by burying the dead among the living. The parochial system did not meet the exigencies of the case."[345]

The demonstration of such a lack of trust in the parishes adds something further to the argument in this Chapter of the thesis. The parishes, or more bluntly, the incumbent and his churchwardens were not trusted to act properly because it was these very same people who had taken money for burials which were then not executed properly. The discussion reveals a real concern that if given extra money, as was proposed, they would simply carry on with these practices.

As is rightly pointed out in the debate, it was not just the parish that had a role in disposing of the dead. There were in fact a number of private cemeteries during this period. There were also dissenter burial grounds and Jewish burial grounds that did not fall within the remit of the Church. This gives pause for thought when considering the fact that the Church can hand over responsibility for upkeep to local authorities. It is evident that historically they were not the only providers of burial services at this time although clearly they were the major provider, so why is it only the Church of England that is permitted to pass this cost onto taxpayers?

All in all, the 1850 debate highlights some of the concerns that were prevalent at the time. There was no doubt that something had to be done to ensure disposal did not continue to affect public health and to offend public morals and was properly and responsibly carried out, but there was clearly some dissent about

[345] As at footnote 340

what that should be. It was in clause 30 of the Bill, that the issue of compensation to the clergy for taking on the challenge was addressed.

On the 11th June 1850, the debate resumed on the Metropolitan Interments Bill. The House was reminded by Sir G. Grey that:

"It had been decided, when the House was last in Committee, that the compensation should not be limited to existing incumbents…" (i.e. would apply to future incumbents).."but the amount of that compensation, and the distribution of it, were still open to consideration. The House seemed generally to assent to the principle of giving a just and fair compensation to existing incumbents. With regard to future incumbents, it had been thought necessary that some payment should be continued to them, with a view to obviate the deficiency of income which would be caused in many parishes were these fees withdrawn. In several parishes, the fees formed a considerable portion of the income of the incumbent, especially of that class of clergy for whom great sympathy had always been expressed in the House, the working clergy."

This compensation was envisaged as a method of appeasing the parishes when a major source of income was being removed from it by the relocation of burials outside of the parish. Burial fees would have been due at the location rather than due to the now distant church to which the land was spiritually, if not geographically, attached. Reference is made in the debate to the 'Establishment' Church, but similar compensation was not considered or made available to those who ran dissenter graveyards.

The major problem with agreeing that compensation should be paid stemmed from the view that the clergy in general could not be trusted to behave in a moral way and therefore did not deserve the level of compensation that was being mooted. A longer excerpt from the debate is included as an example of this.

"Sir B Hall thought the House ought to confine compensation for burial fees to the number of burials of persons who had resided within the parish and had been buried within it... Some of the clergy of London had made a traffic of their burial grounds, and when they found that the fees were too high, they lowered them, in order to induce parties to bring a greater number of bodies for interment than the ground ought to have been made to hold. And yet the House, by this clause (clause 32) was about to give compensation to persons who had practised this improper trafficking. The disgusting scenes which had taken place in St Giles' Cemetery, Old St. Prancras Road, had been given in evidence. Sometimes, when they buried a poor person, they threw a little earth over him, but as soon as the burial was over, and the mourners gone, the coffin was removed to a neighbouring vault. In 1846 there were 896 deaths in the parish of St Giles but there were 2,323 burials in the ground to which he was referring. In 1847 the deaths were 1,298 but the burials 2,877; In 1848 the deaths were 1,111 and the burials 3,578; while for one half of 1849 the deaths were 573 and the burials 3,440. A case could be proved in which a body was entirely broken up, the head being separated from the other parts, and the whole in this disgusting condition put into a wheelbarrow and removed to another part of the ground, where they were thrown into a hole. This was for the purpose of making room for others, yet the rector, when under examination, described the cemetery as in an admirable state. It was indeed notorious that inducements were held out to people to bury in this ground in order to increase as much as possible the fees: and the success which attended these efforts was shown by the great number of burials compared with the deaths in the parish..."[346]

From sources such as Catherine Arnold's book[347], there are far too many examples of this sort of greedy and immoral behaviour by clergy or those who worked for them. It is no wonder that there was such resentment at a payment to

[346] HC Deb 11 June 1850 vol 111 cc 1068-79 Hansard
[347] As footnote 338

recompense clergy based on the number of burials which took place rather than on the number of people of the parish who had died.

Eventually, the Bill became an Act.[348]

To evaluate the relevant clause that it is purported by the Church allows responsibility for closed churchyards to be transferred to the local authority, it is helpful to note what the current advice to the Church has to say:

In Legal Opinions Concerning the Church of England[349]

"The remaining part of section 215 deals with the modern mechanism by which the PCC can pass responsibility of the maintenance of a closed churchyard over to the local authority. In fact, it continues a mechanism originally contained in section 18 of the Burial Act 1855 which provided for the maintenance of a closed churchyard to be paid out of the rates, on the basis that it was treated as a community asset."

S18 of the Burial Act 1855 says:

"In every Case in which any Order in Council has been or shall hereafter be issued for the Discontinuance of Burials in any Churchyard or Burial Ground, the Burial Board or Churchwardens as the Case may be, shall maintain such Churchyard or Burial Ground of any Parish in decent Order, and also do the necessary Repair of the Walls and other Fences thereof, and the Costs and Expenses shall be repaid by the Overseers upon the Certificate of the Burial Board or Churchwardens, as the Case may be, out of the Rate made for the Relief of the Poor of the Parish or Place in which such Churchyard or Burial

[348] C.51,52, 13 & 14 Victorle. Ad 1850 CAP LIL 'An Act to make better Provision for the Interment of the Dead in and near the Metropolis [5th August 1850]
[349] As at footnote 238 page 236

Ground is situate, unless there shall be some other Fund legally chargeable with such Costs and Expenses."

This thesis takes issue with the opinion given in the Legal Opinions concerning the Church of England that this arrangement was made because the churchyard was a community asset. In fact, the arrangement was made because the churchyards were places of horror and filth – with the remains of corpses, the evidence of putrefaction and general disintegration of the fabric of churchyards causing public outrage and a not inconsiderable health risk. S18 was, it is contended, an attempt by the legislature to clean up a very horrible problem and to try and ensure that it could not happen again by closing churchyards as they became full, rather than allowing the continual use that had been the case previously.

There was an obvious drop in the income of incumbents when this happened which, it was feared, could lead to incumbents and their workers disregarding the rule of closure unless a financial benefit was made available. This is why a payment from the poor rate was agreed. It was to ensure compliance.

This is supported by commentary from debates[350] concerning the Metropolitan burial grounds:

"By this Bill, the parochial clergy were deprived of that which was the chief source of their incomes – namely, burial fees. In the parish of Whitechapel, with 50,000 inhabitants, the income of the incumbent had been reduced from 600l. to 300l., upon things occurred in St. George's-in-the-East, and other parishes, and it was evident that where the fees were so reduced it was impossible adequately to supply the spiritual wants of the inhabitants, and that the number of curates in such cases must be limited. Not only, however, was the income of the clergy diminished, but the fund for the repair of the churches had been cut off, so that

[350] Hansard 8 June 1855 HL Deb 08 June 1855 vol 138 cc 1634-45 Bishop of London

the clergyman and his church would go to decay together. But both he and the clergy felt most deeply the evils of the system in its operation upon the poor. As it now worked, it broke down their religious feelings, destroyed their respect for the holy ordinances of religion, and led them to regard with indifference those rites and ceremonies which, when duly performed according to the ordinances of the Church, were calculated to call forth the best feelings of the heart."

This quotation is telling a story that is common place at the time. Unless the incumbent could be compensated for loss of income, he would have to let the fabric of the churchyard collapse with all that this would entail and reduce his number of officers and be unable to help the poor leading to the general disaffection of the public for the Church and its teachings. It is difficult to overestimate the revulsion of the public at the disgusting conditions of the churchyards. Something had to be done, and ultimately, it was decided that the Overseers[351] would have to pay from the poor rate to ensure the 'evils' were put right.[352]

There is little case law to help with the investigation into why the local authority should have the responsibility for maintenance of churchyards, but one case that did have some discussion of the area was *The Queen v The Burial Board of Bishop Wearmouth* heard in the Court of Appeal[353]. The case involved a discussion about who should bear the responsibility for maintaining a closed churchyard following a first instance decision that had passed this responsibility to the Burial Board. On appeal, it was held that where a burial ground is closed by Order in Council, if it is a churchyard, it must be kept in order by the

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[351] Tax collection officers of the church

[352] From Earl Granville in the same debate when discussing the evils that the statute was to remedy: "Their Lordships could not but recollect how the public indignation was roused by accounts which were daily published of the manner in which burials were conducted in this great metropolis before the measure was adopted. It was not his wish to harrow their Lordships' feelings by any description of those pit burials in which bodies were thrown one after another into one common grave, or of the stench and noisome pestilence arising from churchyards reeking with the pestilent products of accumulated centuries of burial".

[353] [1879] QBD vol V at pg 67

churchwardens, and if it is a cemetery formed by the burial board, then it should be maintained by the burial board. The burial ground in Wearmouth was a churchyard, and therefore, the churchwardens were found to be responsible for its upkeep. It was also held in the case, that the expenses of keeping the churchyard in order were to be repaid to the churchwardens out of the rate for the township of W., being a place having a separate poor rate within which the ground was situate and not out of the rates of all the townships composing the parish of which it had been the burial ground.[354]

This then shows that the reimbursement was to have a very 'local' flavour. The case takes into account some issues that need further explanation. It talks about 'overseers of the poor' and poor rates.

Setting the factual scene, the parish of Bishop Wearmouth included the town with that name, plus five satellite villages (referred to as townships in the case). The only churchyard for the whole parish was Gill Cemetery. Each of the six townships had their own overseers of the poor, and its own poor rates. The Gill Cemetery was, in fact, an extension to the original churchyard which had become full. The Gill Cemetery was not immediately within the proximity of the original churchyard but was within the township of Bishop Wearmouth. Eventually, it became full and an Order in Council was issued to close it. This happened in 1854. In 1856 a burial board was formed that claimed it was the burial board for the parish of Bishop Wearmouth (i.e. for all six townships) but in fact, it was the board only for the township of Bishop Wearmouth as the other five townships had declined to accept this board.

The board met on 6 April 1859 and passed a resolution that the board should be responsible for the care and upkeep of Gill Cemetery paid for from funds of the board. On 2 April 1878, the earlier resolution of 6 April 1859 was rescinded and the board then stopped maintaining Gill Cemetery which fell into a state of

[354] As at footnote 353. Background information taken from the headnote to the case.

disrepair. Local people tried to get the board to pay for upkeep, but the board claimed that it was a board for Bishop Wearmouth only and therefore was not responsible for the upkeep of a churchyard that belonged to the whole parish.

The matter then came before the court for resolution. Initially, the board lost and was ordered to pay for the maintenance of Gill Cemetery. They appealed. The argument is said to stem from the interpretation of s18 of the 1853 Burial Act and the appellants argued that the fair construction of the clause was that the burial board should only be liable if the churchyard belonged to them, but if this was not the case, then the churchwardens should be liable.[355]

When referring to s18, Herschell QC says:

"This section was in force before the burial board was in existence, on whom then did it impose the liability? Surely on the churchwardens of the whole parish. It would then be a strange thing if this liability was shifted in 1856 from the churchwardens to the board. Although by the interpretation clause 'parish' may mean any place having a separate poor-rate that does not exclude its primary meaning."[356]

The alternative view is put by Sir H. Giffard, S.G. for the Crown:

"The intention of the Act appears to be, that where the ground is a churchyard and the churchwardens have control they are to do the repairs; and the best interpretation of s18 is that if there is a board the board is to do the repairs; if there is no board somebody must do them, and so the Act fixes on the churchwardens."[357]

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[355] As at footnote 353 at page 68
[356] As at footnote 353 at page 69
[357] As at footnote 353

This is held by Jessel, M.R., to be 'a peculiar way of construing the words'[358] The argument that the Act applies to all burial grounds, whether public or private is dismissed on authority of *Reg v Burial Board of St. John's, Westgate* (1) 2 B. & S. 703 which decided that the clause only applied to the burial grounds of a parish.

Jessel, M.R., gives his judgment first and ascertains that the Gill Cemetery is a churchyard and then turns to consider which types of burial ground fall within the ambit of s18. He refers to Westgate and states that there can only be two types of burial ground that are called parish burial grounds – churchyards and those formed by burial boards.

He then refers further to s18 and its construction and decides that:

"....where it is the church burial ground, or churchyard, then the churchwardens are to repair, but where it is the burial board burial ground, or parliamentary burial ground, then the burial board is to repair."[359]

It is clear from this that it is established that the churchwardens have the duty to repair a churchyard, but this does not decide the issue of who is to pay for those repairs. Whether the two issues should have been separated in quite this way, is open to question. In a modern approach, a duty to repair would almost certainly contain within it, the costs incurred in the discharge of that duty, however, Jessel M.R., refers back to s18:

"It is to be noticed that the charge for the repair is thrown upon the ratepayers of the parish or place in which the churchyard ....is situate. Now, it is quite possible that a burial ground may be outside the parish for which it is the burial ground, but still the legislature, for some reason or other, has enacted in plain words that

[358] As at footnote 353
[359] As footnote 353 page 71

the expenses of its repair are to be paid out of the rate for the relief of the poor of the parish or place in which such churchyard or burial place is situate."[360]

The confusion of who is to pay these expenses is now becoming clear. Bishop Wearmouth is one of six townships that make up a parish, but is also a township that has its own rates and overseers. Does the section mean that the overseers in Bishop Wearmouth are to pay (because this is where the churchyard is situated) or are the expenses to be paid by the five sets of overseers for the five[361] townships which constitute the parish?

Jessel M.R., reaches a conclusion that because of the separate poor-rates and overseers in each township, it is the rate-payers of the township where the churchyard is located that must reimburse the churchwardens for repairs. Brett, L.J., concurs with this finding as does Cotton L.J., who provides the following reasoning:

"It is true, that before this churchyard was closed the whole parish had the benefit of it; but what we are now dealing with is the expense of the churchyard after it is closed and can no longer be used for the benefit of the whole parish. The whole object of these Acts enabling churchyards to be closed by Order in Council, and to be considered useless as places of burial, was the health of the immediate neighbourhood, for the Act under which the Order in Council for closing this burial ground was made expressly mentions the protection of public health as the ground for making such orders. The order, then, was made for the benefit of the health of the inhabitants of the place in which the churchyard was situate; and that, in my opinion, is the reason why the expense of keeping a disused place of burial in repair is thrown upon the inhabitants of the township where it is situate,

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[360] As footnote 353 page 72

[361] There is some confusion here caused by the reference to 'six townships' in the factual outline of the case, but 'five districts' by Jessel M.R. in the official case report.

and not upon the persons who formerly had the benefit of it, but who do not derive any benefit from its being closed."[362]

Again, the case supports the localisation effect noted from the earlier Parliamentary discussions. The decision does leave a rather odd outcome with regard to liability for repair and maintenance in that additional land for burial would often be some miles from the original church, burying its parishioners within the boundaries of another area, but it was the location of the additional land to which the responsibility for maintenance and upkeep was affixed, thereby passing the burden onto fewer parishioners at that location only.

It is argued that the interpretation of s18 was reasonably clear following Jessel MR's finding even though it can be argued that the decision results in an unfair burden on those who find an annexed churchyard in their area. The churchwardens are responsible for the upkeep while the churchyard is open for business but can be reimbursed by the overseers of the parish where there is a separate poor-rate. Once closed, the burden passes to the parishioners where the additional churchyard is located.

This Chapter will now evaluate whether the overseers, churchwardens, and inhabitants referred to in the case law can equate to what is now called 'local authority' and thereby show whether the transfer of closed churchyards in the modern era is properly based in law. The Chapter also evaluates the history of the local taxes to determine whether this translates into council tax in the modern era.

[362] As footnote 353 at page 77

### *4.4.2 Who were the overseers and who would be their equivalent today?*

From the Legal Opinions concerning the Church of England[363] the answer is:

"On that basis (s18 Burial Act 1855) it was for the local authority, which succeeded to the functions of the overseers, to reimburse the PCC, which succeeded the churchwardens in this regard."

The office of Overseer was first created by an Act of 1598 which stated that two elected individuals were assigned on a yearly basis to assist the churchwarden in his duties. One of these duties was to help raise a poor rate to assist with the relief work of the parish. For the argument to succeed for the Church, the overseer would then translate into the local authority today. While it could be argued that this is broadly correct, the overseers did not work for government but rather for the Church in the execution of its spiritual aims and mission of helping the poor. This thesis contends that a better parallel would be the modern charity sector in this regard.

### *4.4.3 What was the poor-rate, who created it, how was it raised and what would be its equivalent today?*

Since the early Middle Ages, paying some sort of local tax to the church has been part of life.[364] King Edgar introduced a tithe system – greater tithes applied to anything produced of the plough; lesser tithes to anything produced of the spade. A man could give his tithe to the poor or to whatever religious house he chose. By later medieval times, greater tithes went to the church. For local churches, the vicar could collect the lesser tithes but these had little monies worth – he would be more dependent on personal contributions from the

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[363] As at footnote 238 at page 220 paragraph 14

[364] Much of the early history of English parishes falls outside the scope of this work, but it does open a further research opportunity. For more detail on the development of the parish reference was made to NJG Pounds, *A History of the English Parish* Cambridge University Press 2000.

congregation which were paid for favours such as prayers, or rental of pews. The tithe money was used for upkeep of the church building amongst other things. When the monasteries were dissolved in 1537, their property was passed to the Crown and many churches found that they no longer had the resources for maintenance of the buildings or churchyard and these fell into disrepair. In 1836, tithes in produce were replaced under the Tithe Commutation Act of that year, by money. Land that had been subject to tithes was then made subject of a survey and a rent was agreed. One tenth of the income from tithe money now went to the land owner rather than the poor or the church.

This diminution in income led to the creation of what became known as the church rate. When faced with a large expenditure, churchwardens would levy a rate on parishioners which included all people of substance, even though that substance may be small and of whatever faith or belief. This would be priced according to the means of the parishioner, the rentable value of his property, the square footage of the parcel of land or, more simply, what the churchwarden would estimate the ability to pay would be. This rate became compulsory as the burden of duties grew in a parish, and was deeply despised, particularly by those people who did not share the faith – dissenters, Jewish people and others. There was a period of great civic unrest and resistance to the tax which was eventually abolished in 1868.[365]

These church rates were different to and separate from the poor rate, but do show that the collection of money from parishioners by the church in order to enable it to discharge its duties is a commonplace event in history. A poor rate and the church rate separately, would be required from parishioners. However, this thesis contends that the repair and up-keep or maintenance of the churchyard came from the church rate rather than from the poor rate and, with the abolition of the church rate, repair and maintenance no longer fell as the

[365] As at footnote 364. As earlier mentioned, this is a very brief consideration merely to fill in the historical path.

responsibility of all persons in the parish, but moved to funds from the poor rate which was levied only on those worshippers at the church. This supports the thesis argument that transfer of liability to tax payers under the current system does not have a sound legal basis and is open to challenge by local authorities.

In 1563, the Government of Elizabeth passed a law requiring that 'two able persons' in each parish should be 'gatherers and collectors of the charitable alms' of the parishioners and required that these two should go into the church when the people are at worship in divine service to gently ask and demand of every man and woman that they, of their charity, will be contented to give weekly towards the relief of the poor.[366]

It is noted from this, that the requests for money for the poor rate were made of the people at worship in the church, the congregation, and not of the wider community, further supporting the thesis argument as to where liability should be placed.

This form of gentle persuasion was then replaced by the Poor Law 1598. In the place of the earlier 'persuaders' two overseers of the poor were to be elected for each parish on a yearly basis as assistants to the churchwardens. Among the duties of the overseers was a call to churchwardens to raise a poor rate on the congregation of the parish.[367]

In 1601, the Elizabethan Poor Law divided the poor into two groups; the impotent poor (sick, elderly, unable to work – would work but could not); and the able bodied paupers (could work but would not and who would be beaten until they saw the error of their ways). Some parishes were rather more sympathetic in their interpretation of the law than others, which caused a large number of people

[366] www.chobham.info/parish.htm accessed January 2010
[367] As at footnote 364

to flock to these parishes, putting an increased burden on the parishioners and the funds available.

In 1662 a Settlement Act was passed which sought to overcome this problem. In order to be able to obtain any relief from the poor rate, a person had to have a 'settlement'. This required that a person was either born in the parish in which he was claiming, or that marriage had occurred in the parish (this was for the use of women) or that he had been working in the parish for a year and a day. Once this was proved, a certificate of settlement was issued. If a person then moved for work, for example, but fell on hard times, the parish issuing the certificate was required to receive them back. There were obvious problems with this system. It would, of course, inhibit the free movement of workers to areas in which they may have been able to find work in. It also prevented those who were unable to find work in their own parish due to overpopulation from moving to a different area in order to find work. It also created many short term contracts of employment (364 days or 51 weeks for example) which would mean that the person could never qualify for poor relief.[368]

From 1795 to 1834 a number of poor laws came and went, but all were based on the Elizabethan Poor Law. For example in 1723, Sir Edward Knatchbull put forward legislation – For Amending the Laws Relating to the Settlement Imployment (sic) and Relief of the Poor – which established workhouses and in 1782, Gilbert's Act allowed parishes to form unions to share the costs of building and running workhouses for the old, sick or infirm. The able bodied were excluded from the workhouses, but could be provided with outdoor relief or employment near their own homes. The Act also introduced a minimum wage and land owners were entitled to claim from the parish rate for increasing their employees pay to the new minimum.

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[368] www.magic-nation.co.uk The London Burial Grounds. Again, this area falls outside the scope of this work but shows an historical link to the development of poor laws.

What this brief historical outline demonstrates is a creation and use for the poor rate which mentions nothing about upkeep of church buildings. This seems to feature far more obviously in the church rate history. This thesis argues that in the modern era, local council taxes are a close parallel with the church rate rather than with the more charitable poor rate. The church rate indicates that the governmental aspects of that tax system should be removed from the grip of the church and social infrastructure would be taken over by emerging councils. Issues of church mission, such as relief for the poor, were continued with the poor rate and were a matter for the church to administer.

### *4.4.4 Churchwardens*

The office of churchwarden is ancient – probably dating to before the fourteenth century.[369] Churchwardens did have duties imposed on them by the Poor Law legislation which have since been removed. Smith asserts that churchwardens originated as treasurers of the church who acted as trustees, before the office of churchwarden existed, for their parishioners stock.[370] He also adds:

"The churchwardens also have a responsibility for the maintenance of order and decency in the church and churchyard, particularly during the time of divine service. It is not clear where this facet of their office comes from, but it seems likely that as the representatives of the parishioners they assumed an oversight of the behaviour of those who came to the church for which they had the dual responsibility of maintaining the place in good order and informing the ordinary of those offending against the ecclesiastical laws."[371]

Churchwardens were appointed from the local community, usually being someone of good standing in that community, although some had to be coerced

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[369] Peter M Smith Churchwardens: An introduction to the Nature of the Office *Churchman 114/2* 2000
[370] As at footnote 369
[371] As at footnote 369

into office. They were often put to great pains to try to find money for repair and maintenance. Although outside the scope of this thesis, what does emerge is that the Churchwardens began using the money from the poor rate to effect urgent repairs to their churchyards:

"The Churchwardens were willing to give up that right which they now had to come upon the Poor Rate for the upkeep of the churchyards"[372]

This debate had formed part of a wider issue about whether ownership of church extensions to burial grounds was in contention and is also evidence of further concern about the financial burden of repair and maintenance of churchyards some forty years after the 1855 Burial Act s18.

Sir R Temple discussed the issue of churchyards that were at some distance from the church and was seeking assurance that these lands would remain in the ownership of the church[373]. It is reported:

"He knew there was a question as to whether any of these closed churchyards received any assistance from the rates. But he admitted that if they were to maintain their position that the closed churchyards should remain under the church or church officers they might, perhaps, have to surrender all assistance from the rates. That assistance was not of very great importance."

In response Mr H.H. Fowler added:

"I think we shall be able to arrive at some satisfactory solution of this question. I explained to the House on the Second Reading that this in our view is purely a

[372] Hansard 28 November 1893 Committee [Progress 27 November] HC Deb 28 November 1893 vol 18 cc 1920-2001 accessed 15 December 2009 pg 5
[373] As at footnote 353 at page 11

sanitary and fiscal arrangement, and that there is no intention to interfere with churchyards, whether closed or not."[374]

This exchange is focused on the issue of ownership and whether transfer of responsibility for maintenance of a closed churchyard in fact transfers ownership of the relevant land to the local authority.

Continuing with Fowler's contribution to the debate[375]:

"...[u]nder the Act (Burial Act 1853 s18) provision was made, where churchyards were closed, that the Churchwardens should repair the fences and keep the churchyards in order, and that, unless there was some other fund chargeable, the expense should be paid out of the poor rate. Now, the principle I venture to submit to the House is that where public money is used for any public purpose a Public Authority should have the control of the expenditure....But that, where no demand is made in that respect upon public funds, the churchwardens should have the right to maintain and repair such places out of any funds which they may legally devote to that purpose. The Churchwardens would know that if the expense did not fall upon the poor rate, they could undertake the repair and maintenance if they thought proper. If they did not undertake the duty, they would know that the management of the churchyards would fall upon the Parish Council.[376]

This commentary is taken from debate in the House of Commons and is, therefore, used with caution. However, this thesis contends that it is evidence to support the hypothesis that a misunderstanding of the interpretation of s18 has occurred because there is no recognition of the difference between the basis for the church rate and the basis for the poor rate.

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[374] As at footnote 353
[375] As at footnote 353 at page 12
[376] As at footnote 353 – Fowler continuing

When the responsibility for maintenance was placed on the poor rate, this, in effect, put that responsibility on those people who were members of the congregation of each and every church. The rate was imposed on them only, rather than the wider community that were subject to the earlier despised and abolished church rate. This thesis argues that the assumption that the responsibility should be on the modern local authority ratepayer can then be seen to be erroneous and the responsibility for maintenance of the churchyard should instead be with the congregation which removes the burden away from the local authorities.

While this may be of some relief to local authority funding, it does raise the issue of how such maintenance would then be funded, should this be agreed not to be the responsibility through statute of the local authorities. It is highly probable that the Church would not have the funds available from its congregation, which is in decline, to pay for maintenance and the churchyards would once again fall into a state of disrepair, potentially returning to the position which existed before the Burial Acts and the Local Government Act regulated the area.

In this regard, the thesis recognises that there is a public health problem and the logical thought is that the local authorities would be required to address as the only possible organisation that could administer and equip such undertakings.

This thesis argues strongly that the emergence of 'friends' groups for individual churchyards, is a possible alternative organisation that could take on the responsibility for the upkeep of a closed churchyard. These groups, usually made up of local churchgoers and other interested people, work to raise funds as well as physically working in the churchyards to turn these into wildlife havens for the local community to use. With the responsibility for maintenance coming from the poor rate, it is contended that this these groups would equate to those who formerly had to pay the poor rate.

The Church argues that this maintenance transfer is in recognition of its past service as the major provider of burial facilities, but this thesis has demonstrated that rather than being a reward for services rendered, it was a drastic and urgent response to the very poor level of service offered. There was corruption and negligence in the provision that could only be remedied by passing control to burial boards. The passing of control is not the same issue as the passing of cost, although as is mentioned earlier in the Chapter, when public money is being spent, public authorities should have control of that expenditure. Burial boards were often private companies rather than government bodies and here again, it is argued that not all churchyards would have arrived into public jurisdiction, undermining the certainty that s18 did intend for all expenditure to come from the public purse.

The Church of England denies that this transfer of responsibility is a privilege related to it because of its status as the established church, but no other religious group has this benefit and indeed the disestablished Church of Wales has no corresponding right[377]. This thesis contends that this right can only be viewed as a privilege in the circumstances set out above.

This section of Chapter Four has discussed the legal basis for the transfer of responsibility for maintenance of closed churchyards. The Chapter now focuses on several issues that arise in relation to memorials and headstones. The Chapter will consider the law and regulation of memorials and headstones; the ownership and property issues that relate to memorials and headstones; the health and safety responsibilities that arise and liability for maintenance. This part of the thesis relates therefore to the management of the churchyard.

[377] Discussion with Steven White, legal advisor to the Church in Wales at the Law and Religious Scholars Network conference at Cardiff University Law School, May 2009

### *4.5 Establishing liability for maintenance*

There have been a number of accidents in churchyards and in civic cemeteries caused by monuments that have fallen into dangerous disrepair over time. In a rather heavy handed attempt to prevent further accidents, the 'health and safety' lobby have created an environment where testing of monuments is deemed acceptable and necessary. All providers of burial space accept that this is necessary, as some of the accidents have resulted in deaths, and on the principle that no death by accident is tolerated, topple testing is carried out up and down the country in cemeteries of any kind.

In 2009 a report was published by The Local Government Ombudsman[378] in response to public anger and agency concern, caused by the heavy handed tactics used by topple testers when checking cemeteries for unstable memorials. It seemed that nothing short of desecration was taking place in the name of health and safety, orchestrated by independent firms brought in by cemetery management – the local authorities and the PCCs.[379]

No one disputes that the local authority, PCC or other burial authority has a duty to take reasonable steps to ensure that cemeteries are safe for the public to visit, but it is clear that something had gone seriously wrong and within a very short timescale.

In setting the context for their report, the Ombudsman stated:

"In England and Wales, people do not buy graves. They buy the right to be buried in a specific place in a cemetery [this is of course not the case in Church

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[378] Advice and guidance from The Local Government Ombudsmen *Special Report Memorial safety in local authority cemeteries* LGO 612 (03/06) Commission for Local Administration in England, Public Services Ombudsman for Wales

[379] As at footnote 378 Comments from the various parties are used to introduce the report cited above. To quote just one of these "No stone left unturned in the name of official vandalism" *The Times* 24 January 2005

of England consecrated land – see Chapter Three where it is made clear that there is no right to a specific place in the churchyard]. The owner of the burial right may decide who is buried in a given plot. The length of the right depends on the terms of the grant. Although granted in perpetuity when cemeteries were first established, burial rights now may be more typically for 50 years or less. The right to burial usually carries an implied right to erect a memorial."[380]

This right of a memorial is neither explicit nor implied in the Church of England rules as was referred to in Chapter Three of this thesis.

The report states that:

[the] "…[o]riginal maintenance liability will rest with the grave owner for the period of the grant of the right of burial, or the right to erect the memorial if separate."[381]

This report continues the tendency in this area of law to add to the confusion that is a feature of it by using interchangeable language or legal terms that are not properly representative of the legal position. In this quotation it can be noted that there could be a confusion in the issue of liability because the reference now is to the 'grave owner' when it has just made it clear that the person with the right of burial does not 'own' the grave, but merely the 'right to burial'. Assuming that 'grave owner' means the person with the right of burial, what the report highlights is that the right to burial and the right to erect a memorial are two separate and distinct rights.

As the Ombudsman points out, as with many areas of regulation regarding disposal of the dead, the guidance available is multiplicitous and conflicting. The Burials and Cemeteries Advisory Committee have a Memorial Safety subgroup to

[380] As at footnote 378 at page 9
[381] As at footnote 378 at page 9

whom consideration of the whole issue of memorial safety falls but from whom clear concise guidance is lacking.

The legal structure for maintenance of memorials and headstones stems from the Health and Safety at Work Act 1974, which imposes a duty on burial authorities to ensure that their staff and people who, while not in their employment may be affected by their work, are not exposed to risks for their health and safety.[382]

The Occupiers Liability Acts 1957 and 1984 also apply, as does the Local Authorities' Cemeteries Order 1977 and the Faculty Jurisdiction Measure 1964 for memorials on Church of England land. The legal structure is in place to compensate for accidents, but the prevention of them in the first place is where the problem with over-enthusiastic health and safety procedures lies.

There are a number of tests that can be applied to decide whether a memorial has become unstable and therefore is deemed unsafe. The arguments have focused on whether the testing methods themselves have in fact caused otherwise stable memorials to become unstable and whether the testing methods have caused damage to the property of others. Headstones and memorials are the property of the 'owner', a concept that has a complicated definition as will be explored later in this Chapter.

The most disputed method of testing for the stability of any memorial or headstone is the pressure testing device which is used once the hand testing method has shown that the memorial is unsafe by that standard. Essentially, a tester will hold the headstone or memorial and physically shake it to see whether it feels loose or unstable. If so, then a 35kg device is used to see whether the memorial can withstand the pressure, but interestingly, if the headstone or

[382] Management of Health and Safety at Work Regulations 1999

memorial passes the hand test, it will still then be tested with the 35kg device, or that seems to be what the Ombudsman discovered during its research.[383]

The topple testing device is a handheld machine that is placed against the headstone or memorial which then applies a 35kg force against the stone. If it was not unstable before, the allegation made by many is that it will be after this. The operatives who are employed to undertake this work were found by the report to be, in some areas, untrained for the work. This resulted in a wide spread practice of declaring thousands of headstones unsafe. Perhaps an interesting aside, but there are very few Victorian age memorials that are declared unsafe – it is by far more prevalent in the new style lawn cemeteries, where headstones sit on a concrete plinth which is submerged at the top of the plot with no other obvious sign of the grave above ground.

Complaints to the Ombudsmen were either centred on the fact that there was a lack of notice to the owners of the headstones and memorials or that huge numbers of memorials were simply found to be unsafe if they moved at all and so immediately laid flat. This "wholesale laying down of memorials that have failed the safety test" caused "the most vehement public outrage and anger"[384] and, as highlighted in the report, causes something of a risk of itself in that members of the public may trip over the laid-flat stones. The picture that this conjures up is one of authority-approved vandalism, as many of the thousands of headstones that were laid flat were found in fact not to be an immediate danger at all.

In consecrated ground the Faculty Jurisdiction Measure 1964 s3(4) sets out that the owner of a monument, which includes a headstone, is the person who erected the monument and, after his death, the heir or heirs at law of the person in whose memory the monument was erected. This peculiar passing of ownership is explored later in this Chapter of the thesis.

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[383] As footnote 378 at page 31
[384] As footnote 378 at page 18

Consecrated ground in public and privately owned cemeteries is under the jurisdiction of ecclesiastical law and this legal system has a different set of rules that apply to it. It is a requirement that parties apply for a faculty for any alteration to a monument.

The Ombudsmen Report refers to the case of *Re Keynsham Cemetery,*[385] where it was decided that it was not necessary to apply for a faculty for minor works associated with the maintenance of monuments, which includes the use of safety testing appliances, propping up with temporary supports or fencing off unsafe monuments.[386] It is, however, still necessary to obtain a grant of faculty if the headstone is to be laid flat and this would usually be granted. At this stage, the Church were a little ahead of local authorities, because the Church would require any council to give notice to any person affected so that they would have time to remedy the problem before the stone was laid flat.[387]

In *Re Welford Road Cemetery, Leicester*[388] the chancellor granted a faculty to permit the testing of 10,000 memorials at the cemetery. The faculty requested covered work that had already been undertaken as well as work to be undertaken in the future. Chancellor Behrens said in reference to the Consistory Court:

..."should not now readily grant a faculty which will result in the laying down of significant numbers of memorials unless this is clearly shown to be necessary. If councils are unwilling to pay for the cost of the necessary repairs to memorials, far more use should be made of the temporary protection afforded by a stake

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[385] Re Keynsham Cemetery [2003] 1WLR 66

[386] (2004) 7 Ecc LJ 492 where it was reported in *Re Keynsham Cemetery (No 2)* Bath and Wells Consistory Court: Briden Ch, March 2003, the chancellor varied the faculty earlier granted to substitute a force of 30kg with one of 35kg for the testing of headstones in a municipal churchyard.

[387] As at footnote 378 at page 32 – reporting on a petition by Sedgmoor District Council in January 2005 heard by Chancellor Briden.

[388] [2007] 2 WLR 506, [2007] 1 All ER 426, Ct of Arches

placed behind the memorial and attached to it with a strap, while efforts are made to contact the owner. Then, and only then, as a last resort, may gravestones be laid flat."[389]

Unfortunately for the chancellor, the Justice Minister, Bridget Prentice, denounced the practice of staking in a press release dated 16 January 2009.[390] The press release announced new guidance published on the same day.[391] The guidance was prompted by requests from burial ground managers for some clear advice on how they should proceed following the public outcry to the "over zealous risk assessments or poor communication"[392] exercised by the testing operatives[393]. There had also been a campaign by John Mann, then MP for Bassetlaw, who had responded to his constituents' complaints to stop the practice of laying flat or staking.

In an article in The Guardian newspaper, Mr Mann (who had trained as a topple tester) celebrated after 'winning his campaign to end the unnecessary topple testing of gravestones in cemeteries up and down the country':[394] Mr Mann is quoted as saying:

"This has been a distressing and expensive situation for many people. For the past year I have been battling to get proper guidelines in place...In recent times many graveyards have been blighted by swathes of gravestones, supported by wooden stakes with large yellow stickers instructing the visitor of its imminent danger and need of repair. For many relatives, this is the first they know of their

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[389] As per footnote 378
[390] *Stop unnecessary staking says minister* Ministry of Justice website 16 January 2009 www.justice.gov.uk/newrelease 160109
[391] Managing the safety of Burial Ground Memorials, Practical advice for dealing with unstable memorials Ministry of Justice January 2009
[392] As at footnote 391- preface
[393] Who are often not council employees but employees of outside contractors
[394] Guardian web page 20 January 2009 MP John Mann wins gave topple test campaign, Debbie Lockett. www.worksopguardian.co.uk/news/MP-John-Mann-wins-grave.4892821.jp

family gravestone having failed a 'topple test' and they are left to foot the bill to put right the damage. This costs people an average of £200.
...Mr Mann learned that some contractors are paid per gravestone they stake...Mr Mann trained to become a topple tester, and proved that the vast majority of staked gravestones were safe and did not require staking. Indeed, the topple testing process itself had caused damage to a significant number of gravestones that were otherwise perfectly fine"[395]

The guidance document also acknowledges from the outset, the:

"great historical and environmental heritage of our cemeteries"[396]

This comment demonstrates support for the socio-historical context of this thesis.

The guidance is targeted at all burial authorities including the Church of England PCC. It has to be remembered that the need for this guidance is not because of any major concern about accidents in churchyards – as the guidance itself says, the risk of injury or death is very low.[397] The time and expense of preparing this guidance was caused by the disproportionate response of the operatives employed by burial authorities, including the PCC, to a perceived problem which this thesis argues gave the PCC (and others) the opportunity to 'deal' with the costly problem of maintenance in churchyards that had become too expensive to manage. The ease of cutting the grass in churchyards features heavily in PCC policies, regulating the style and form of headstones and memorials, as was mentioned in Chapter Three of this thesis. The zeal with which topple-testing was permitted was and is a disproportionate response to this aim.

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[395] As at footnote 391
[396] As at footnote 391
[397] As at footnote 391 – Background pg 3 where the guidance says that over the last 30 years, eight people have died when a memorial has fallen on them which conflicts with the Ombudsmen Report which stated the number was 3. This figure is from the whole UK and the guidance stresses that when the number of burial grounds and memorials is taken into account, this figure is extremely low.

The guidance makes very clear that what it calls 'operators' (i.e. the PCC, local authority and other providers) need to adopt a risk-based and proportionate approach and that a visual inspection, followed by a hand test should suffice to identify memorials where there is a potential problem with stability, but that routine use of mechanical test instruments is not recommended. The guidance states:

"The routine use of mechanical test instruments as inspection tools is not recommended. Results from these instruments are liable to overestimate the actual risk."[398]

How much money has been spent on topple testing which, from the guidance above, seems to be an unnecessarily disproportionate response to a low risk of death or injury? As reported in a national newspaper, the BBC Panorama programme conducted research for a programme and using the Freedom of Information Act 2005, it appeared that 118 councils admitted to topple testing in the previous 2 years at a cost of £1.65m.[399] The programme reported that it believed up to one million gravestones may have failed the tests in recent years.

The article goes on to state:

"The British Safety Council said recent examples showed how companies were using health and safety as an excuse to become 'overburdened' by red tape. A spokesman said: 'The BSC believes that health and safety is often used by organisations and individuals as an excuse for stopping legitimate activities, saving the time and money (that would otherwise be needed)...Quite often these decisions have little or no basis in the health and safety regulations, or else the

[398] As at footnote 391 at paragraph 18 page 10
[399] Councils spend millions on gravestone 'topple' tests for health and safety Daily Mail 20 April 2009 Daily Mail Reporter.

regulations are taken too literally…The solution must be proportionate to the risk."[400]

Some research from Sheffield Hallam was reported in 2010.[401] The findings of the report are précised as:

"The issue of memorial safety illustrates the tensions that can arise between safety and conflicting priorities, in this case sensitivity to the bereaved. The study shows that the simple promulgation of guidance will not automatically lead to it being accepted by all as 'good practice".[402]

The research explores why the reaction to an incident such as the death of a child crushed by an unstable monument is "that more should be done"[403] and the sometimes 'knee-jerk' legislative response that follows can be so risk averse that it drives those deemed responsible to take actions far in excess of that required. This would explain why the sudden emergence of topple testing as a method of testing headstones and monuments for safety happened when it did.

The report refers to the death of Reuben Powell, a six year old boy who was crushed by a falling monument at Grove Road Cemetery in Harrogate in July 2000 as being the 'trigger' for the concern about risk posed by monuments.[404]

The report says:

"Following the Harrogate incident, and the ensuing compensation claim, the Health & Safety Executive issued a guidance circular to local authority enforcement officers, drawing their attention to memorial safety as a risk issue

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[400] As at footnote 399
[401] *"Perceptions of occupiers' liability risk by estate managers: a case study of memorial safety in English cemeteries"* Bennett, L., and Gibbeson, C., International Journal of Law in the Built Environment, 2(1), pg 76. Author deposited version from http://shura.shu.ac.uk/1737/
[402] As at footnote 401 at page 1
[403] As at footnote 401 at page 2
[404] As at footnote 401 at page 8

that needed greater attention paid to it. This circular, *LAC 23/18: HELA Local Authority Circular 23/18: Management of Unstable Memorials* (HSE 2001) is credited by most of the interviewees (in the report), as the spur for the ensuing cemetery survey programmes, and mass precautionary action (laying down or staking gravestones)."[405]

This circular seems, according to the report, to have engendered a mass panic reaction by local authorities which is evidenced in the report from press reporting and which was commented on by the Local Government Ombudsman who had to deal with a large number of public complaints:

"Spurred on by concerns of public safety, many local authorities see laying down as the immediate solution to the risk posed by unstable memorials. This work was often done without any consideration of degrees of risk or the effect on the public when scores or even hundreds of memorials were laid flat. The hurt was often compounded by failures of communication before and during the testing process."[406]

This reaction within the municipal cemeteries, which caused so much public anger, was mirrored in the churchyards with a number of cases coming before chancellors who tried to give guidance about memorial safety.[407] Guidance for PCCs eventually followed and mirrored the Ministry of Justice advice to municipal cemeteries.

It does seem that the rather short but brutal existence of topple testing has been curtailed, but not without the considerable expense that was incurred nor with much discussion about interference with the property of others, bearing in mind that the headstones and memorials are held to belong to the person who pays for

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[405] As at footnote 401
[406] As footnote 378 page 9 citing the LGO 2006; 13)
[407] An example would be *Re Welford Road Cemetery, Leicester* (2006) Fam 62 as cited in the report on page 11.

the erection of the monument and thereafter to the heirs of the person whose passing it marks. This aspect of the thesis is examined in further detail below.

### *4.6 Why are headstones or memorials not the responsibility of the burial authority although annexed to the land?*

It is a legal oddity that memorials, while being annexed to the freehold, are held to be property where ownership and, therefore, responsibility for maintenance remains with the original purchaser or provider of the monument until that person dies, following which it becomes the responsibility of the heirs of the deceased in the plot. This thesis argues that this legal position is incorrect.

The general rule of annexation has its basis in *Holland v Hodgson*[408] where it is made plain that an item brought onto land which is then found to be annexed to the land becomes part of the land and therefore within the ownership of the freeholder. Blackburn J devised two tests – the degree of annexation and the purpose of annexation. It would be an understandable conclusion of any undergraduate student of law, that a headstone, which is attached to the land with the intention of permanence as a marker of that particular piece of land would probably fulfil the criteria. So why does the law contend that gravestones are not the responsibility of the freeholder i.e. the incumbent as representing the Church? At all times, the freehold in a churchyard belongs to the Church.

In The Legal Opinions of the Church of England[409] the general position is stated as:

"At common law property in a tombstone is vested in the person who erected it and after that person's death in the heir or heirs at law of the deceased. Thus the party having title to the monument was able to maintain an action against the

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[408] [1872] LR 7 CP 328
[409] As at footnote 238 at page 197: Churchyards: ownership of monuments and trees

incumbent or churchwardens for interfering with it, even though the monument had been annexed to the freehold."[410]

The root of this peculiarity is said to be with Sir Edward Coke[411] but as is acknowledged in the Legal Opinions, "Coke 'based himself upon less explicit case law'. Nonetheless, this decision has been restated over many years in texts and cases and is deemed to be correct."[412]

This thesis argues that this restatement of the law is not correct. Not only does the Legal Opinions reflect that Coke's statement of the law was not based on explicit case law on the point, as has been shown clearly earlier in this thesis, also incumbents regularly interfere with headstones and, as was shown in Chapter Three, have little hesitation in interfering with other personal property brought into the churchyard.

The explicit case law on annexation leaves little alternative but for the law to be demonstrably incorrect. Using Blackburn's purpose of annexation test, a headstone is designed to be the permanent marker of a grave and brought onto the land with the intention of the parties that the memorial will be permanently affixed. The headstone or memorial will be erected by a specialist and from *TSB* v *Botham*[413] it is plain that this renders the object something that has become annexed to the land.

The Legal Opinion moves to consider s45(1)(a) of the Administration of Estates Act 1925 which abolished the descent of property to heirs. It reports that s45(1)(a) states:

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[410] As footnote 409
[411] As at footnote 238 – in paragraph 1: (See *Corven's Case* (1612) 12 Co. Rep. 105, 1 Co. Litt. 18 and 3 Co. Inst. 202)
[412] As at footnote 238 – referring to Phillimore *Ecclesiastical Law* 2nd ed p 691 and *Halsbury's Laws of England, 4th ed 1975*vol 14, para 1085; *Re St. Andrew's Thornhaugh* [1976] Fam 230; *Re St John the Baptist, Bishop's Castle* (1999, Hereford Consistory Court; unreported); and *Re Keynsham Cemetery*[2003]1 WLR 66.
[413] (1997) 73 P & CR D1, [1996] EWCA Civ 549

"With regard to the real estate and personal inheritance of every person dying after the commencement of this Act, there shall be abolished –

(a) All existing modes rules and canons of descent, and of devolution by special occupancy or otherwise, of real estate, or of personal inheritance..."

The Opinion says that the impact of the abolition contained in this section on the transfer of ownership from the person providing the memorial to the heirs of the deceased on the death of the original provider has never been satisfactorily determined. It goes on to state that the title of the person who erected the monument is unaffected by the abolition. It is that transfer of ownership from the originator of the memorial to the heirs of the deceased that is a cause for concern for this thesis.

There seem to be three possibilities for the legal position as far Legal Opinion is concerned:

"At common law there is a transmission to the heir of the deceased, and on his death to the next heir, notwithstanding section 45....Presumably on this analysis devolution operates outside the scope of s45 because the rights in relation to the monument are neither 'real estate' nor 'personal inheritance'.[414]

This thesis argues that this conclusion is unsatisfactory although favoured in some case law. The gravestone would be 'personal inheritance' in any common sense meaning of the word and, therefore, section 45 would apply. If the property in the gravestone remains as personal property rather than becoming annexed to the land and, therefore, not 'real estate', as is contended at the outset of the Opinion chapter, then the word 'personal' in section 45 is fulfilled in terms of land law. It can also be argued that it is 'personal' in terms of being passed to the heir of the deceased – directed at the specific person. It is an inheritance, albeit not

[414] As at footnote 238 at para 3(i) pg 231/232

directly from the deceased (unless he was the original provider of the memorial presumably) but rather from the original provider on his death.

The second possibility in Legal Opinions is:

"The common law rule is restricted to cases in which the person commemorated died before 1 January 1926 or died after that date but (as is usual) had no title to the monument; and is further limited to a single transmission after that date from the person who set up the monument to the heir at law of the deceased, the descent from heir to heir being doubtful given the impact of section 45."[415]

This is the solution that is given by Professor J.H. Baker[416] when tracing back to the ancient decision by Coke referred to above.

If this is the case, it appears that the suggestion is that the person who died had not been the original provider of the memorial. While this makes sense, in that usually people do not commission their own headstones, it is not the case that this could never happen and those that prepare in advance for their passing may well commission a stone. Again, the reasoning is not comfortably conclusive.

The single transmission point makes sense if descent of property is read as meaning transmission of property which returns the argument to the point that it is the passing of ownership from the first provider across to someone who may be totally unrelated to that provider by virtue of being the heir of the deceased, which is at the very least contentious because of the circularity of the argument.

The third suggestion in Legal Opinions is:

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[415] As at footnote 238 para 3(ii) pg 232
[416] Professor J.H. Baker (1970) 5 Irish Jurist N.S. 391

"The shifting interest passes from the person erecting the monument to the personal representatives of the deceased by virtue of the Administration of Estates Act 1925, further devolution being governed by the provisions of that Act."[417]

What is not clear in this suggestion is precisely which deceased is being considered – the deceased in the plot or the now deceased first provider of the monument. As the Opinions state, it would be something of a difficult task to work out how ownership had moved between a line of personal representatives.

Despite the legal uncertainty of the transmission of property in this way, the Church has continued to adhere to the rule even though there is open concern voiced in the Opinions:

"Despite the modification to the rules of inheritance made by the Administration of Estates Act 1925, section 3 of the Faculty Jurisdiction Measure 1964 reiterated the common law...." [and used the word 'owner' to mean the] "person who erected the monument in question and, after his death, the heir or heirs at law of the person or persons in whose memory the monument was erected..."[418]

In Newsom[419] it was said:

"Until 1926, real estate devolved (in the absence of other testamentary provisions) upon the heir at law of the owner, that being his nearest surviving relation under a system of primogeniture with males taking priority over females. This system of devolution ceased to have any practical application in the law of real property as a result of the Administration of Estates Act 1925, and at the

[417] As at footnote 238 para 3(iii) pg 232
[418] As footnote 238 para 4 pg 232
[419] Newsom *Faculty Jurisdiction of the Church of England, 2nd ed pg 155*

present time, it would in most cases be difficult, once the person who erected the monument is dead, to say who, in fact is the 'owner' within subsection (4)."[420]

While Newsom is making a good point about the difficulty of evidencing who is the 'owner', the passage does refer explicitly to 'real estate' devolving rather than personal property. Unless the annexation argument is accepted as passing title to the freeholder, which it is not, then the discussion is around personal property and therefore what Newsom says does not take the point very much further.

There are differences of opinion, however, even within the consistory court system. The well documented case of *West Norwood Cemetery* takes a very different perspective but this could be argued to be due to the particular facts of the case.[421] This thesis argues that the decision in *West Norwood* more accurately reflects how the law should be applied in relation to ownership of a headstone or memorial.

In West Norwood, Lambeth Borough Council (hereafter referred to as Lambeth) had acquired the cemetery by means of compulsory purchase. In 1971, Lambeth had decided that they wanted to re-shape the landscape of the cemetery and rather than keeping to the traditional garden design, opted for a 'lawn' style cemetery.[422] The Council began work and, depending on the view taken, destroyed much of the original garden cemetery, including monuments and trees. There was a huge public outcry about this and for a time, the work was stopped, but it recommenced in January 1990 when yet again, public outcry brought the desecration to the attention of English Heritage and other interested parties who contacted the Archdeacon of Lambeth to see if he could bring the works to an end within the consecrated part of the cemetery.

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[420] As footnote 419

[421] *Re West Norwood Cemetery (No 1)* Consistory Court (Southwark) 8 March 1994, [1994] Fam. 210; 3 WLR 820; [1995] 1 All ER 387; Times, April 11, 1994.

[422] Lawn style cemeteries have stones that stand upright but there is no visible grave above the lawn level – see Julie Rugg, *Lawn Cemeteries: the emergence of a new 'landscape of death'* Urban History, vol. 33, issue 2, pp213-233

It is difficult to express just how upset and angry people were with what Lambeth Council had done. The author has spoken to a member of the still functioning committee to oversee the 'putting right' of West Norwood Cemetery[423] indicating the scale of the project that has been ongoing since the Archbishop's intervention in 1993. In essence, the Council said that it had the right to do whatever works it thought necessary as it had compulsorily purchased the land without the need to apply for a faculty from the Church.

The Church, however, said that it had jurisdiction over the consecrated parts of the cemetery and that the Council would need to apply for a remedial faculty for the work already undertaken.

West Norwood Cemetery was created by William Tite (later to be Sir William Tite) and opened in 1837 and followed the 'garden of the dead' theme that, with some dispute is said to have started with the Pere Lachaise in Paris.[424] Tite was President of the Royal Institute of British Architects which indicates the importance that cemetery design had at this time. As the chancellor says when setting out the facts in West Norwood:

"These new cemeteries had become a necessity because of the appalling insanitary conditions which had prevailed in the 80 small churchyards lying within the City of London which between them amounted to only nine acres of burial space. There were reburials in some cases after only nine months, and a campaign was started by a barrister called George Carden to promote private cemeteries, where the dead could be decently interred, and a proper respect given to the monuments erected in their memory by their bereaved friends and relatives."[425]

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[423] At York University, 2009 Colloquium on Cemeteries
[424] Sarah Rutherford Head of English Heritage's Register of Historic Parks and Gardens speaking at York University Conference 2009
[425] As footnote 421 at 215

Tite's design for the chapels and buildings on the site changed what had been the fashion for classical style to one that was gothic. The chapels were pulled down in the 1950's and replaced with what was then considered something more tasteful. The chancellor, R.M.K. Gray QC extensively listed the great and the good buried at West Norwood and stressed the heritage and architectural importance of the monuments to them and the fact that it was a responsibility to preserve, maintain and pass on such important sites.[426]

Turning to part 218 of the judgment, and in support of what is said in relation to property issues in this thesis, Chancellor Gray discusses the property issues and stated:

"It will be apparent from the sections of the Act of 1836[427] which I have set out that what the purchaser of a burial plot at West Norwood Cemetery acquired was an exclusive licence, either in perpetuity or for a limited period, to buy in that plot and to leave that plot by will or by assignment to members of the family or others named. What the purchaser of a plot did not acquire was any interest at all in the land as real property. Any real property remained throughout vested in the company, subject to the statutory inalienability of any part of the cemetery which was consecrated."[428]

This supports what has already been said in this thesis in that it appears there is no real property interest in a grave space and that the consecrated land remains in the ownership of the Church. The chancellor then continues to discuss the property rights in a headstone:

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[426] West Norwood Cemetery is included in English Heritage (Historic Buildings and Monuments Conservation) Register of Parks and Gardens of Special Historic Importance, and is an important site of wildlife interest – The London Ecology Unit, English Nature and the London Wildlife Trust.
[427] As footnote 421 at 218 referring to The South Metropolitan Cemetery Act 1836 ss3,8,10 and 12
[428] As footnote 421

"The ownership of the tombstones clearly also passed to the owners of the realty: see D'Eyncourt v Gregory (1866) 3 L.R. Eq 382, and Leigh v Taylor [1902] A.C. 157. The monuments are affixed to the ground, and intended by those who paid for their erection to be permanently affixed; the contrast with Madame de Falbe's tapestries at Luton Hoo is an obvious one. Mr Briden (for the Council) argued the contrary only very faintly. They, like the rest of the land, are held by the council subject to the rights of the licensees, who are in a similar position to the grantee of any faculty to place a monument in the burial ground attached to a church."[429]

This does not follow the Church's often stated reasoning from the distant common law, as it clearly declares that headstones are fixtures and therefore belong to the owner of the freehold, which places responsibility for maintenance and upkeep back with the PCC to whom this responsibility would pass, rather than the person who paid for the monument or, following the death of that person, the heirs of the deceased in the grave.

The cemetery had been set up by an Act of Parliament[430] and covered 42 acres. It was the second of the 'magnificent 7' cemeteries (an eighth joined later)[431] and a company had been set up with responsibility to run the cemetery. Most of the acreage is consecrated which brings that land within the jurisdiction of the consistory court.

It appears from the chancellor's finding that the arguments put forward by this thesis have a basis in law and have been recognised. The real property interest remains with the legal freehold owner, the Church, and that burial plots are purchased by licence, creating no proprietary interest in the land for those that hold such a licence. As is clearly stated, headstones are annexed to the land and

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[429] As at footnote 421
[430] South Metropolitan Cemetery Act 1836. Norwood was originally called the South Metropolitan Cemetery before its name was changed to South Norwood)
[431] As at footnote 423 Julie Rugg at York University 2009

therefore part of the land itself and so obviously the responsibility of the freeholder. Why then, is this not how the law has been applied?

The South Norwood Cemetery Company conveyed the land to Lambeth Council by a conveyance dated 2 December 1965 which stated:

"All the land and premises in the parish of Norwood in the London Borough of Lambeth together with the buildings thereon or on some part thereof known as the South Metropolitan Cemetery as more particularly shown delineated by the red line of the plan annexed hereto subject to the contractual [sic] obligations under deeds of grant in respect of exclusive rights of burial and in respect of deeds for the maintenance in perpetuity and lesser periods of certain memorials and graves."[432]

The Chancellor stresses that this means the land and monuments remained at all times vested in either the cemetery company or, following conveyance, in the Council.

Mr Briden, for the Council, had tried to argue throughout that the faculty jurisdiction did not apply to the cemetery once the land had been conveyed to the council, but this was dismissed by the Chancellor, who relied on what he called the 'plethora of case law', which stated that even though the land may be conveyed, if it was consecrated land it remained within the jurisdiction of the consistory court.

The case is very clearly focused on the extraordinary damage done to heritage, tombs and headstones of historical importance and to the architectural design of the cemetery but nowhere does responsibility for the headstones or memorials appear to be other than with the Council via the conveyance to them in 1965.

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[432] As footnote 421 at 219 as quoted in the case from the conveyance

In further support for the hypothesis, is an article 'Exclusive rights of burial and the law of real property'[433] by Alan Dowling, which considered monuments and gravestones and discussed whether an action of trespass could be upheld in relation to interference with the items which would require exclusive possession by the claimant.

"That items such as monuments and gravestones are fixtures and become the property of the owner of the cemetery, would appear to be almost beyond argument"[434]

He refers to West Norwood where the Chancellor "was in no doubt about the matter" and uses the quotation from the case cited above. He continues:

"The analogy between the rights of persons erecting monuments or gravestones in cemeteries and those erecting monuments in churchyards has an obvious appeal. In the case of the latter, a series of cases going back to the yearbooks establishes that the fact that the monument is affixed is no bar to the person erecting the monument or his successor bringing trespass for interference with the monument, so that the position appears to be the same both for churchyards and cemeteries. On further examination however the cases involving churchyards proceed on the basis that the property in the monument has not passed to the freeholder."[435]

This brings the problem identified in this thesis nicely into perspective. There seems to be no clear point in time when the churchyard cases made the step away from the line of reasoning supporting annexation of the monuments and headstones. It just seems to have 'happened'. Dowling continues:

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[433] Alan Dowling 'Exclusive rights of burial and the law of real property' *Legal Studies* 438 – 452 Vol. 18 Issue 4 December 1998
[434] As at footnote 433 at page 447
[435] As at footnote 433

"In *Spooner v Brewster*[436] Best CJ said: 'It has been argued the freehold of the churchyard is in the parson; that is undoubtedly true, but even he has no right to remove the tombstones, the property of which remains in the persons who erected them.

A similar view appears to have been taken in the earlier cases of *May v Gilbert*[437] and *Frances v Ley*[438] It appears from *Corven's Case*[439] that the justification for this reasoning is an analogy between gravestones or monuments on the one hand and heirlooms on the other. Referring to *Lady de Wyche's Case*[440] in which the plaintiff brought an action against the parson of a church who claimed that a coat of armour, pennons and a sword placed in the church by the plaintiff in honour of her late husband were oblations and therefore belonged to him as freeholder of the church, Coke CJ explained that:

'the parson cannot claim them as oblations, neither ought he to have the said things, for that they were hanged there in honour of the deceased; and therefore, by the same reason, although a gravestone, coat of armour, tomb &c, are annexed to the freehold of the parson, yet in regard the church is free to all the inhabitants for burying, the parson cannot take them.'"[441]

So there is no dispute that headstones or monuments are annexed to the land even from these early cases, but the problem is that an analogy has been drawn with gravestones and personal property. Dowling deals with this in the following way:

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[436] As footnote 433 at page 448 at footnote 63 citation given as (1825) 3 Bing 136, 139
[437] As footnote 433 cited as footnote 64 (1613 2 Bulst 150
[438] As footnote 433 cited as footnote 65 (1615) Cro Jac 366
[439] As footnote 433 cited as footnote 66 (1612) 12 Co Rep 105
[440] As footnote 433 cited as footnote 67 (1469) YB 9 Edw 4 f14 p18
[441] As footnote 433

"Heirlooms are items of personal property which, prior to 1925, descended to the heir of the owner as part of the deceased's realty rather than to his next of kin.[442] In so far as they are used to explain how the items placed in a church descend to the heir of the person putting them there, no real difficulty exists in the case of pennons or a sword which can still be regarded as chattels. A difficulty arises, however, in the application of the principle to items such as gravestones, where the degree of annexation to the freehold will differ...It would appear that the basis of the decisions in the cases in question is that, notwithstanding annexation to the freehold, the items remain personal property, albeit that they descend to the heir, as in the case of heirlooms."[443]

As Dowling says, this is problematic post 1925 when the law on the passing of property to heirs was revoked, and also when consulting the more modern case law on fixtures where, once something is declared annexed to land, it becomes part of the freehold and therefore the property of the freeholder.

Dowling finds it odd that an action for trespass can be brought against the owner of the cemetery land, even though the property rights remain personal property rights with the owner of the items, but says that:

"...it is evident from the modern authorities that the same result so far as allowing the person erecting the monument to sue for trespass to the monument is concerned can be reached without the necessity of holding that the property in the monument remains in the person erecting it"[444]

This does not take the point far enough to help with a definitive answer to the question. Dowling stops his analysis at property remaining with the person who erects it. This is the known position, but what is not evident in his argument is

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[442] As at footnote 433 cited as footnote 69 Megarry and Wade pg 547
[443] As at footnote 433 at page 448/9
[444] As at footnote 433 at page 449

what happens when that person dies – to whom is the responsibility then passed?

Coke's view, which has been perpetuated by the Church and included in its law, is that it will be the heirs of the person remembered by the headstone or monument,[445] but, as has been explored above, this Measure uses the word 'owner':

"For the purposes of this section 'monument' includes a tomb, gravestone or other memorial and any kerb or setting forming part thereof and 'owner' means the person who erected the monument in question and, after his death, the heir or heirs at law of the person or persons in whose memory the monument was erected and 'property' shall be construed accordingly."[446]

It is the contention of this thesis that this confused and muddled area of law has benefitted the Church in that it has been able to pass responsibility to the person who erected the monument and, thereafter, the heirs of the person commemorated, thereby by reliance on its own legislation which is not supported by clear legal reasoning. As is said above, there seems to be little dispute that headstones or monuments are annexed to the land. This would make them the responsibility of the land owner who remains the Church and, through them the PCC, who would have responsibility for the maintenance.

This thesis contends that confusion has arisen from the analogies made in case law and in academic debate between personal property left to mark a death and head stones and memorials, and, because an action in trespass to the headstone or memorial is said to be possible notwithstanding that the headstone is annexed to the land, but that property rights in it remain with the claimant. This

[445] Faculty Jurisdiction Measure 1964 s3(4)
[446] As at footnote 445

would also lead to a conclusion that Article 1 of Protocol 1 of the Convention could be engaged within the human rights framework.

The Chancellor in West Norwood had no problem in finding that the headstones and monuments were annexed to the land and that ownership had passed from the cemetery company to the local authority by conveyance of the land.

The Legal Opinions concerning the Church of England handbook admits that there is a muddle in this area and gives its advice as:

"In relation to a municipal cemetery where by Act of Parliament rights of interment were created by contractual licence, Chancellor Gray QC concluded that the associated monuments, like the land, became vested in the freeholders (originally the cemetery company) subject to the rights of the licensees: *Re West Norwood Cemetery* [1994] Fam 210 at p.218. The chancellor held that under the statutory framework peculiar to West Norwood Cemetery, the monument became annexed to the freehold upon installation so that even the person who had the licence to install it lost title in the monument, which passed to the freeholder as soon as it was affixed to the ground. Since at common law title to a churchyard monument is at the very least retained for life by the person who set it up, *Re West Norwood Cemetery* is inapplicable in that context. Neither is any principle to be deduced from *Re West Norwood Cemetery* concerning the vesting of title to a monument in a churchyard where there was no, or no ascertainable, heir or other representative of the deceased."[447]

This thesis argues that this is the Church picking at which bits of the West Norwood case that it likes. The reference to the statutory framework is an illusory point to try and distinguish the findings of the chancellor because, no matter how the land was created into a cemetery, once that land becomes consecrated, it

[447] As at footnote 238 at page 232

falls within the faculty jurisdiction of the Church and the law would then apply across all such land, including churchyards.

The fact that the Legal Opinions claims that common law says that title is retained at the very least by the person who erects the monument during their lifetime is also challengeable, if the equally applicable common law of annexation is applied as it was in West Norwood.

West Norwood was opened at a time when cemeteries were being designed and opened by commercial companies. In 'The Victorian Cemetery', Sarah Rutherford says:

"Meanwhile London, the greatest capital city in the world, lagged behind the provinces and other capital cities in its cemetery provision. Its first proper cemetery was not opened until 1832, and even then it was left to private enterprise to pioneer this essential sanitary measure in the capital. In the first fifty years of the nineteenth century London's population more than doubled from 1 million to 2.3 million, and the problem of safe burial became acute...In 1832 a Bill was passed for 'establishing a General Cemetery for the Interment of the Dead in the Neighbourhood of the Metropolis..."[448]

West Norwood was the second cemetery set up under this statute – there were seven in all called the magnificent Seven[449]. This rather contradicts the Opinions comment that the statutory framework arrangements for West Norwood were 'peculiar' to it. Publicly funded cemeteries did not really follow until after the 1850's and the series of Burial Acts.

On the Bereavement Services Management Centre 'wikispaces' site, there is reference to a case that Dowling similarly referred to in his article cited earlier:

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[448] Sarah Rutherford *The Victorian Cemetery* 2008 Shire Library Publications pg 16/17
[449] As at footnote 448, at page 18 and at footnote 363

"This judgment is consistent with a recent finding of the House of Lords which held that neither agreement nor common assumption between the owner of a chattel and the freeholder can prevent a chattel affixed to the freehold from becoming in law part of the land and as such the property of the owner of the land *(Melluish (Inspector of Taxes) v BMI (No 3) Ltd* (1995) 4 All ER 453] (overruling an earlier case on this point *Simmons v Midford* (1969) 2 Ch 425, in which it was held that pipes laid in the servient land were not intended to and therefore did not become the property of the landowner)..."[450]

While this is useful, it does not of course address the fact that the Church would point to the law contained within the Faculty Jurisdiction Measure 1964 as conclusive on the matter.

It is, therefore, at least contestable that 'owner' should be construed somewhat differently from the way that it has been adopted by the Church and that it is more accurate to read the case law as confirming that gravestones, headstones, monuments and all are annexed to the land and on the point of that annexation, ownership passes to the land owner. There should be no distinction made between the churchyard nor the municipal cemetery where the land is consecrated – as is supported by the need for faculty jurisdiction over both.

## *4.7 Conclusion*

This Chapter of the thesis has explored some of the most sensitive issues relating to disposal of the dead and has challenged several areas of law. The right of the Church of England to pass responsibility for the maintenance and repair of churchyards once they are closed because they are full and incapable

[450] Bereavement Services Management Centre: http://closedchurchyards.wikispaces.com The Management of Closed Churchyards in England. Author is anonymous but the source is included because of the mention of the case in the Dowling article.

of taking any further disposals, is of very obvious financial benefit to the Church which has strongly defended the right as reflecting their historical role in disposal. This Chapter has demonstrated that this right is open to challenge because the rule is not based on a legitimate background. The consequences for the Church would be substantial and this would have the consequence of involving the local authorities anyway, but this does not remove the arguments against it.

The issues surrounding property rights are extremely complex and, again, the root of the Church's position is lost in the history of time. When holding the law as stated up to scrutiny, this thesis has been able to demonstrate that the basis for the legal position is untenable and is, again, open to challenge. With the greatest respect to Coke, it is argued in this Chapter that there was either a confusion between real and personal property or the law in that area was substantially different prior to the time he wrote, but from the sources that are available, this thesis has been able to demonstrate that the law has taken a wrong turn in relation to ownership of headstones and memorials which has allowed the Church to absolve itself from both the responsibility and the expense for maintenance.

In the section of the Chapter that examines responsibility for maintenance, this thesis was able to demonstrate that disproportionate measures had been taken when assessing safety in the churchyard which could open the opportunity for actions under Article 1 Protocol 1 of the Convention, because the decision to interfere with the property of another was taken without notice.

The next Chapter of this thesis examines the law of exhumation in churchyards and within this area of law the thesis will demonstrate that the consistory court are not applying human rights standards to the decisions that are made. This area of law contains some of the most distressing case law that this thesis has had to evaluate, dealing as it does with this most sensitive of issues relating to disposal of the dead.

## Chapter Five: Exhumation

### *5.1 Introduction:*

In the previous Chapter, maintenance and management of the churchyards was explored and within the context of management of the churchyard, this Chapter demonstrates that exhumation presents a difficult challenge to both the PCC and to the managers of civic cemeteries. In this Chapter though, the emphasis is not only directed at the PCC but also at the operation of the Consistory Courts.

This Chapter reviews the law that currently applies to the exhumation of human remains from consecrated ground and compares it to the law of exhumation from unconsecrated ground in civic cemeteries. The purpose of this exploration is to consider whether there are potential breaches of Convention rights being caused by the complex nature of the area of law which has two different legal systems and, within those two systems, complicated regulatory structures, and also to consider whether there are natural justice implications for users of the processes.

There are concerns, particularly within the Church of England, that the tendency towards portable remains is something that has arisen from current societal expectations of rights and ownership in an area where neither have applied previously, but this thesis argues that the many cases that arise from the issue of portable remains are indicative of the confusion in the area of law. The Church has been freely accusing funeral directors of giving incorrect information that leads people to expect that exhumation and re-burial are somehow easily resolved issues when they are anything but, as will be shown. Perhaps if the area of law was less complex, the information given could be more authoritative. Many of the cases that follow have happened because people have been given conflicting or erroneous advice about the consequences of the place of burial but, as this Chapter argues, this is would be the likely outcome in any area of law where the tests and decisions are so confused.

The first part of this Chapter will consider the way that applications for exhumation are regulated both within the Church and by the State. It will show that there are differences in both procedure - including time, cost and process and in the likely outcomes of the cases, leading to problems with the legitimate expectations that exist.

In the second part of this Chapter, the thesis examines how the decisions are made in both the consistory court and secular court systems, with discussion of the simplicity of the State system compared to the judicial process required by the Church, which includes conflicting legal tests and difficulties with the rebuttable presumption between the provinces of York and Canterbury, which are the feature of this part of the Chapter.

The remainder of the Chapter will then consider the reasons why one of the leading cases had to be set aside in part, after it was the subject of criticism and where that leaves the legal position in more modern case law.

Throughout, the protections offered by the human rights framework of the Convention are borne in mind and, in particular, the strength of challenges that may be issued using Article 9 and Article 14 by those users of the Church system. It may seem perverse to use Article 9 against the Church in this way, but the Chapter attempts to show how the Articles could be engaged in a number of circumstances.

It is also the purpose of this Chapter to explore Article 8 and whether it could have application in the issues that arise, despite a refusal by the Church to accept that the Article has any application to exhumation.

## *5.2 The application process.*

The concept of portable remains is one that is abhorrent to both the Church and to the State, albeit for some differing reasons, and both systems have a rebuttable presumption against exhumation once remains are interred. However the State system makes it much easier than the Church system for applicants to obtain the necessary permission to exhume the remains of their loved ones. While exhumation applications extend beyond relatives who were loved, it is argued in this Chapter that exhumation requests for scientific reasons, criminal investigation or where the application has political or notorious connotations, it does not seem so problematic to approach the Consistory Court.

Why would people want to exhume the bodies of those close to them who have been buried? There is the tendency to believe in the portability of remains in modern society – that the remains are somehow the property of the family or friend and should the "owner" move away, there is a right to take the remains with them. There is a long established rule that there are no property rights to a body, whether buried or not,[451] but nonetheless the sense that the dead 'belong' to us is strong and this is supported by writers such as Robert Pogue Harrison. There are many other reasons why people may wish to exhume remains – from the personal to the scientific (for example for DNA testing); to the pecuniary in trying to prove genetic links for advantage[452].

Exhumation amounts to a disturbance to human remains which, without the required authority, is a criminal offence.[453] What has to be undertaken to get the required authority varies, depending on whether the remains are in

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[451] *Haynes'case* (1614) 12 CoRep 113; *Dr Handyside's case* (1749) 2 East PC 652; *R vLynn* (1788) 2 TR 733; *R v Sharpe* (1857) Dears & Bell 160; and *R v Price*(1884) 12 QBD 247 as cited in *Conway* Dead, but not buried; bodies, burial and family conflicts, *Legal Studies* Vol 23 No 3, September 2003 pg 423

[452] As an example a Robert Brown who persists in his claim that he is the illegitimate child of Princess Margaret and who wished to apply to have her grave exhumed so that he could have a DNA sample taken to prove his case. The application was rejected.

[453] Mark\Hill *Ecclesiastical Law* 3rd ed Oxford at page 267 at para 7.104 as at footnote 363 *R v Sharpe* (1857) Dears & B 160

consecrated[454] or unconsecrated ground. This thesis argues that the differences in these requirements could amount to a breach of Convention rights under Articles 9 and 14 when considering the administrative procedure of the State against the more complicated judicial requirements of the Church.

### *5.2.1 State requirements for exhumation*

The requirements of the State are that a licence be granted to the applicant before any interference with human remains is permitted. This is a purely administrative procedure.[455] The applicant obtains a form to complete from the Ministry of Justice which can be downloaded with ease. There is no cost for the application. The circumstances in which a licence will be granted are:

1. In the interests of justice (for example, exhumation on the order of a coroner)
2. For personal reasons by the next of kin of the deceased
3. On grounds of public health or nuisance
4. In the public interest (in connection with site developments which have public or other planning consents
5. For scientific purposes (eg for archaeological research) or
6. For other exceptional reasons ...[456]

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[454] "Land becomes consecrated when the bishop of a diocese signs a document, called a sentence, by which he separates and sets apart an area of land and dedicates the land to the service of Almighty God. The effect of this sentence where the land is to be used for the interment of the remains of the dead, whether the land consists of churchyard around a church or an identified area of land in a cemetery, is to set apart the land as being held for sacred uses and to bring it within the jurisdiction of the consistory court." As per Dean of Arches, The Right Worshipful Dr Sheila Cameron QC *Blagdon Cemetery* [2002] 3 WLR 603, (2002) 6 Ecc LJ 420 para 11.

[455] Burial Law and Policy in the 21st Century The Way Forward. Government response to the Consultation carried out by the Home Office/DCA (Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach. Home Office January 2004) Ministry of Justice June 2007

[456] As at footnote 455

"The Home Office practise in considering applications is to grant licences provided the consent of the burial ground manager, the grave owner and the next of kin (normally interpreted as for probate purposes) is forthcoming, there are no known legitimate objections, and the application is for personal family reasons."[457]

There is no limit imposed by statute on the discretion of the Secretary of State and licences may be issued without all of the necessary consents.[458]

The application process is usually completed within 10 working days and almost all applications are successful[459] There is no formal appeal structure but all decisions are subject to judicial review procedures.[460] This straightforward and sympathetic process is in sharp contrast to that which happens when the human remains are in consecrated ground. It is argued there are, of course, reasons of theology for this which do not apply to the civic system:

The "...normal reticence of the ecclesiastical courts to agree to exhumations, while allowing proper pastoral exceptions in individual cases".[461]

### *5.2.2. Church of England requirements for exhumation*

The theological view of what constitutes 'portable remains' is addressed in Christopher Hill's article, which discusses the fact that, in Christian history, remains have been removed, but that this occurs when the whole community moves – the remains being part of that whole community. Again this point supports the view of this thesis that the dead are an important factor in the

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[457] Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach January 2004 Home Office at page 12
[458] As at footnote 455 at page 12
[459] As at footnote 455.
[460] As at footnote 455 at footnote 6
[461] Christopher Hill "A Note on the Theology of Burial in Relation to some Contemporary Questions" 7 Ecc LJ at page 447

identification of a society, which is supported by Robert Pogue Harrison. The article also addresses the desire for permanency once the remains have been buried as related to the 'giving to God' and of entrusting the remains to God. The article argues that in modern society the understanding and expectation of rights and concepts of ownership and the portability of remains, means that exhumation of individuals suggests the very opposite of this:

"...reclaiming, possession and restlessness; a holding on to the 'symbol' of a human life rather than a giving back to God."[462]

It can be, therefore, understood that the procedures required for permission to exhume human remains from consecrated ground are more complex and the explanation for that is rooted deeply in custom and religious belief, but immediately, there is the essential difference in approach in that, for the Church, the process is not administrative in nature, as it is in the secular system, but instead judicial in nature.

There must be application made for a grant of faculty[463] from the consistory court.[464] The petitioner is then in the hands of the chancellor who will make a decision often taking some weeks[465] as to whether the petitioner has been able to rebut the presumption against the issue of a faculty to exhume the remains. This has led to an ever-increasing body of case law. With the increased knowledge of human rights among the public, more people are requesting exhumation and challenging the findings of the consistory court.

The starting point in modern law for the requirements that will need to be met before the grant of a faculty for exhumation is stated in two cases, *In Re Christ*

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[462] As at footnote 433 at page 450
[463] "A faculty is a permissive right to effect some alteration to a church building or its contents" Mark Hill *Ecclesiastical Law* Third edition Oxford Chapter 7 Faculty Jurisdiction at page 220 para 7.01 citing Canon F 13 para 3
[464] As footnote 463 "Faculty jurisdiction is exercised in the consistory court by the chancellor of the diocese, or for certain specified matters, by the archdeacon."
[465] See the timescale in *Blagdon* later on in this Chapter

*Church, Alsager*,[466] a decision from the province of York, and *Re Blagdon Cemetery,*[467] a decision from the province of Canterbury.[468] While *Alsager* is now not thought to be good authority in certain respects, as will be seen, *Blagdon* has utilised a number of the same tests as *Alsager* and has done little to remedy the confusion in the area.

There is no system of binding precedent in canon law and neither province is bound by the other's decisions, although due weight is given by each province to the decisions of the other.[469] Mark Hill does state that "the decisions of ecclesiastical courts are today generally considered to be binding on the particular court making the decision and on courts of inferior jurisdiction".[470] This appears to have happened by a gradual acceptance rather than by any formal decision. There has also been a restructuring[471] of the very complex appeals procedure. Nonetheless, the effect of a system of non-binding precedent exists which can lead to conflicting case law.

### *5.3 Alsager*

In *Alsager* the petitioner was a Mr Davies, whose father died in 1981 and was cremated. His ashes were interred in the churchyard of Christ Church, Alsager.

In 1995, Mr Davies' mother died and she was buried in the same churchyard but about 90 feet away from the location of her husband's ashes. It would appear that the reason why his mother was not cremated is linked to the petitioner's belief that this would not be permitted by the Roman Catholic religion to which his

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[466] [1999] Fam 142, [1999] 1 All ER 117
[467] [2002] 3 WLR 603, (2002) 6 Ecc LJ 420
[468] The Church has two provinces, York and Canterbury which are established as a matter of history. The two provinces used to create legislation for the Church but this role is now undertaken by the General Synod (Mark Hill *Ecclesiastical Law* Third Edition Oxford at page 35 para 2.04 citing Synodical Government Measure 1969, s1; Canon H1
[469] As at footnote 453 at para 1.33 onwards
[470] As per footnote 468
[471] Referred to in the Introduction Chapter of this thesis at 1.3' Definitions'

mother had returned just before her death. This was a mistaken belief on his part and once discovered formed the basis for his wish that his parents be reunited in death.[472]

Both sets of remains were within consecrated ground. Mr Davies consulted the funeral directors who advised him that it would be a straightforward case for Mr Davies to apply for a faculty to exhume his father's ashes and have them re-buried in the same grave in which his mother was buried. Mr Davies duly applied for the grant of faculty. Chancellor Lomas, sitting in the consistory court at first instance, refused the grant of faculty as "he did not find good and sufficient reasons for acceding to the appellant's request for exhumation."[473] Mr Davies believed *inter alia* that he was the victim of discrimination because there had been a number of exhumations from the nearby municipal cemetery. Mr Davies tried to adduce evidence from the municipal cemetery manager that between the period of February 1997 and January 1998, there had been 32 exhumations from the cemetery, but the consistory court deemed the evidence inadmissible. On appeal to the Chancery Court of York it was held:

"The only evidence that would add to the facts adduced before the chancellor would be the letter from the crematorium manager. Under r8(1) of the 1965 rules further evidence can only be called 'in exceptional circumstances' and this normally means that the evidence could not have been adduced in the lower court: see *Re St Gregory's Tredington* [1971] 3 All ER 269 at 273 per Deputy Dean Newsom QC. Clearly evidence similar to that of the crematorium manager could have been so adduced and in the circumstances we cannot pay attention to her letter, however, we would point out that, even if admissible, her evidence

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[472] Philip Petchey *Exhumation Reconsidered* 6 EccLJ at page 123. Petchey states that the court records are very unclear on the facts. It does appear from his article that he had some access to information which revealed the real reason for the difference in treatment as between the two parents.

[473] [1999] 1 All ER120 at para h

would not have taken the matter further unless it had been specifically directed to exhumations from consecrated ground."[474]

This thesis argues that the differences in practise between that of the municipal cemetery and the churchyard could amount to discrimination under Articles 9 and 14 of the Convention for several reasons:

1. The difference in procedure – one is administrative and one is judicial.
2. The costs of the judicial process against the free administrative procedure
3. The time taken to reach a decision – 10 days in the administrative procedure as against several weeks in the judicial procedure.

Of course, arguments based on the human rights framework of the Convention start with the question of whether the circumstances engage the requisite Article before there is any consideration of whether there has been a breach. This thesis is, at this point, claiming that the above points would allow Articles 9 and 14 to be engaged.

A policy paper from government does raise the issue of the two system approach:

"Ecclesiastical case law is more restrictive as to the criteria for the grant of a faculty, a fee is charged whether the application is successful or not, and the decision may take some weeks to be made. More importantly, there is a degree of overlap whereby both a faculty and a Home Office licence is required in certain circumstances (where, for example, the remains are to be removed from consecrated ground to unconsecrated ground)."[475]

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[474] As at footnote 473 at page 119 at para f/g
[475] As at footnote 455 at page 13

There is general recognition that the two systems create an inequality for bereaved families or friends. The Government response paper:

"...acknowledges the difference in approach to exhumation applications between itself and the Church of England authorities. It therefore proposes to explore the scope for a more consistent approach, in particular where there is an overlap of the State and ecclesiastical jurisdictions."[476]

Throughout *Alsager* it is possible to get a flavour of the likely response of the Church of England to the above proposal. Much of the judgment considered the role of the chancellor's discretion in such matters.

If the exhumation is for moving a body from one piece of consecrated ground to another, then only a faculty is required. If, however, the body is to be exhumed from consecrated ground and re-interred in unconsecrated ground or vice versa, then both a Home Office licence and a faculty are required. It is argued that this double burden is added to by the fact that the issue of a Home Office licence does not of itself mean that a faculty will be issued. As stated in *Alsager*:

"The attitude of the Home Office will not be that of the Chancellor. It is understood by this court that the Home Office will normally grant a licence for exhumation. The Chancellor, however, must follow ecclesiastical law and, acting within that law, must make a judgment."[477]

The areas of conflict in the application process are therefore identified as the procedural requirements in relation to expectation of success, cost, time and in addition, where a body is moving from consecrated to unconsecrated ground or vice versa, the double application burden with the differing approaches as between Church and State when considering the application, one being judicial

[476] As at footnote 455 at question 18
[477] As at footnote 473 at 119 para j

and the other administrative. As something potentially of concern to applicants in the State system, the Government response to their consultation paper[478] indicates that it may be pertinent, presumably financially, for the State to adopt a process that is more in line with the Church procedure, although this has not yet been acted upon.

### *5.3.1 Consideration of the application – the tests*

As has been outlined above, there is little consideration of the detailed reasons for an application made to the State for an exhumation order. Provided the criteria are fulfilled, a licence is issued.

This is not the case for a petitioner for a grant of faculty. A judicial process is required involving the discretion of the chancellor and it is very often the case that it is the PCC for the church in question that opposes the grant of a faculty to exhume and this is one of the considerations that the chancellor will take into account when exercising his discretion as to whether to issue the faculty. The hard line taken by the PCCs in this area of law are again indicative of their reluctance to embrace changes to the policies that they have created, which would show adaptability to a modern approach and a similar reluctance to accept that human rights principles should apply to their decision making.

In *Alsager* the question of the exercise of the chancellor's discretion arose. Prior to the case, there had been no clear guidance as to what issues a chancellor should take into account in the exercise of that discretion. This is partly because there is no system of precedent in ecclesiastical law[479] and partly because the two provinces do not bind each other and therefore can reach conflicting decisions.

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[478] As at footnote 455

[479] "Although a chancellor must have a consistent policy there can of course be no question of him, by a decision of fact, creating a legal precedent." (As at footnote 473 at page 121 paras c,/d)

Sir John Owen (Auditor) explained in *Alsager* how the discretion works and the criteria to be considered in any application for a grant of faculty for exhumation. He gave the starting point as:

"There is a burden on the petitioner to show that the presumed intention of those who committed the body or ashes to a last resting place is to be disregarded or overborne....The court should resist a possible trend towards regarding the remains of loved relatives and spouses as portable, to be taken from place to place so that the grave or place of interment of ashes may be more easily visited."[480]

While this may be the view of the Consistory Court as the starting point, it is difficult to see why this was applicable in the case of Mr Davies' request. Firstly, he is the person who committed the body or ashes to a last resting place so there is no question of presumed intention of another, and, secondly, he did not wish to take his parents' remains from place to place, but merely to bring them together in consecrated land in the same burial ground, there being only 90 feet between them.

The criteria that must be kept in the mind of the chancellor when exercising his discretion as to whether the presumption can be rebutted was taken from *Re Stocks*[481] and reformulated in *Alsager* as:

"(1) Once a body or ashes have been interred in consecrated ground, whether in a churchyard or in a consecrated section of a municipal cemetery, there should be no disturbance of the remains save for a good and proper reason.

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[480] As at footnote 473: Sir John Owen referring to the case of *Re Atkins* [1989] 1 All ER 14 at 19 as the correct starting point for the use of the discretion.
[481] (decd) (1995) 4 Ecc LJ, 527

(2) Where a mistake has been made in effecting the burial, for example, burial in the wrong grave, the court is likely to find that a good reason exists, especially when the petition is presented promptly after discovery of the facts.

(3) In other cases, it will not normally be sufficient to show a change of mind on the part of the relatives of the deceased, or that the spouse or another close relative of the deceased has subsequently been buried elsewhere. Some other circumstance must usually be shown.

(4) The passage of time, especially when this runs into a number of years may make it less likely that a faculty will be granted.

(5) No distinction is to be drawn between a body and cremated remains except in so far as the process of decay may affect a coffin more than a casket containing ashes and may also affect the sensibilities of a congregation or neighbours.

(6) It is immaterial whether or not a Home Office licence has already been obtained."[482]

As against point 1 – this thesis contends that it is not entirely clear but probable that a 'good and proper reason' is one that fits all or as many of the criteria as possible. The court did not give any specific guidance as to whether the tests must all be met or whether the test would be met providing one or more of the tests were met.

A criticism of point 3 is that this is a very widely written guideline, which does not offer any real guidance at all. The use of the word 'normally' adds a level of uncertainty in that it leaves a question – when would it be accepted that the relatives have changed their mind? Also, it refers to 'some other circumstance must usually be shown'. Presumably this means another circumstance from the

[482] As at footnote 473 at page 122/3 from para h

list, but this is not clear from the wording. As no definitions or examples of when these two conditional tests may be met by applicants, it is unclear how this guideline is to be interpreted.

On point 4, the issue of the amount of time that has passed between the interment and the request to exhume, this thesis argues that this is not a relevant consideration as it will often be the case that circumstances may not arise until a considerable time after the initial interment. For example, failing health of the applicant and therefore, a wish to move remains for accessibility.

As Philip Petchey also comments:

"The writer cannot see any reason *per se* why the passage of time makes it less appropriate to grant a faculty for exhumation".[483]

Petchey refers to the case *Re St Mary the Virgin, Hurley* and comments

"This concerned a petition for the exhumation of the remains of a Brazilian patriot and their reburial in Brazil. The petition was made more than 175 years after the original interment of the remains. Following *Alsager* Boydell Ch held that the length of time since interment counted against exhumation. However this factor was outweighed by the special circumstances of the case in which the principle of comity of nations played a part (the petitioner was the Brazilian Ambassador). Although the decision is (it is submitted) eminently justifiable, cases of this type – which at root are similar to the 'portable remains' cases – are not altogether happy exceptions to the *Alsager* principle."[484]

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[483] As at footnote 472 at page 126
[484] As at footnote 472 at footnote 10 *Re St Mary the Virgin, Hurley* [2001] WLR 831; 6 Ecc LJ 166

Once the stated criteria had been applied, the Chancellor in *Alsager* went on to outline a required test that has been the subject of controversy and which led to *Alsager* being set aside on the point. The Chancellor set out the test as:

"Is there a good and proper reason for exhumation that reason being likely to be regarded as acceptable by right thinking members of the Church at large? If there is he should grant a faculty. If not he should not."[485]

This highly subjective test has been the subject of some criticism and was revisited in the case law that followed. In *Re Blagdon Cemetery*[486] Mark Hill (for the appellants) and Philip Petchey[487] (amicus curiae at the invitation of the court) submitted that the test's reference to 'right thinking members of the church at large' was an 'extremely difficult test to apply'. The court argued that the consequences of such a test could result in the chancellor having to go and ask a cross section of such people for their view, or alternatively, the applicant believing that if he could muster the support then any application would succeed.

In *Blagdon* no reference to this objective test was made but instead the previously used simple principle "faculty for exhumation will only be exceptionally granted" [488] was to be preferred, relying on some general guidance as to when the exception may arise.

Philip Petchey later wrote in his article on the point stating:

".....reference to the notional views of right thinking members of the church at large will have the effect of apparently shifting the responsibility for a decision to refuse a faculty from his (the chancellor's) own shoulders. No doubt, it will be his earnest hope that after full consideration that his decision will reflect the views of

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[485] As at footnote 473 at pg 123 para c
[486] As at footnote 466 [2002] 3 WLR 603, (2002) 6 Ecc LJ 420
[487] As at footnote 472 at para 30
[488] As at footnote 472 at para 33

right thinking members of the church at large, but this is surely a consequence of a correct judgment rather than the case of it."[489]

In *Alsager* according to Philip Petchey,[490] who admits that the court's records of the facts are rather ambiguous, the petition was unopposed. He states that the vicar did not object and neither did any parishioner. He says that the Archdeacon gave evidence that there were strong pastoral circumstances in this case and he did not object. Petchey further comments:

"In these circumstances, such evidence as there was as to the views of right thinking members of the church at large would surely point to the conclusion that they would not object; whereas it would seem to flow from the Chancery Court's decision to dismiss the appeal and not to grant a faculty that they *would* object. It was surely appropriate for the Chancery Court to refer to this apparent discrepancy, but it did not."[491]

It falls to the petitioner to prove the good and proper reason on the balance of probabilities against the narrow objective test of right thinking people rather than the more commonly used 'reasonable man'. This thesis contends, however, that potentially the Chancellor was applying a legal test in existence but the test was so uncertain in these circumstances that the lawyers on appeal thought it best to be avoided.

The objective test of 'right thinking people' is not unknown in law. It is used in defamation cases in English law to decide whether a person's reputation has been damaged. It is also used in German contract law. The similar test used in Tort emerged in *Sim v Stretch*[492] where the test was created by Lord Atkin as:

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[489] As at footnote 472 at page 124
[490] As at footnote 472 at page 122/3
[491] As at footnote 472 at page 125
[492] [1936] 2 All ER 1237 per Lord Atkin

"...after collating the opinions of many authorities I propose in the present case the test: would the words tend to lower the plaintiff in the estimation of right-thinking member of society generally".[493]

The test appears to date from the times of King Charles II and is referred to by Slesser LJ in the case of *Bryne v Deane*[494]

"...In my view, to allege of a man – and for this purpose it does not matter whether the allegation is true or is not true – that he has reported certain acts, wrongful in law, to the police, cannot possibly be said to be defamatory of him in the minds of the general public. We have to consider in this connection the *arbitrium boni,* the view which would be taken by the ordinary good and worthy subject of the King (to quote the matter which appears in the old declarations), and I have assigned to myself no other criterion than what a good and worthy subject of the King would think of some person of whom it had been said that he had put the law into motion against wrongdoers, in thinking that such a good and worthy subject would not consider such an allegation in itself to be defamatory."[495]

This test, while founded on "right thinking" persons, does seem to equate much more widely to society in general – because it does not narrow the pool of such people in the same way that the test in *Alsager* does by referring to the right thinking members of the church at large, thereby excluding those right thinking members of society who do not attend the church. It is also argued that, as there is no jury in the consistory court, where reference to right thinking people could be held to be met by asking any jury present, this is not a suitable test for the consistory court. This thesis argues that the right thinking member of the congregation is therefore, the chancellor alone.

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[493] Hepple, Howarth and Matthews, Tort Cases & Materials 2000 (5th ed) Butterworths page 936
[494] [1937] 2 All ER 204 per Slesser LJ
[495] As at footnote 492 at page 943

*Blagdon* indicates that *Alsager* was wrong to formulate a general test for an area dealt with by discretion previously but because the two provinces do not bind each other both decisions stand and clearly conflict on the point. This is supported by reference in the current Legal Opinions concerning the Church of England, where the following is stated:

"26. A faculty is required for the exhumation of human remains for reburial elsewhere. The law and practice in relation to this is set out in the judgement of the Chancery Court York in the case of *Re Christ Church, Alsager* [1999] Fam 142 and in the judgement of the Court of Arches in *Re Blagdon Churchyard* [2002] Fam 299."[496]

The tests from *Blagdon* are referred to more fully in the discussion on the case further in this Chapter.

### *5.3.2. Circumstances when the presumption may be rebutted - Alsager*

Both in *Alsager* and in *Blagdon* the relevant consistory courts set out a list of circumstances when it was likely that the presumption against a grant of faculty would be rebutted and when it would not. This thesis contends that these lists in the two cases do not fit comfortably within a human rights framework and could give rise to allegations of breach under Articles 9 and 14 because of the lack of certainty as between each province and between Church and State rules. Some of the issues that this Chapter highlights are dealt with further on in the Chapter when the facts of *Blagdon* are set out.

The list of considerations was set out in *Alsager,* where Sir John Owen said:

[496] Legal Opinions Concerning the Church of England written by the Legal Advisory Commission of the General Synod 8th ed, 2007 Part 9, para 26 as revised in 2003 at page 251

"Although mistaken advice by a funeral director or anyone as to the likelihood of a successful petition in itself is unlikely to carry much weight, a mistake by the applicant or by a third party such as an incumbent churchwarden, next of kin, an undertaker or some other person e.g. as to locality may be persuasive to the grant of a faculty. Other matters which may be persuasive are medical reasons relating to the applicant, that all close relatives are in agreement and the fact that the incumbent, the PCC (Parochial Church Council) and any nearby residents agree. That there is little risk of affecting the sensibilities of congregations or neighbours may be persuasive, although in practice, this is not likely to apply to municipal cemeteries.

The passage of a substantial period of time will argue against the grant of a faculty. Public health factors and improper motives e.g. serious unreasonableness or family feuds will be factors arguing against the grant. If there is no ground other than that the applicant has moved to a new area and wishes the remains also to be removed, this is likely to be an inadequate reason. In normal circumstances, if there is no intention to re-inter in consecrated ground this will be a factor against the grant of a faculty. If the removal would be contrary to the intention and wishes of the deceased, if there is reasonable opposition from members of the family or if there is a risk of affecting the sensibilities of the congregation or the neighbourhood, these will be factors arguing against the grant of a faculty."[497]

This thesis argues that this list is not cited anywhere as exhaustive and raises a multiplicity of problems for the petitioner. Not only has he to pass the objective test earlier stated, but he must also prove, for example, that the sensibilities of the congregation will not be affected if that is required by the chancellor to be adduced. Presumably the petitioner must assess this situation prior to making the application in case he is so required to adduce it.

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[497] As at footnote 473 at page 123 para e-j

There also seems to be an indication that removal to unconsecrated land will be a factor against the grant of the faculty. This is potentially a further area of conflict with Convention rights protected by Article 9 but one that was later partially addressed in *Re Durrington Cemetery*[498] where the chancellor in the case granted a faculty to the orthodox Jewish relatives of the deceased for the cremated remains of a Jewish man to be disinterred from a Christian cemetery and re-interred in a Jewish one.

The deceased in *Re Durrington* had been a practising Jew during his lifetime, but he married outside of his religion. It appears that the widow arranged for his burial in consecrated ground in the municipal cemetery with a minister officiating. The widow later emigrated to Australia and after she had gone, the Jewish relatives of the deceased applied for a faculty of grant to have him exhumed and reburied according to Jewish rites. The widow did not object.

The chancellor held that if he refused permission then he could be held to be acting unlawfully under s6(1) of the HRA in respect of Article 9 of the Convention. The decision was based on the wishes of the relatives of the deceased to manifest their religious beliefs. It is, therefore, difficult to see that *Alsager* is correct in holding that the removal of the remains from consecrated to unconsecrated ground to be a factor against the grant in a case where Article 9 applies as was the case in *Durrington,* leaving open a challenge to this aspect of the judgment. If a relative can show that as part of the manifestation of their religious beliefs it is necessary to exhume and rebury according to their rituals, then Article 9 would be breached if the grant of faculty did not occur.[499]

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[498] *Re Durrington Cemetery* [2000] 3 WLR 1322
[499] As footnote 472 - supported by Philip Petchey in *Exhumation Reconsidered* page 131

### 5.4 *Blagdon – the tests for circumstances to rebut the presumption*

In *Blagdon* Steven Whittle was killed in an industrial accident aged 21. He was buried in consecrated ground at the municipal cemetery in Blagdon, Somerset. In 1995, his parents who were publicans retired to Somerset but a distance from Blagdon. They applied for a grant of faculty to have Steven's remains moved nearer to their home as Mr Whittle was in ill health and could no longer drive himself and his wife to the existing grave. The proposed new grave was in unconsecrated ground as no consecrated space was available. The petitioners were unsuccessful and appealed.

The appeal was heard on 6 October 2001 with judgment on 16 April 2002 in the Court of Arches. The original petition was heard on 16 February 2000. The comparison with the 10 working day time scale for the administrative process of the state is obvious.

The Burial Act 1957 changed the position as to exhumation from consecrated to unconsecrated ground.[500] Prior to the Act, there was no grant of faculty for exhumation from consecrated to unconsecrated ground. The reason for this was given in *Re Talbot*[501] as the fact that if granted, this would mean the removal of the remains from an area under the protection of the consistory court to an area that had no protection at all. Perhaps this view is linked to the grave robbing phenomenon that was still of concern at the time.[502] The Burial Act brought in the system of Home Office licensing for exhumation from unconsecrated ground which in turn led to the consistory courts feeling they were able to grant this kind of faculty, demonstrated in *Blagdon*:

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[500] As at footnote 466

[501] [1900] P.1 at page 5 London Consistory Court, per Dr Tristram

[502] *Death Dissection and the Destitute* Ruth Richardson Pelican 1989 Chapter 8 "Bringing Science to the Poor Man's Door" references to 'burking' related to Burke and Hare, bodysnatching and the development of Anatomy as a science.

"Apart from this legal protection afforded to remains in the unconsecrated part of a cemetery, it can generally be assumed that local authorities carry out their legal responsibilities for care and maintenance of their cemeteries. Thus, if remains are to be removed from the consecrated ground of a churchyard or the consecrated part of a cemetery, and to be re-interred in the unconsecrated part of the same or another cemetery, it is reasonable for the consistory court to conclude (certainly in the absence of evidence to the contrary) that the new grave will be cared for in a seemly manner and will be protected in this sense."[503]

The judgment differentiates as between unconsecrated ground in the municipal cemetery and that in a private cemetery where the court makes no like assumption that the grave will be taken care of in the same 'proper' way and the judgment advises chancellors to take care when considering such applications for exhumation.[504] This does present a possible discriminatory approach engaging Articles 9 and 14 in this aspect of the law of the Church, as it will presumably be for the petitioner in cases where removal is from consecrated ground to unconsecrated ground in a private burial ground to prove that such care is available (at whatever additional cost that may be) while the petitioner for removal to a municipal cemetery is not required to so prove. If there is no assumption on the part of the chancellor, it is argued by this thesis that this equates to the necessity for a negative presumption of lack of care to be rebutted by the petitioner. The exploration of this issue is outside the scope of this thesis, but does present an opportunity for further research.

The list of circumstances, as far as the Canterbury province was concerned, as to when the presumption against exhumation may be rebutted was given in *Blagdon* and a comparison was made with those given in *Alsager.* The list is as follows with full excerpts included to allow this Chapter to demonstrate not only

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[503] As at footnote 466
[504] As at footnote 466

the general approach by the Consistory Courts to applications for exhumation but also to allow for discussion of the extended points within a human rights context:

"(i) Medical reasons

We were shown a medical certificate relating to Mr Whittle's health in the context of his inability to drive from Stowmarket to Blagdon so that he and his wife might visit Steven's grave. Mr Whittle is receiving appropriate medication and, as a senior citizen, he is in no different a predicament than many thousands of his age group who find that advancing years have an effect on certain aspects of life, including travelling. In so far as Briden Ch (chancellor at first instance) treated the petition of Mr and Mrs Whittle as one seeking exhumation of Steven simply in order to visit his grave more easily, we cannot fault his conclusion that this was not a sufficient reason for exhumation.

If advancing years and deteriorating health, and change of place of residence due to this, were to be accepted as a reason for permitting exhumation then it would encourage applications on this basis. As George QC Ch., pointed out in *Re South London Crematorium*[505] 'Most people change place of residence several times during their lives. If such petitions were regularly to be allowed, there would be a flood of similar applications, and the likelihood of some remains (and ashes) being the subject of multiple moves.'

Such a practice would make unacceptable inroads into the principle of permanence of Christian burial and needs to be firmly resisted. We agree with the Chancery Court of York that moving to a new area is not an adequate reason by itself for removing remains as well.

Any medical reasons relied upon by the petitioner would have to be very powerful indeed to create an exception to the norm of permanence, for example, serious psychiatric or psychological problems where medical evidence demonstrates a

[505] Unreported, 27 September 1999

link between that medical condition and the question of location of the grave of a deceased person to whom the petitioner had a special attachment."[506]

If this is compared to the requirements for rebutting the presumption for a licence from the Home Office (showing a personal reason) it can be seen that there is a very wide gulf between the two systems which could be argued to engage Articles 9 and 14 and, it is later argued in this Chapter, there is potential for Article 3 to be engaged. The stringency of the requirements for obtaining a grant of faculty on medical grounds let alone the difficulty of interpretation of words such as 'special attachment' creates a fetter on the freedom of religion if disposal is an expression of that freedom as evidenced by the approach taken in *Re Durrington.* Again, there is a lack of clarity as to whether tests such as the medical reasons can be sufficient on its own, or whether this will need to be supported under the other circumstantial tests.

As evidence of the difficulty in surmounting the medical test set out above, the case of *Re Crawley Green Road Cemetery, Luton*[507] serves as an indicator.

In *Crawley Green* Kathleen Sunasky sought a grant of faculty to allow her to exhume the casket containing her husband's ashes from its resting place in consecrated ground at Crawley Green Road Cemetery, Luton. She wished to have the ashes re-buried at a cemetery in Ruislip in unconsecrated ground. Her main reasons were that, at the time of the original burial, had she and the family realised that the remains were in consecrated ground they would never had proceeded with the burial as they would have deemed this hypocritical as neither she nor her husband were Christian. The funeral itself had been a humanist one.

Mrs Sunasky adduced medical evidence of a long history of depression and suicidal feelings connected to the fact that her husband's remains were located

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[506] As at footnote 466 at para 36 (i) Medical reasons
[507] *Re Crawley Green Road Cemetery, Luton* [2001] 2 WLR 1175;

so far away from where she was living, but even this strong level of evidence was not enough to act as a factor in rebutting the presumption.

However, in *Re South London Crematorium: petition of Mary Murphy*[508] Chancellor George granted a faculty in a case where the petitioner's brother had a history of serious depression which had left him in a fragile mental condition. That both of these decisions are from the Canterbury province is evidence of the almost lottery effect of decisions made in different consistory courts.

Mrs Sunasky did succeed on other grounds. The chancellor considered the effect of s6(1) of the Human Rights Act which makes it unlawful for any public authority to act in a way which is incompatible with a right protected by the Convention and referred to Article 9:

"I entirely accept that his widow has rights under article 9 and that the article embraces not only religious beliefs, but also such non-religious beliefs as pacifism."[509]

He also referred to *Kokkinakis v Greece*[510] which referred to the scope of Article 9 as:

"...in its religious dimension, one of the most vital elements that go to make up the identity of believers and of their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned."[511]

The Chancellor concluded that the consistory court would have been acting in a way that was incompatible with the petitioner's rights under Article 9, if he did not grant the faculty.[512]

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[508] *Re South London Crematorium: petition of Mary Murphy* (2000) 6 Ecc LJ 85
[509] As at footnote 507
[510] (1993) 17 EHRR 397, 418 para 31
[511] As footnote 507

Returning to the analysis of *Blagdon the* judgment next dealt with the long period of time that had elapsed from when Steven was buried until the application was made for exhumation:

"(ii) Lapse of Time

Briden Ch, in the first hearing, treated the lapse of time of a period in excess of twenty years since Steven's death as determinative (of his refusal to grant the faculty). He gave the following reasons:

"Despite the particular circumstances of Steven Whittle's death and burial, and the inability of his parents to take any active steps for so long, I am forced to conclude that it is now simply too late for a disturbance of his remains to be permitted. The Chancellor was probably influenced by the statement of the Chancery Court of York in Re Christ Church, Alsager that 'the passage of a substantial period of time will argue against the grant of a faculty' (at page 149H). However, we do not read this statement as signifying that time alone will be determinative. It may well be a factor in relation to assessing the genuineness of the petitioner's case. Long delay with no credible explanation for it may well tip the balance against the grant of a faculty but lapse of time alone is not the test. Mr Hill pointed to a period of 110 years in Re Talbot [1901] P.1 and examples of up to 20 years since the date of burial in other reported cases.

"Having found that Mr and Mrs Whittle had been unable to take any active steps earlier to apply for a faculty for exhumation of Steven's remains because of their peripatetic existence (the family had been publicans who were moved around during their lives) we consider that the Chancellor erred in treating the lapse of time as determinative instead of concluding that there was a credible explanation

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[512] As at footnote 466

for the delay. Having so concluded, he should then have proceeded to consider what other factors operated for or against the grant of a faculty."[513]

The issue of lapse of time does seem to have high importance but it is difficult to justify precisely why that is so, as supported by Petchey. This thesis contends that the reality is that a petitioner is *very likely* to apply some time after the original burial. For example, the Whittles became frail as they aged causing the problem of access to their son's grave, they did not set out to wait a long time before asking and indeed they had asked about the possibility of moving Steven when they retired but were told to wait until they had a permanent home[514]. This renders the time test as one that is unfair and an unnecessary hurdle as it will almost never be possible to overreach it.

The issue of mistake as to the location was considered next, but with broad agreement with York's position on this test that a genuine mistake as to the nature of the land into which the body was interred would normally rebut the presumption. It is true that mistake as to location is a strong argument to rebut the presumption, and it is argued that this element is a reasonably easy one for petitioners to make after the event.

When it came to the issue of local support for the grant of faculty, Canterbury took a very different view to York. In *Blagdon,* Mark Hill argued in reliance on *Alsager,* that Steven's parents had the support of close relatives and the Rural Dean of Stowmarket, but the court while accepting that the views of close family were relevant, dismissed the need for support from the local incumbent, PCC or nearby residents.

"We do not regard it as persuasive that there is a particular support for an unopposed petition any more than support for a contested petition of this nature

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[513] As at footnote 466 at para 36 (ii)
[514] As at footnote 466

would affect the decision on the merits of the petition. It is the duty of the Consistory Court to determine whether the evidence reveals special circumstances which justify the making of an exception from the norm of the finality of Christian burial, as we have already said earlier in this judgment. The amount of local support, whether clerical or lay, should not operate as a determining factor in this exercise and will normally be irrelevant."[515]

This view seems to make the objective test of *Alsager* even more difficult to apply. Within this part of the judgment it is clear that *Blagdon* is determined to remove any objective elements from the considerations that must be met and to avoid the controversy that arose in *Alsager*. In the cases that followed *Blagdon* this approach was preferred and the objective test from *Alsager* disappeared from the list of tests.

With the differing approaches now made clear, the issue of precedent was raised. One argument advanced by Mark Hill for the appellants was that the chancellor at first instance had followed previous cases instead of considering the individual merits of the particular case.[516]

The court admitted that:

"In our view, precedent has practical application at the present day because of the desirability of securing equality of treatment, so far as the circumstances permit it, as between petitioners."[517]

This thesis argues that the recognition contained within this comment demonstrates that there was already concern that with the growing number of cases, the Consistory Courts were envisaging problems ahead if parity of treatment was not achieved leading to a rise in the number of cases that could

[515] As at footnote 466 at para 36 (iv)
[516] As at footnote 466 at para (v)
[517] As at footnote 466

potentially engage Article 9 of the Convention. The need for precedent would, of course, have to apply across the boundaries of the two provinces as well as within each. This would fundamentally change the nature of approach by the consistory courts which this thesis argues would be for the better.

The court finally permitted the appeal and granted a faculty. The fact that a family grave had been purchased in order to accommodate both parents and Steven was a determining factor. The provision of family graves into which all members of a family are interred is a preferred policy of both Church and State as mentioned in Chapter Three of this thesis.

### *5.5 The dismissal of Article 8*

While the HRA and Convention rights are often not obviously considered by the consistory courts, something which indicates the reluctance of the Church to engage with a human rights framework as outlined in the Introduction to this thesis, was evidenced in this case when the issue of the possible engaging of Article 8 of the Convention was briefly raised and equally briefly dismissed:

"Finally, we record that although article 8 of the European Convention on Human Rights was mentioned in argument, greater emphasis was rightly placed on other factors to be taken into account in the exercise of the discretion of the Consistory Court. We are not persuaded that the judgment of Briden Ch constituted an interference with any article 8 right. In the absence of any right to exhumation petitioners can expect fairness and equality of treatment in the exercise of the discretion of the Consistory Court. Those safeguards have been and will continue to be present as Courts exercise their discretion on a proper evaluation of the facts in the light of the principles set out above."[518]

[518] As at footnote 466 at para 41

This position was reinforced in the judgment from the European Court of Human Rights in the case of *Elli Poluhas Dodsbo v Sweden*[519].

The remains of the applicant's husband were buried in a family plot in 1963. In 1980 the applicant moved away to be closer to her children. In 1996 the applicant wanted the remains moved to a family plot nearer to her location arguing she had no connection with the site of the original burial and all her children agreed. She was refused and on appeal she argued (*inter alia*) that her Article 8 rights had been breached. The court agreed that it was an interference with her Article 8 rights, but that such interference was in accordance with the law and served legitimate aims in preserving the sanctity of the grave.

This thesis argues that the reliance on *Dodsbo* by commentators who support that Article 8 does not apply is not correctly founded[520].

Article 8 was engaged by the facts in *Blagdon* as was asserted in *Dodsbo* but this was denied in *Blagdon* because, it was stated, there is no right to exhumation. This is factually incorrect because there is a right to exhumation provided that all the circumstances are met. This thesis submits that the Consistory Court should have recognised that Article 8 was prima facie engaged and the Consistory Court should then have gone on to assess whether the interference with that right was proportional, had a legitimate aim and was necessary in a democratic society. By simply dismissing the relevance of Article 8 rather than applying the correct process, the Consistory Court has not properly applied the law within a human rights framework. There has been support for the approach advocated by this thesis in the case of *Manchester City Council v Pinnock*[521].

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[519] *Dodsbo v Sweden* App No 61564/00 (2006) 8 Ecc LJ 496, E Ct HR
[520] R Sandberg *Human Rights and Human Remains: The Impact of Dodsbo v Sweden* (2006) 8 Ecc LJ 453
[521] [2010] UKSC 45, [2010] 3 WLR 1441

The Consistory Court did refer to the fact that petitioners could expect 'fairness and equality of treatment' presumably in reference to s.6 HRA, but it is submitted by this thesis that this did not happen in this case and the court erred in law under s6 HRA.

It may well have been the conclusion that after proper consideration, the result would still have been that Article 8, although engaged, was not relevant to the finding, but this breach of correct process could have been argued to breach s6 HRA.

### *5.6 Conclusions and some modern case law*

In his article 'Exhumation Reconsidered'[522], Philip Petchey reviewed the case of *Alsager* which purported to:

"set out to provide a judgment which would be of assistance for chancellors in the Provinces of both York and Canterbury."[523]

He comments in regard to the case and the subjective test:

"It will be argued that the test is unhelpful and that some of the guidance is questionable. The actual decision is a harsh one and might have been different had a different approach been taken."[524]

This thesis argues that while it is accepted that *Alsager* is no longer referred to as good authority in relation to the tests to be applied in cases of application for a faculty for exhumation, that *Blagdon* is similarly flawed because of its adoption of many of the criteria from *Alsager* and its failure to address the engagement of

[522] As at footnote 472 at page 122
[523] As at footnote 472 at paragraph 2
[524] As footnote 472

Article 8 of the Convention and should be similarly discredited. This leaves the area of law in an uncertain state, still dependent on individual decisions with the potential that more petitioners will find themselves tangled in the labyrinthine laws that operate.

This Chapter has set out the position of the Consistory Courts to applications for exhumation and has demonstrated that, as in other areas of Church regulation, this area is a confused and complex one. There is a competing set of interests at work in this regard. Petitioners are failing to understand that for the Church of England, there is a presumption of permanence which must be strongly rebutted, using a set of criteria that would be daunting by any definition. In this most sensitive of areas, petitioners who are often vulnerable are poorly advised by their local incumbent, the PCC and by funeral directors. While the law is so complex, this is no surprise.

The consequence of the confusion is unnecessary distress and financial loss. Petitioners often believe that as the remains are of their loved ones, they will have the ultimate say in what happens to those remains. An indication of this is the high number of petitioners who are requesting a faculty for exhumation despite the low level of success rate. This is evidence that the mixed messages are still occurring.

Increasingly, petitioners are arguing that a mistake as to location was made, and as was held in *Alsager* and *Blagdon,* this is one exception to the presumption of permanence which seems to result in successful application. In just one edition of the Ecclesiastical Law Journal,[525] there are five case reports alone dealing with petitions for faculty for exhumation, with two of these being denied, two granted and one granted but with a variation to the request made by the petitioner.

[525] Ecclesiastical Law Journal Vol 13 No 1 January 2011

In the successful cases[526] the decision was justified on the grounds that the petitioner had made a mistake in relation to the location of the burial in consecrated grounds. In each it was mentioned that the fact that the ground was consecrated, and the implications of this, were not known to the petitioner. In the unsuccessful cases[527] the grounds for refusal were that no exceptional circumstances could be shown.

This thesis contends that there is a trend to be observed in the modern case law which indicates that if the petitioner argues that a mistake has been made as to location, and that the deceased would not have wanted to be in consecrated ground, or as in *Crawley Green* the relatives see the location as pertinent to their own manifestation of religious belief, the application for a faculty is more than likely to succeed. The problem with this is that what the Consistory Court is accepting as evidence of this appears to be the assertion of the petitioner despite the fact that the deceased may well have wanted to be left where he was. Should a petitioner support this claim for mistake with a reference to their Article 9 rights under the Convention, they are even more likely to succeed. This is indicative that the presumption against portable remains is becoming easier to rebut provided the petitioner is able to construct their application in the area of mistake as to location.

From the point of view of the Church, it is clear from this case law and the many hundreds of other cases over time that the chancellors consistently refer to the fact that the implications of burial in consecrated land are not being explained to relatives who seek to bury their dead in the churchyard or consecrated part of the local cemetery. As a way of addressing some of the complexities in the system, this would be a good starting point. The role of the PCC and the incumbent in relation to this aspect of the thesis is arguably lacking, as it falls to them to

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[526] *Re Putney Vale Cemetery* Southwark Consistory Court: Petchey Ch, April 2010; *Re Hagley Municipal Cemetery* Worcester Consistory Court: Mynors Ch, July 2010; *Re Bromsgrove Old Cemetery* Worcester Consistory Court: Mynors Ch, July 2010

[527] *Re Oxley deceased* Bradford Consistory Court: Walford Ch, March 2010; *Re Hughes, deceased* Manchester Consistory Court: Tattersall Ch, August 2010

provide the necessary information for parishioners or others who choose burial in consecrated ground.

This Chapter has also explored the tests for exceptional circumstances demonstrating that these are neither clear not reasonably attainable for many petitioners. This is particularly true when considering the standard applied when a ground of adverse health is argued. Mrs Sunasky produced medical evidence that she was suffering from suicidal tendencies directly related to the fact that the remains of her loved one were so far away. This did not sway the consistory court at all and this does raise the question of quite how seriously affected a petitioner would have to be before this ground could be successfully argued. Within this context, this thesis argues that Article 3 would be engaged, with the need for the Consistory Court to then examine whether the rules and regulations were outside of the high standard of investigation that would be needed.

This Chapter has been able to demonstrate that there is a strong argument that Articles 8 and 9 are engaged and a proper review of the law should take place. It has also been able to demonstrate that there are potential breaches of s6 HRA in relation to process and procedure. This thesis contends that this is evidence that the law of the Church of England does not fit within a human rights framework in some of the most sensitive and emotional areas of the people that come into contact with it.

## Chapter Six: Conclusion

### *6.1 Concluding Remarks*

The thesis question asked was whether the regulatory structures of the Church of England for disposal of the dead fit within a human rights framework, This thesis has strongly argued that, in a number of essential areas, the answer is that it does not. A question may be raised as to why the Church of England should ensure that its structures fit within a human rights framework. There is, of course, the position of the Church of England as the established Church and the indivisibility of the Church from State, but that argument is outside the scope of this thesis. There are possible moral and ethical arguments which also support that a Christian organisation should have a human rights framework at its heart.

Instead, this thesis has argued the case for the PCC being categorised as a functional public authority when it regulates the disposal of the dead and, by this route, this thesis has demonstrated that human rights standards apply to its rules, regulations, policies and decision making. The consistory courts are already bound within this framework by s6(1) HRA.

It is the purpose of this final chapter to bring together the various strands and arguments to give a broader view and to show areas in which future research projects may develop from the conclusions drawn in the thesis.

### *6.2 Summary of chapters*

Chapter One is an introductory Chapter, which raises the many issues that are considered in detail within the following Chapters. It contained a definitional section to help with the vocabulary of the subject. The introduction set the context for the research, examining the background and rationale for the thesis

and its significance in the existing body of literature. Against an initially cautious, if not hostile, reception for the Human Rights Bill, the Chapter reviewed the early literature surrounding the human rights agenda and the Church.

Chapter Two is an extensive and thorough review of the background of definitional problems with s6(3)(b) HRA 1998 – the functional public authority. The first case to be heard in the House of Lords on the point involved the PCC in a landmark line of litigation involving Mr and Mrs Wallbank and their Parochial Church Council. Previous case law had reached Court of Appeal level only. The *Wallbank* case was completely different on the facts from the subject matter of this thesis, as it related to the collection of chancel repair costs, but, nonetheless, *Wallbank* provided the first detailed exploration by the secular courts at the highest level of what a functional public authority was.

Despite several reports from the Joint Committee on Human Rights and other cases (involving either social landlords or care providers) this thesis argues that this is an on-going issue. The thesis takes the academic and legal debate from the outset of the HRA and identifies the key issues. This thesis then develops a test from the cases of *Wallbank* and *Weaver,* against which to measure the PCC when acting as policy maker and enforcer for regulation of the churchyard. The thesis is able to demonstrate that the PCC will be a functional public authority in this regard and, therefore, susceptible to challenges within the human rights standards of the Convention under Article 10.

It is in this Chapter that the essence of the thesis is shown by drawing on areas of law that have not been compared in the same way before. This part of the thesis is therefore original and its arguments are compelling. The thesis adds to the existing body of knowledge in this area by its development of a new test, combining the decisions in *Wallbank* and *Weaver,* which, this thesis argues, gives voice to the intention of the legislators in regard to the organisations that it envisaged would be brought within the definition of a functional public authority.

Chapter Three explored the topic of burial in the churchyard and commenced with a review of the procedure and process of obtaining a burial plot. It highlighted the increasingly urgent problem caused by lack of burial space and referred to the Government policy report: Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach (January 2004). This report confirmed the claim in this thesis, which is supported by academic commentary and anecdotal evidence, that the whole area is a confused and muddled one which can only add to the troubles of a bereaved person or family. Not only that, but even the professionals in the industry, such as undertakers, find the laws and regulatory structures a potential minefield.[528] This accounts for the frequent references to the poor advice to members of the public in the case law which adds a further level of confusion. Furthermore, as between Church and civic providers of burial services, there is a layer of alternative rules and regulations which only serves to create the labyrinthine confusion that the thesis title refers to.

The Chapter considered the right to reserve burial space both in churchyards and in municipal cemeteries. While it is still possible to reserve space in the municipal cemetery (indeed this is actively being encouraged as a way of fund raising for the local authority to be able to provide new burial sites[529]) this practice is often opposed by the local PCC in churchyards where space is at a premium. While there is a common law duty to bury anyone who dies within the parish, the PCC have power to make the rules that regulate their churchyards and resistance to applications for a grant of faculty to reserve a grave space is one area where the policies of the PCC come into conflict with a human rights framework.

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[528] *'Grave Concerns'* Tuesday May 20, 2008 www.publicservice.co.uk accessed 9 November 2009

[529] BBC News 'Grave threat to town's allotments' 22 March 2010; 'Spelthorne cemeteries running out of space' 26 January 2011; 'Poole Council may offer chance to buy burial plot' 29 November 2010: All accessed 26 January 2011 www.bbc.co.uk/news

Chapter Three also discussed and analysed in some detail the approach of the PCC to the style and form of graves – the appearance being of importance to both the Church and to the relatives and friends of the deceased. Here the Chapter examines the case law and measures it against human rights standards, particularly those of Article 10. It is here that the disparity between the two opposing sides is most evident and the PCC susceptible to challenge. The Church evidences, through the policies of the PCCs to be far removed from the opinions of those who wish to bury their dead in the churchyard and record that life in a manner which reflects the person they knew. By their own publication, The Churchyard Handbook, it is evident that matters of personal taste, monetary consideration and aesthetic sensibilities take precedence.[530] If, as this thesis contends, the PCC who formulate these policies are a functional public authority, then the competing interests of the parties will be weighed and balanced within the context of Convention rights in the event of a dispute and, while the Chancellors may be uneasy at present at the weight given to policies, they will have to take a firmer approach when considering the longevity of those policies.

Chapter Three also critically evaluated the guidance given in the Churchyards Handbook to incumbents and the PCC for regulating the wording permitted for headstones, and the thesis developed an argument that this guidance reveals the true position of the Church as an overwhelming piece of evidence of elitist and subjective personal views of what is tasteful and one that is not built on human rights standards. This thesis is supported by a review of the case law in Chapter Three, which demonstrates the 'hard-line' position taken by the Church and an evaluation of the Article 10 position follows this. The Chapter argues that Article 10 is engaged in regard to inscriptions, photographs and shape of headstones and it is, therefore, for the Church to justify its decisions as having a legitimate aim, be necessary in a democratic society and a proportional response

[530] The Churchyards Handbook, 4th edition Edited by Thomas Cocke FSA updated 2001 at pg 27 "....they should not have unsightly bases that can damage mowing machines"...

to the harm legislated against. The Chapter contends that this justification is not sustainable in the modern society.

Chapter Four of the thesis considers the management and safety responsibilities in churchyards. The Chapter discusses the peculiarity of arrangements when the Church declares that a churchyard is closed. Unlike the Church in Wales, the Church of England is permitted, following the declaration of closure made by the incumbent, to turn the churchyard over to the Local Authority for maintenance thereafter. This is not a matter of discretion or an issue where a request has to be made, it is of right by Order in Council[531].

The thesis examines the historical legal basis of this arrangement by evaluating the role of the church-rate and the poor-rate, something that has not been tackled with clear success previously. The thesis contends that there has been a misdirection taken because of the changing nature of congregations and responsibility for the payment of rates that feed into the maintenance and up-keep of the fabric of the church buildings and the churchyard. Where in the past the church-rate payer would have been a member of the parish of whatever denomination, and therefore expected to pay for such items, the thesis is able to demonstrate that on the abolition of the church-rate due to public outrage at the imposition of a liability that did not directly benefit non-believers, the link between the general rate payer in a parish and responsibility for payment to upkeep church property was broken. The poor-rate was a tax imposed only on the members of the congregation itself and the purpose of the poor-rate was to assist with the mission work of the Church, not to the upkeep of its buildings, although with the reduction in burial fees, money from the poor-rate was diverted in urgent cases.

[531] See s215 Local Government Act 1972 which simplified the previous procedure to make it easier for PCCs to give local authorities 3 months notice to take over maintenance.

The Chapter argues that the responsibility for maintenance and upkeep of closed churchyards lies with the Church congregation and, through that, the 'friends' groups that have sprung up in many parishes to turn closed churchyards into natural habitats for wildlife or other community uses, rather than with the local authorities that currently bear the financial burden. The Chapter recognises that there is a wider social benefit in keeping closed churchyards in good order, with the prevention of criminal activity or potential health and safety issues the reasons for doing so, but as ownership of the freehold remains at all times with the Church, the justification for passing this financial burden onto the wider community through Council tax, the Chapter strongly argues, is not justified.

This is an area of the thesis that opens the possibility of further research which could result in considerable financial repercussions to both Church and local authorities.

Chapter Four also examined liability for maintenance of memorials in the churchyard. This Chapter looks at an interesting legal puzzle in land law - while memorials are annexed to the freehold, they are held to be in the ownership of the original purchaser or provider of the memorial until that person dies, after which the memorial becomes the responsibility of the heirs of the deceased.

The Chapter evaluates the root of this arrangement, which again appears to move the burden of liability from the church on whose land the memorial stands, and questions whether the law has been rightly developed and applied. The thesis examines the historical aspects of the current position and is again able to demonstrate that there has been a misapplication of the law. The Chapter suggests an alternative approach to the definition of 'owner' in this regard, again developing an original strand of argument that Coke's early exposition of the law was incorrectly translated and applied. *Legal Opinions and guidance* is used extensively in support of the arguments in the Chapter that the legal position is very unclear.

If the finding of the Chapter in relation to annexation is accepted, the ownership of headstones and memorials should be with the Church of England. This would result in the loss of an action for trespass following any interference with the headstone or memorial by the PCC and, potentially, could save the Church from a number of potential cases against it. Alternatively, if responsibility for safety of these headstones and memorials is with the PCC, the costs for the Church could be significant.

Chapter Five tackled one of the most emotive subjects in the area of disposal of the dead, that of exhumation. The thesis examined the different approaches of the State and Church in procedural terms and measured these against human rights standards, particularly those in Articles 9 and 14. The thesis identifies a two tier system in place which neither Church nor State seem able to reconcile, although in the Report referred to in Chapter Three it does appear that government are interested in the revenue stream that the Church have managed to generate in this regard. The Chapter examines in detail the definitive case law from the Consistory Courts and is able to highlight areas of difference as between the two provinces and differences in approach as between different consistory courts even within the same province. This lack of clarity and certainty has created an area of law which is thoroughly confusing and muddled for people, who it is argued, are in a very vulnerable position.

The Chapter is able to identify a number of categories or tests that a person must comply with before their request for a faculty to exhume would be firstly, considered and secondly, granted. The thesis is able to show that these criteria are not being commonly followed or applied, resulting in some extremely harsh results when considered within the human rights context.

While there has been little help from the European Court of Human Rights, the thesis is able to develop an argument that the application of Article 8 to cases in

this area is being overlooked by chancellors, but when it has been considered, as not been interpreted or applied in the correct way.

The overall conclusion then, presents a number of points:

1. The Church of England has a duty to bury by common law, but not a duty to marking of graves. Nevertheless, as a functional public authority, the PCC policies, rules and decisions are within the ambit of the HRA and Convention and the human rights framework should apply.

2. The PCC being a body constituted by statute sets the policies that regulate the churchyards which are rarely reviewed or updated and which evidence degrees of localisation that impede legal certainty

3. That human rights standards are not accounted for in policy making by the PCC or decisions of the consistory courts; and

4. The current legal and regulatory framework is indeed labyrinthine, complex and complicated.

### *6.3 Recommendation for Further Research*

There are four specific areas for future research that could be undertaken to further the conclusions drawn by this thesis.

Firstly, as is apparent from the thesis, the definition of a functional public authority for the purposes of s6(3)(b) HRA is an ongoing issue. This thesis has developed a potential new test by combining the decisions in *Wallbank* and *Weaver* which it is argued should be applied in future cases and which could aid the government in reaching a conclusion as to what that definition should be. Future research would examine such decisions against this new test to see

whether the contextual approach is being followed. It is argued that this thesis will feed into an on-going academic debate in this area.

Secondly, there is potential for an empirical research project involving a number of PCCs through examination of their policies, rules and regulation within their particular churchyards, to look for evidence of human rights approaches, even if these are not explicitly referred to. This research project should also involve the municipal burial grounds as a comparator. The aim of this research project would be to support the development of a human rights culture within PCCs.

Thirdly, there is potential for further research in two historical aspects discussed within the thesis. The link between the church-rate and the poor-rate that is argued in this thesis has demonstrated that the legal basis for the claimed 'right' for the PCC to hand over closed churchyards is unclear, particularly in relation to the interpretation of s215 Local Government Act 1972. Further research into the link between the church-rate, poor-rate and s215 could bring some clarity to this matter. To this end, the Ministry of Justice have indicated an interest in the conclusions drawn by this thesis in this regard.

The issues raised in Chapter Four in relation to property rights also have an historic flavour and, again, the roots of the decisions taken today are lost in the sands of time. Further research into the reasons for Coke's findings may offer some opportunity to untangle the issue of ownership of a headstone.

Fourthly, the lack of regulation of private burial grounds is one of concern. With the lack of civic or church burial space, the financial rewards of opening such sites are growing, but the regulation of these sites is poor or non-existent. This area for future research is urgent and necessary. An examination of the rules to establish the sites should be undertaken, with empirical research of a sample to evaluate issues of maintenance and management liability. While subjects such

as rural and urban planning, architecture and the sociology of burial grounds examine these issues, to date there has been little legal research in this area.

### *6.4 Contribution to knowledge*

Previous research in relation to disposal of the dead has been from a medical, architectural, sociological or heritage aspect. This thesis is original because, throughout this thesis, not only have the legal frameworks of both Church and Convention been considered, but, in addition, social, historical and theoretical aspects have been interwoven. This is an original direction for study in the area of disposal of the dead.

The existing legal knowledge in the area has not been mapped against a matrix of human rights perspectives and this has resulted in the thesis adding to the existing literature and offering an original contribution to the debate. By taking this perspective, the issues have been highlighted in a way that offers a new departure from the existing 'singular issue' based approach.

It is the aim of this thesis to bring the approaches of the PCC and wider Church into an era of human rights and to illustrate the areas where the Church could be open to allegations of human rights breaches, thereby giving the opportunity for the Church to re-evaluate the existing regulatory structure that governs the churchyard in relation to disposal of the dead.

### *6.5 Concluding remarks*

This conclusion has brought together the arguments, theories and suggestions made within the thesis. It has answered the research questions highlighted in Chapter One of this thesis. Further it has considered future research potential.

The government had declared an intention to review the law and attempt to simplify and update it but political events have overtaken this and in the current uncertain economic climate the dead are probably not seen as a priority, although those bereaved undoubtedly suffer under the current arrangements.

This thesis has demonstrated that the title given to it is apt and relevant – the law that regulates the disposal of the dead is labyrinthine, complex, and complicated, but by applying a framework of human rights to the law, it is possible to re-evaluate the law to achieve a more consistent, fair and equitable outcome for all the parties involved.

## Bibliography

### Statutory Materials

The Burial Act 1857

Canon H1

Church of England (Miscellaneous Provisions) Measure 1992

Churchwarden's Measure 2001

Faculty Jurisdiction Measure 1964

Health and Safety at Work Act 1974

Human Rights Act 1998

Local Authorities' Cemeteries Order 1977

Management of Health and Safety at Work Regulations 1999

Occupiers Liability Act 1957

Occupiers Liability Act 1984

Priests (Ordination of Women) Measure 1993

Public Health (Control of Disease) Act 1984

Synodical Government Measure 1969

### Books

Merris Amos *Human Rights Law* 2006 Hart Publishing

Catherine Arnold *Necropolis London and Its Dead* 2006 Pocket Books

Clayton & Tomlinson *The Law of Human Rights* para 5.06 (check the title)

The Council for the Care of Churches (edited by Thomas Cocke) *The Churchyards Handbook* 4th edition 2001 Church House Publishing

Norman Doe, *The Legal Framework of the Church of England "A critical Study in a Comparative Context"* 1996 Clarendon Press, Oxford

Helen Fenwick, *Civil Liberties and Human Rights* (4th ed) Routledge Cavendish

Steve Foster, *Human Rights and Civil Liberties* (2nd ed) Oxford Chapter 8

Steve Foster *Human Rights and Civil Liberties* (3rd ed) Pearson

Robert Pogue Harrison *The Dominion of the Dead* 2003 The University of Chicago Press

Hepple, Howarth & Matthews *Tort Cases & Materials* 2000 (5th ed) Butterworths

Hoffman and Rowe *Human Rights in the UK* (3rd ed) Pearson

Mark Hill, *Ecclesiastical Law* 2001 (2nd ed) Oxford University Press

Mark Hill, *Ecclesiastical Law* 2007 (3rd ed) Oxford University Press

Mark Hill, Edited Collection, *Religious Liberty and Human Rights* 2002 University of Wales Press Cardiff

Jeffrey Jowell and Dawn Oliver *The Changing Constitution* 5th edition Oxford

The Legal Advisory Commission of the General Synod *Legal Opinions Concerning the Church of England* 2007 (8th ed) Church House Publishing

Sir Donald Limon & WR McKay *Erskine May Parliamentary Practice* 1997 (22nd ed) Butterworths

Hugh Murray *This Garden of Death The History of York Cemetery 1837 – 2007* York Publishing Friends of York Cemetery 2008

The Natural Death Handbook edited by Stephanie Wienrich and Josefine Speyer of the Natural Death Centre 4th ed Rider 2003

GH Newsom & GL Newsom *Jurisdiction of the Church of England* 1993 (2nd ed) Sweet and Maxwell

N.J.G. Pounds *A History of the English Parish* Cambridge University Press 2004

Ruth Richardson *Death Dissection and the Destitute* 1988 Penguin Books

W.E. Rumble Ed, Austin, John (1832) *The Province of Jurisprudence Determined*, 1995 Cambridge University Press

Susan Rutherford *The Victorian Cemetery* Shire Publishing 2008

Michael Salter and Julie Mason *Writing Law Dissertations An Introduction and Guide to the Conduct of Legal Research* Pearson 2007

Noel Whitty, Therese Murphy, Stephen Livingston, *Civil Liberties Law: The Human Rights Era* 2001 Butterworths

**Journals and Articles**

*American Journal of Jurisprudence* (1974) at section 6 As discussed by Raz,J Kelsen's Theory of the Basic Norm

*Cambridge Law Journal* "A Wrong Turning: Article 3 ECHR and Proportionality" Stephanie Palmer 65(2), July 2006, pp 438-452

*Churchman* "Churchwardens: An introduction to the Nature of the Office" Peter M. Smith 2000 114/2

*Contemporary Literature* Vol 43, No 4(Winter,2002), pp 760-783 Patrick J. Whiteley and Robert Bolt 'Natural Law and the Problem of Certainty: Robert Bolt's "A Man for All Seasons" published by University of Wisconsin Press. Sourced from Http://jstor.org/stable/1209041 accessed 23/05/12

*Conveyancer and Property Lawyer* "Property interest in a burial plot" Remigus N. Nwabueze 2007 517

*Ecclesiastical Law Journal* "A Note on the Theology of Burial in Relation to some Contemporary Questions" Christopher Hill 7 Ecc LJ at page 447

*Ecclesiastical Law Journal* "The Accommodation and Regulation of Islam and Muslim Practices in English Law" Urfan Khaliq 6 Ecc LJ at page 332

*Ecclesiastical Law Journal* "The Consequences of *Aston Cantlow"* Edward Nugee QC 7 Ecc LJ at page 452

*Ecclesiastical Law Journal* "Digging up Exhumation" Rupert Bursell 5 Ecc LJ 265 at page 18

*Ecclesiastical Law Journal* "Exclusive Burial Rights" P Sparkes (1991) 2 Ecc LJ 133

*Ecclesiastical Law Journal* "Exhumation Reconsidered" Philip Petchey 6 Ecc LJ at page 122

*Ecclesiastical Law Journal* "Human Rights and Human Remains: The impact of Dodsbo v Sweden" (2006) 8 Ecc LJ 453

*Ecclesiastical Law Journal* "The Impact for the Church of England of the Human Rights Act 1998" Mark Hill 5 Ecc LJ 265 page 431

*Ecclesiastical Law Journal* "Losing one's Faculties A personal reflection on the workings of the consistory court in the light of the Newman Report" Mark Hill 5 Ecc LJ 265 at page 164

*Ecclesiastical Law Journal* "Recent Ecclesiastical Cases" Edited by Justin Gav, Ruth Arlow and Will Adams 7 Ecc LJ

*Ecclesiastical Law Journal* Vol13, No.1, January 2011

*Elder Law and Finance* "Defining the Boundaries of the HRA 1998: The Implications of Heather v Leonard Cheshire Foundation" Lucy James (Solicitor, Trowers & Hamlins) Issue 1 2002 pg 6

Ian Leigh, Religious Liberty and Human Rights, Ecclesiastical Law Society 2001 Residential Conference, Trinity Hall, Cambridge 30 March – 1 April 2001 Paper title 'Freedom of Religion: Public/Private, Rights/Wrongs'

*Harvard Law Review 71,* 593 Hart H.L.A. (1958) "Positivism and the Separation of Law and Morals", (repr. In Essays in Jurisprudence and Philosophy (1983) Oxford Clarendon Press

*Institute of Cemetery and Crematorium Management* "Historic Announcement Could Change the Face of Burial in the UK" (Editorial) June 2007

*Institute of Cemetery and Crematorium Management* ICCM Member Information – Memorial Inspections and Actions – Report on graveyard safety involving memorials – accessed on iccm-uk.com 11.3.08

*International Journal of Law in the Built Environment* "Perceptions of occupiers' liability risk by estate managers: a case study of memorial safety in English cemeteries" Bennett L., and Gibbeson, C. 2(1) pg 76 2010

*Irish Jurist* Professor J.H.Baker (1970) 5 N.S. 391

*Journal of Current Legal Issues* Peter W Edge "Religious rights and choice under the European Convention on Human Rights" [2000] 3 Web

*Journal of Law and Medicine* "Claims on the Deceased: The Corpse as Property" Rosalind Atherton, Volume 7, May 2000 pg 361 (Paper based on conference "Law and Medicine at the Frontier: The Body, Property and Reproductive Technology", Health Law Seminar Series, Faculty of Law, University of Sydney, 11 March 1999)

*Law Quarterly Review* "Church, State and Human Rights: are Parish Councils Public Authorities?" Peter Cane (2004) 120 LQR 41

*Law Quarterly Review* "Horizons of Horizontality" (2000) 116 LQR 217, 220 and 223-4

*Legal Studies* "Dead, but not buried; bodies, burial and family conflicts" Heather Conway Vol 23 No 3 September 2003 at page 423

*Legal Studies* "Exclusive rights of burial and the law of real property" Vol 18, issue 4, 4 December 1988 pgs 438 - 452

*New Law Journal* "Exhuming Justice" Steven Gallagher 2008 158

*New Law Journal* "Mind the Gap" Jamie Burton NLJ December 20 2002 pg 1933

*(NUCL) Japanese Journal* "The Benefits and Burdens of a State Church: a Reflection on the Idiosyncracies of the United Kingdom" Mark Hill Vol 24 (2007) pg 241

*Public Law* "Chancel Repairs and the Human Rights Act" Dawn Oliver (2001) PL 651

*Public Law* "The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act" Dawn Oliver (2000) PL 476

*Public Law* "Functions of a public nature under the Human Rights Act" Dawn Oliver (2004)

*Public Law* "The Human Rights Act 1998. Pepper v Hart and all that" Francesca Klug (1999)

*Ratio Juris* Aldo Schiavello 'Neil MacCormick's Second Thoughts on *Legal Reasoning and Legal Theory.* A Defence of the Original View' Vol.24 No.2 June 2011 (140-55)( taken from the fourth thesis)

*St John's Law Review* "Emotion in the Language of Judging" Martha C. Nussbaum Winter 1996

*St John's Law Review* "Emotion in the language of Judging" Martha C. Nussbaum 70 St. John's L. Rev, 23

*Urban History* "Lawn Cemeteries: The emergence of a new 'landscape of death'" Julie Rugs Vol.33, issue 2, pg 213-233

**Newspapers**

*Daily Mail* "Councils spend Millions on gravestone in 'topple' tests for health and safety" 20 April 2009

*Daily Mail* "Fake flowers at a baby's grave and the family at war with the vicar who says they're vulgar" 18 January 2011

*Daily Telegraph* 18 December 1997 – Comments from the Bishop Rippon

*The Independent Newspaper* "Family in gravestone row can exhume body" (no by-line) 13 April 1995

*The Times Newspaper* "Churchmen urge Human Rights Bill rethink" 5 Feburary 1998 letters

*The Times Newspaper* "Consistory Courts scrapped" Ruth Gledhill 25 October 2000

*The Times Newspaper* "Dead end: no room left to rest in peace" Kaya Burgess Tuesday 17 May 2011

*The Times Newspaper* "Here lies the body of no-one special" Tom Whipple and Fran Infante Monday 28 June 2010

*The Times Newspaper* "No place for the tacky and the sentimental" Ben Hoyle Monday 30 June 2003

*The Times Newspaper* "Solicitors body comes to heel" (no by-line) 1 November 2001 page 15

**Websites Accessed**

www.BBC.co.uk/news

www.chobham.info/parish.htm

www.magic-nation.co.uk

www.publicservices.co.uk

**Government Reports, Papers and Advisory documents**

Advice and guidance from The Local Government Ombudsman *Special Report Memorial safety in local authority cemeteries* LGO 612 (03/06) Commission for Local Administration in England, Public Services Ombudsman for Wales

Briefing Paper by Commission for Architecture and the Built Environment (CABE) 2007 *Cemeteries, churchyards and burial grounds*

*Brenda Wilson Jull Robson: Home Office Online Report 1/04* Cemeteries and their Management (expressly stated: The views expressed in this report are those of the authors, not necessarily those of the Home Office (nor do they reflect Government policy)

Department for Constitutional Affairs *Burial Law and policy in the 21st Century: Response* DCA/HO 1/05

Department for Constitutional Affairs *Guide for Burial Ground Managers* 2005

Diocese of York Notes of Guidance:Church yards: Broken and Dangerous gravestones 2003 revised 2009.

Disused Burial Grounds (Amendment) Bill [H.L.] HL. Deb 15 December 1980 vol 415 cc961-7 (accessed 19 August 2009)

Environmental Subcommittee of the House of Commons Select Committee on the Environment, Transport and Regional Affairs Eighth Report, 21 March 2001 HC 91-1

HansardArchivesResearch www.publications/parliament.uk/pa 12.2.08

Home Affairs Department House of Commons Library *The Human Rights Bill [HL], Bill 119 of 1997-98 Churches and Religious organisations"* 98/26

Home Office *Burial Law and Policy in the 21st Century: The need for a sensitive and sustainable approach* January 2004

House of Commons Debates (Burial Law Reform) Thursday 28 June 2007 – accessed on www.theyworkforyou.com/debates 10.10.2007

Joint Committee on Human Rights Inquiry into the Meaning of Public Authority under the Human Rights Act, Press Notice, 28 February 2003 Session 2002/3 No 6

Joint Committee on Human Rights *The Meaning of Public Authority Under the Human Rights Act* Seventh Report of Session 2003-4 HL Paper 39 HC 382

Joint Committee on Human Rights *The Meaning of Public Authority under the Human Rights Act* Ninth Report of Session 2006-7 HL Paper 77 HC 410

Memorial Safety in Local Authority Cemeteries Guidance from the Local Government Ombudsmen:Special Report 2006

Ministry of Justice, Burial Grounds – The results of a survey of burial grounds in England and Wales 2007

Ministry of Justice *Burial Law and Policy in the 21st Century: The Way Forward* 2007

Ministry of Justice – Managing the safety of Burial Ground Memorials: Practical advice for dealing with unstable memorials (January 2009)

Ministry of Justice – Stop unnecessary staking says minister (16 January 2009) (www.justice.gov.uk/news/newsrelease160109.htm (accessed 19 August 2009)

*Public Law* "The Human Rights Act 1998, Pepper v Hart and all that" Francesca Klug (1999) Retrieved from Westlaw 1.12.08

Research Paper 98/26, House of Commons Library 'The Human Rights Bill [HL] Bill 119 0f 1997-98 Churches and Religious Organisations' Home Affairs Section

Responsible Care for Churchyards – A brief practical guide for parishes (accessed at www.cofe.anglican.org (19 August 2009)

Select Committee on Environment, Transport and Regional Affairs Memoranda, SL Yates, Superintendent and Registrar (Epsom Cemetery) (CEM 62) Hansard ArchivesResearch www.parliament.the-stationery-office.co.uk/pa 11.03.2008

Select Committee on Environment, Transport and Regional Affairs Memoranda, Memorandum by the Corporation of London (CEM 50)

**Other policy documents**

Chancellor's General Directions – replacing in their entirety the previous Chancellor's General Directions (Issue 1) dated April 2001. Issue 2, Easter 2007 – accessed on www.diochi.org.uk/content/buildings/ChanceDir.doc

Policy Relating to Shallow Depth Graves Issued by the Institute of Cemetery and Crematorium Management May 2004

**General Synod Papers**

Legal Advisory Commission of the General Synod: The Maintenance of Monuments in closed churchyards (accessed at www.cofe.anglican.org (19.08.09)

**Case Law**

*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank,* (2001) 81 P & CR 14, [2000] 2 EGLR 149; [2002] Ch 51, [2001] 3 All ER 393, [2001] WLR 1323 (CA); [2003] 3 WLR 283; [2003] 3 All ER 1213 (HL)

*Botham v TSB Bank plc* (1997) 73P&CR D1, [1996] EWCA Civ 549

*Brown v Runcie* The Times, 20 Feburary 1991 CA

*Byrne v Deane* [1937] 2 All ER 204

*Callin and Others v Leonard Cheshire Foundation* [2002] EWCA Civ 595

*Chivers & Sons Ltd v Air Ministry* [1955] 1 Ch 585, 593

*Countryside Alliance v AG* [2005] EWHC 1677 (Admin); [2006] EWCA Civ 817

*Dr Handyside's Case* (1749) 2 East PC 652

*Douglas v Hello! Ltd* [2001] QB 967

*Elli Poluhas Dodsbo v Sweden* ECHR August 2004

*Greek* (1969) 12 YB 170

*Gaunt v OFCOM* [2010] EWHC 1756 (Admin)

*Hampshire County Council v Graham Beer t/a Hammer Trout Farm* [2003] WECA Civ 1056

*Haynes' Case* (1614) 12 CoREp 113

*Holland v Hodgson* (1872) LR 7 CP 328

*Holy Monasteries v Greece* (1995) 20 EHRR 1

*Hoskins-Abrahall v Paignton Urban District Council* [1929] 1 Ch 375, (1928) All ER 57

*In Re Blagdon Cemetery* [2002] 3 WLR 603, (2002) 6 Ecc LJ

*In Re Christ Church, Alsager* [1999] Fam 142

*In Re Crawley Green Road Cemetery, Luton* [2001] 2 WLR 1175

*Ireland v United Kingdom* (1978) 2 EHRR 25

*Kokkinakis v Greece* (1993) 17 EHRR 397

*London & Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587

*Manchester City Council v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441

*McGough v The Lancaster Burial Ground* [1888] LR21 QBD

*Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley Warwickshire (appellants) v Wallbank and another (respondents)* [2003] UKHL 37

*Pepper v Hart* [1993] AC 593

*Poplar Housing and Regeneration Community Association v Donoghue* [2001] 19 EG 141

*Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48

*The Queen v The Burial Board of Bishop Wearmouth* [1879] QBD vol V at page 67

*R v Archbishops of Canterbury and York, ex parte Williamson*, The Times, 9 March 1994, CA

*R (Countryside Alliance) v AG* [2007] 3 WLR 962

*R (Williamson) v Secretary of State for Education* [2005] UKHL 15, [2005] 2 WLR 590

*R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853, [1993] 1 WLR 909

*R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd* [2003] EWCA Civ 1056

*R v Lynn* (1788) 2 TR 733

*R v Panel on Take-overs and Mergers, ex parte Datafin plc (Norton Opax plc Intervening)* [1987] 1 All Er 564, [1987] QB 815

*R v Price* (1884) 12 QBD 247

*R v Secretary of State for the Home Depatrment, ex parte Daly* [2001] UKHL 26

*R v Sharpe* (1857) Dears & Bell 160

*Re Atkins* [1989] 1 All ER 14

*Re Brightlingsea Churchyard* (2004) 8 Ecc LJ 233

*Re Bromsgrove Old Cemetery* Worcster Consistory Court: Mynors Ch, July 2010

*Re Durrington Cemetery* [2000] 3 WLR 1322

*Re Hagley Municipal Cemetery* Worcster Consistory Court: Mynors Ch, July 2010

*Re Holy Trinity Churchyard, Freckleton* [1994] 1 WLR 1588

*Re Holy Trinity Churchyard, Freckleton* (No. 2) (1995) 3 Ecc LJ 429

*Re Hughes deceased* Manchester Consistory Court: tattersall Ch, August 2010

*Re Keynsham Cemetery* (Bath and Wells Consistory Court), September 2002 [2003] 1 WLR 66

*Re Oxley deceased* Bradford Consistory Court: Walford Ch, Marh 2010

*Re Putney Vale Cemetery* Southwark Consistory Court: Petchey Ch, April 2010

*Re South London Crematorium,* unreported 27 September 1999

*Re South London Crematorium: petition of Mary Murphy* (2000) 6 Ecc LJ 85

*Re St Gregory's, Tredington* [1971] 3 ALL ER 269

*Re St John the Baptist, Bishop's Castle* (Hereford Consistory Court, November 1999 – not cited

*Re St Mary the Virgin, Hurley* [2001] WLR 831, 6 Ecc LJ 166

*Re St Peter, Wrockwardine* Lichfield Consistory Court, June 2003

*Re Stocks (deceased)* (1995) 4 Ecc LJ 527

*Re Talbot* [1900] P1 London Consistory Court

*Re West Norwood Cemetery (No 1)* [1994] Fam. 210; [1994] 3 WLR 820; [1995] 1 All ER 387

*Re West Norwood Cemetery (No 2)* [1998] 3 WLR 128; [1998] Fam 84

*Re West Norwood Cemetery* [2005] 1 WLR 2176

*Re West Pennard Churchyard* [1992] 1WLR 32, [1991] 4 All ER 124

*Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609

*Tyler v United Kingdom* (1994) 4 April ECHR 21283/93

*Wainwright v United Kingdom* (2007) 44 EHRR 40

*Williamson v Archbishops of Canterbury and York*, 5 September 1996, CA (unreported)

*YL (by her litigation friend the Official Solicitor) v Birmingham City Council and others* [2007] UKHL 27