

IN THE CONSISTORY COURT OF  
THE DIOCESE OF BATH AND WELLS

Re: Keynsham Cemetery

---

JUDGMENT

---

1. Keynsham Town Council is the local authority which has the management of Keynsham Cemetery pursuant to the powers conferred upon it by Section 214 of the Local Government Act 1972 and the Local Authorities' Cemeteries Order 1977 (S.I. 1977 No.204). Part of this municipal cemetery is consecrated. By a Petition dated November 21<sup>st</sup> 2001 and presented on its behalf by the then Town Clerk, Mr. Mark Inglis, the Council seeks relief in these terms:

“The laying flat on its appropriate grave any tombstone or other monument found on inspection to be unstable or dangerous in some other respect. Such permission to cover both past and future works.”

2. The Petition is opposed. A written protest (not itself of probative value) attracted numerous signatures. Notice of Objection was received from 20 members of the public. Some were content to express their disapproval by way of letters sent to the Registry. I have taken account of these letters in reaching my decision. Others chose

to be joined in the proceedings as Parties Opponent. The Petitioner, very properly, has not challenged the standing of any of the objectors, who have a sufficient interest in the proceedings either as relatives of persons buried in the affected graves or, more generally, as local residents concerned with the well-being of the cemetery.

3. The Petitioner and the Parties Opponent have agreed, at the Court's invitation, that judgment should be given upon written representations. Mrs. Anne Bibbings and Mr. Robert Grace have prepared written submissions on behalf of themselves and the remaining objectors. The Petitioner's initial representations are dated May 20<sup>th</sup> 2002, but were supplemented by an additional document dated June 28<sup>th</sup> 2002 responding to the case of the Parties Opponent. I have been greatly assisted by the clear and concise submissions made on both sides.

#### The Background to the Proceedings

4. A series of accidents, some of them fatal, involving the displacement of monuments has caused growing concern about safety in cemeteries. Many local authorities have adopted procedures for testing the stability of monuments and making them safe. The Petitioner was no exception. The steps which it took are described in the Town Clerk's letter of October 22<sup>nd</sup> 2001, the accuracy of which I accept. He wrote,

“The Town Council had not inspected any memorials since taking over responsibility for the cemetery in 1996 and there was no evidence that Wansdyke Council had ever had an inspection policy while it was in charge. We were advised that surveys had shown that as many as one in ten monuments in the average cemetery can be in an immediately dangerous condition and on the verge of collapse. An initial inspection of the cemetery confirmed these fears as we quickly found memorials that were no longer secured to their plinths or were a clear hazard to the public and staff. Therefore the Council’s actions were clearly motivated solely by deep concerns about the safety of our cemetery ...

The Council was disappointed that there was no nationally agreed procedure for inspecting memorials and that the Health and Safety Executive had not issued any guidance on this subject ... Trying to find a reasonable procedure was genuinely problematic and so it was decided to use an accurate instrument to apply a measured force, known as a Topple Tester. The standard adopted was the German standard set at 50kg ...”

5. The tests were conducted, without the authority of a faculty, over a period of months during 2001. The Topple Tester used for the purpose was a commercially manufactured device which applied a

predetermined force of 50kg to the monument. An audible signal was given if the stone withstood the force applied to it. A monument failing the test was dismantled and laid upon the grave. Thereafter a letter was sent to any known relative of the deceased stating that the monument was considered dangerous and had been laid down flat. There are photographs showing the appearance of some of the graves treated in this way. Of a total of 809 memorials tested, 178 failed the test and were laid flat. Relatives were traced and notified in 111 of these cases.

6. The Town Clerk's letter of October 22<sup>nd</sup> 2001, from which quotation has already been made, also contained an apology for carrying out work in the cemetery without the authority of a faculty. There is no reason to doubt that the omission was, as he put it,

"A genuine error based on lack of knowledge of aspects of cemetery management."

Subsequently, however, the Petitioner has sought, on advice, to argue that no faculty was required because it had sufficient statutory authority to act as it did. On April 12<sup>th</sup> 2002 the Petitioner's application to withdraw the Petition, in substance because the Court lacked the jurisdiction to entertain it, was dismissed. The Petitioner's right to re-argue the point in its written representations was, however,

preserved. Part of the representations are directed to the jurisdiction issue, which must now be considered.

### The Jurisdiction of the Court

7. Land, whether in public or private ownership, assumes a sacred character when it has been consecrated. Legal effect is given to the act of consecration by placing the land concerned within the jurisdiction of the Ordinary, who is almost always the Bishop of the Diocese in which the land is located. Consecration does not bring about a change of ownership, neither does it vest any title in the Bishop. Instead it enables the Consistory Court, as the Bishop's Court, to exercise oversight with a view to maintaining appropriate standards of decency and reverence in relation to the user of the land. In the context of a consecrated public cemetery, that function involves upholding the sanctity of Christian burial and the respectful treatment of the dead.
  
8. It is in accordance with the above principles that Keynsham Cemetery, to the extent that it was consecrated, originally became subject to the faculty jurisdiction. The Petitioner's primary argument is that the Local Authorities' Cemeteries Order 1977 has deprived the Court of the jurisdiction which it otherwise would have by empowering the Petitioner to make safe dangerous memorials. Articles 3 and 4 of the

Order confer upon a burial authority general powers of management and repair, while Article 16(1) specifically provides that,

“A burial authority may –

(a) put and keep in order any grave or vault, or any tombstone or other memorial, in a cemetery ...”

9. While these provisions, and in particular Article 16(1) ostensibly authorise activities including the laying flat of a dangerous tombstone on a grave (but not its removal or disposal, which is governed by Article 16(2)) the draftsman has made no explicit reference to the faculty jurisdiction. Plainly he was aware of its impact, because other Articles, notably 5, 6(1)(b) and 13, deal with consecration or the rights of the Bishop.
  
10. The faculty jurisdiction may be removed or curtailed by legislative enactment. Clear words, however, are needed to bring this about. Where, as here, the relevant provision simply creates a power, its exercise remains subject to the control of the ecclesiastical court. In considering whether a faculty should be granted the court will have due regard to the fact that the person or legal entity concerned has been entrusted by law with the discharge of the function in question. The prescribed activity falls however to be regulated so that it is carried out, if at all, only in a manner consistent with the objects of

consecration. Often regulation is conveniently imposed by granting a faculty subject to conditions.

11. The provisions of the 1977 Order do not, therefore, deprive the Court of its jurisdiction. This conclusion is fortified by similar reasoning adopted by the late Chancellor Gray Q.C. when dealing with the same issue in re West Norwood Cemetery [1994] Fam 210 at 224H-226F.

12. As a subsidiary argument the Petitioner seeks to derive authority for its actions from the Health and Safety Executive Local Authority Circular No.323-18 (August 2001) part of which reads,

“... if memorials are in immediate danger of falling, then cemetery management should take immediate action by either: laying them down; structurally supporting them; cordoning them off; or carrying out immediate repairs.”

13. For the reasons already given this contention also is bound to fail. Additionally, the Circular was received (as is demonstrated by the Town Clerk's previously mentioned letter) after the Petitioner's programme was well under way. It cannot have influenced, still less authorised, the commencement of the programme. More fundamentally the quotation comes, not from legislation but from a Circular, the status of which is purely advisory. There can be no question of extra-statutory guidance ousting the Court's jurisdiction.

14. A further jurisdictional matter has to be addressed, although not specifically included in the Petitioner's submissions. In practice the Consistory Court rarely intervenes in the management of the consecrated parts of local authority cemeteries. Apart from exhumation (for which specific provision is made in Section 25 of the Burial Act 1859) the jurisdiction is exercised sparingly. This restrictive approach is in practice justified because cemeteries are managed by responsible authorities acting through experienced and well-qualified staff. In most circumstances control is best left in their hands.

15. The present case, however, is exceptional. It involves the preparation and implementation of a controversial policy involving a large number of memorials. The appearance of the cemetery has been impaired, at least in the shorter term; the widespread displacement of monuments potentially affects the dignity of burial there; and public disquiet has been manifest. For these reasons it is appropriate for the Court to intervene.

#### The Relevant Law

16. The merits of the parties' submissions can only be evaluated after account has been taken of the surprisingly complex legal principles governing memorials to the dead.



17. The proprietor of a cemetery does not own the monuments therein. At common law a tombstone belongs to the person who set it up. After the death of the first owner title, under this doctrine, passed to the heir at law of the person commemorated. Professor J. H. Baker Q.C. ("Funeral Monuments and the Heir" [1970] 5 Irish Jurist N.5.391 reprinted in *The Common Law Tradition* 349) has described the evolution of the common law rule, which owes much to the creativity of Sir Edward Coke C.J. Its survival into modern times is confirmed by case law including *re St. Andrew's Thornhaugh* [1976] Fam 230, *re St. John the Baptist, Bishop's Castle* [1999] 5 Ecc LJ 487 and *re St. Michael's Orchard Portman* [2001] Fam 302, despite the uncertainties caused by the enactment of Section 45(1) of the Administration of Estates Act 1925 whereby the descent of property to the heir at law was abolished. For present purposes it is unnecessary to analyse the impact of Section 45(1)(a), or indeed that of Section 3(4) of the Faculty Jurisdiction Measure 1964 (which preserved for certain purposes transmission to the heir at law) because what remains clear is that ownership of the monument is separate and distinct from ownership of the underlying land. The contrary view, expressed in *re West Norwood Cemetery* [1994] Fam 210 at 218 C-D, is sustainable only in the context of the particular provisions of the private Act of Parliament governing that cemetery.

18. A mason is liable in tort for injury caused by a negligently constructed monument. (Brown v. Cotterill [1934] 51 TLR 21.) Apart from this duty of care, he is likely (depending on the terms of the agreement) to owe contractual obligations to the purchaser of the monument.
19. The owner of a monument is the person primarily responsible for keeping it in proper repair. In all probability the owner owes a duty of care in accordance with the established principles of the tort of negligence to persons whose safety may be affected by it.
20. The proprietor of the cemetery, as its occupier, is liable to visitors (under Section 2 of the Occupier's Liability Act 1957) and potentially to others (see the Occupier's Liability Act 1984) in respect of dangers within it, including those caused by unstable monuments.
21. The cemetery proprietor also faces a potential criminal liability, in particular under Sections 2 and 4 of the Health and Safety at Work etc. Act 1974, by exposing his employees or other working people to risk. Breach of the comparable provisions of the Workplace (Health Safety and Welfare) Regulations 1992 (S.I.1992 No.3004) gives rise to a civil claim for damages on the part of the injured party.

## The Confirmatory Faculty

22. Minor works associated with maintaining the safety of monuments, including non-destructive testing, fencing or covering dangerous stones, or affording temporary support, do not require the authority of a faculty. The need for a faculty arises where, pursuant to a policy of safety inspection, it is desired to lay flat a potentially large number of tombstones.
23. I am satisfied that the Petitioner displaced the 178 monuments in good faith without appreciating the need for a faculty. Furthermore a local authority, facing the prospect of civil or criminal liability outlined above, and alerted to the need for intervention by literature from organisations such as the Association of Burial Authorities, was constrained to take decisive action. It was not easy to balance respect for the departed against the safety of the living. The remedy chosen by the Petitioner, namely the flattening of tombstones which failed the German 50kg test, was among the most drastic immediately available. Nonetheless its selection was not unreasonable in public law terms (Associated Provincial Picture Houses v. Wednesbury Corporation [1948] KB 223). I am also persuaded that the potential for accidental injury was sufficient to justify the petitioner in making safe the affected monuments immediately after testing and without giving the owners a period of grace to effect a repair.

24. It is therefore appropriate that a confirmatory faculty should issue. The effect of such a faculty is limited, for as was explained by Chancellor Garth Moore in re St. Mary's Balham [1978] 1 All ER 993 at 995j,

“Work done without the permission of a faculty is illegal and remains illegal for all time. If, however, a confirmatory faculty is granted, it means that from that point in time onwards the situation is legalised; but it does not retrospectively legalise what has already done.”

The confirmatory faculty, while regularising for the future the Petitioner's position cannot deprive aggrieved parties of any of their rights or remedies in other jurisdictions.

25. A confirmatory faculty may, moreover, be granted subject to conditions. The payment of compensation cannot be included among them, because the ecclesiastical courts have no power to award damages. Reinstatement may, however, be directed, as re Woldingham Churchyard [1957] 1 WLR 811 illustrates. It is to this aspect of the case that the submissions of the Parties Opponent are in reality directed.

26. At the forefront of those submissions is the criticism of the testing procedure as regards monuments less than a metre in height. The

point is fairly made that the manufacturers' literature directs that the appliance be placed against the tombstone one metre above ground level. The Petitioner admits that in some instances the test was carried out upon tablet monuments lower than a metre in height which were, nonetheless condemned. Attractive as the criticism may appear, it is on closer analysis unconvincing. There is no evidence to demonstrate that a monument less than a metre high was exposed to a disproportionate force or produced a false reading if subjected to the Topple Tester. Neither, with hindsight, is it practicable to identify memorials (if any) within this class which might have been saved by the use of some other test. A condition for the reinstatement of memorials simply because they were less than a metre high will not, therefore, be attached to the confirmatory faculty. Instances of particular hardship may, however, come within the limited ambit of the condition imposed at paragraph 28 of this judgment.

27. There are other instances in which objectors have challenged the Petitioner's actions because a particular memorial was newly installed, or was visually in good order. Unfortunately these factors do not affect the outcome, since (as the Petitioner's evidence has shown) it is generally the new monuments which have not been firmly anchored and have therefore failed the test.
28. Apart from the above categories, I am concerned that there may be a small residual number of cases in which either a monument not of

tablet design (for instance a cross or a statue) was lowered after being exposed to the Topple Tester, or there is evidence that a monument was actually tested in a suitable manner by or on behalf of the owner and was found to have been secure on a date proximate to the Petitioner's survey. There is the potential for injustice in such exceptional cases, which must be addressed by adding a condition to the confirmatory faculty whereby the Petitioner shall, if required by the Court on the application of the owner, reinstate any monument within these limited classes. The owners concerned will have liberty to apply to the Court under the faculty and the matter will be dealt with summarily upon the written representations of the Petitioner and the applicant.

#### Future Control by Faculty

29. Quite apart from the confirmatory faculty, there must be a separate faculty dealing with the future. The periodic testing of monuments for safety purposes is likely to become a routine feature of cemetery management.
30. Although the method of testing adopted in 2001 was justifiable on the information then available to the Petitioner, subsequent experience suggests that it is now capable of mitigation. Other local authorities have introduced less stringent systems, and no nationwide standard has yet been imposed. The Petitioner has sought to sustain the

continued application of the 50kg test on the grounds that wind gust force in the United Kingdom can reach that level at exposed sites. Against that, I have no evidence that monuments in churchyards or cemeteries in this diocese have been the victims of wind damage. Sadly the more vulnerable parts of its churches have often been less fortunate. Without compromising safety standards, it is sufficient for the future to direct that monuments may be laid flat only if they fail hand testing or testing to a 30kg standard by a Topple Tester (or similar device) used strictly in accordance with the manufacturer's directions. This requirement will take effect as a condition to the faculty and will be operative until further order, enabling the standard to be modified in the light of further developments.

31. This faculty will also be subject to the following self-explanatory conditions:-
- (i) whenever it is reasonably practicable to do so the Petitioner shall give any person known to have an interest in a monument notice that it has been found unstable on testing and afford that person reasonable opportunity to remedy the defect;
  - (ii) the Petitioner shall abide by any further direction which the Court may give in relation to any monument affected by the faculty;

- (iii) any person having an interest in a monument so affected may make application to the Registry by letter for directions under the faculty;
- (iv) a list of monuments displaced under the faculty shall be maintained by the Petitioner and a copy of such list, updated annually, shall be lodged at the Registry;
- (v) a photographic record shall be kept of each monument displaced pursuant to the faculty.

The faculty will be operative until further order and will run without any time limit.

32. The two faculties have due regard to the rights of ownership protected by Article 1 of the First Protocol to the European Convention on Human Rights. The confirmatory faculty cannot, by its very nature, interfere with the accrued rights of the owners of displaced monuments. The conditions which will be imposed in future are designed to give continuing protection to the graves at Keynsham Cemetery, both as places of burial and (in respect of their monuments) as objects of private property.
33. This judgment must not be read as an implied criticism of any system of testing or making safe memorial stones which is less rigorous than



that under consideration here. Many factors, including the size and location of the burial ground, as well as the past history of its management and the age, quality or design of monuments to be found there will affect the approach to questions of safety. If standards of general application are to be set in this sensitive area, it is the task of others to formulate them.

*Timothy Borders*  
*Chancellor.*

*18.9.2002*