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BENNETT, L. and GIBBESON, C.

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# Perceptions of occupiers' liability risk by estate managers – A case study of memorial safety in English cemeteries

Luke Bennett<sup>1</sup> & Carolyn Gibbeson<sup>2</sup>

## Keywords

Occupiers' liability - Risk assessment - Safety – Burial – Disposal of the dead - England

## Abstract

**Purpose:** This article presents a case study examining how a notion of 'reasonable safety' provision has come to be constructed by municipal cemetery managers in relation to gravestones and other memorial structures over the last decade in England.

**Design/methodology/approach** The article is based upon a literature review of policy and law and the results of qualitative face-to-face semi-structured interviews with a small sample of English municipal cemetery managers.

**Findings:** 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". The interviews show how organisations and individual managers have sought to make sense of, and render workable, the memorial safety issue by drawing upon, and at times ignoring or adapting, available guidance.

**Research limitations/implications:** The interview study was based upon a small non-random sample, accessed via a single phase of enquiry in Spring 2008. The influence of fear of liability may manifest differently in other cemetery managers and/or change over time. Given the novel, and powerful 'resisting-forces' in the case of cemeteries direct comparison with the risk perception of managers in other parts of the built environment may be difficult.

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<sup>1</sup> Senior Lecturer, Department of Built Environment, Sheffield Hallam University

<sup>2</sup> Former MSc Property Appraisal & Management student at Sheffield Hallam University – this paper utilises Carolyn's field research into the liability risk perceptions of a small sample group of local authority cemetery managers.

**Originality/value:** Given the lack of existing research in the field of liability perception by landowners, this article may assist analysis of the generic processes by which safety guidance is negotiated, and reconciled with competing drivers in management of the built environment.

## 1. Introduction

*How do place managers perceive and respond to occupiers' liability and safety laws?*

This article explores this question through a case study: the management of memorial<sup>3</sup> safety within English municipal cemeteries.

Gravestones, statues and other memorial structures are often modest in scale, but the circumstances of their erection, abandonment and subsequent use raise interesting questions about how 'reasonable safety' is determined for such structures and the ways in which a balance comes to be struck between safety and other priorities.

The issue of memorial safety within English municipal cemeteries has seen heightened press interest in recent years (for example BBC 2002; BBC 2003; Morpeth Herald 2005; Church Times 2006; Nurden 2006; Groves 2008). It was originally brought to the media's attention following the fatal crushing of a six year old child by an unstable gravestone in a Harrogate cemetery in 2000. Following the accident (and the ensuing compensation claim and enforcement action), many local authorities embarked upon programmes of 'topple testing', and consequent removal, staking or laying flat of 'unsafe' gravestones, a project claimed to have cost £15 Million nationwide (Groves 2008). Yet such steps were swiftly met with public complaint and adverse press comment. It appeared that an attempt to respond to a perceived public safety risk had backfired, and needed re-thinking.

Commentators such as Adams 1995: 210; Ball 1995: 4; Ball 2002: Section 7.2; Haythornthwaite (quoted in RRAC 2008) and RRAC 2009 argue that in contemporary society the interpretation and application of public safety law is frequently subject to a 'ratchet effect' whereby legal requirements are interpreted ever more cautiously and restrictively. The ratchet effect is, in particular, associated with calls "*that more should be done*" in the aftermath of an accident that attracts public attention<sup>4</sup>. These commentators see this effect as spurred by the rise of 'risk entrepreneurs' (advisers, who, they claim, have a vested interest in preaching

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<sup>3</sup> In this article the expression 'memorial' comprises gravestones, statues, crosses, railings and other smaller elements related to a grave or tomb such as curbs, plinths, plaques, markers and vases – to the extent that they might have the ability to cause injury.

<sup>4</sup> When related to a legislation made in the aftermath of, and in reaction to, a high profile incident this is sometimes (coincidentally) referred to as '*tombstone regulation*', see for example Lodge and Hood's (2002) comparative analysis of dangerous dogs legislation

caution and risk avoidance). They believe that by such ratcheting, and the preaching of such 'experts', place managers' judgments about adequate safety provision are rendered ever more cautious, with corresponding negative effects on recreational access and aesthetic enjoyment of the natural and the built environment. They then conclude that these effects, when combined with fear of media criticism in the event of an accident, and a perception that members of the public are nowadays more likely to claim compensation in the event of an accident (HSE 2007a), lead to greater caution in place management and, on occasion, withdrawal of access to public space altogether.

By this view, if left unchecked matters of safety and liability avoidance can come to dominate place management, for as Landry (2005) notes, drawing upon the social theorists who observed and interpreted the rise of a "Risk Society" during the 1990s (e.g. Beck 1992; Furedi 1997):

"The evaluation of everything from a perspective of risk is a defining characteristic of contemporary society. Risk is the managerial paradigm and default mechanism that has embedded itself into how companies, community organisations and the public sector operate. Risk is a prism through which any activity is judged...It narrows our world into a defensive shell." (Landry 2005: 3)

For Adams, writing in relation to the proliferation of protective street furniture, this process actually often plays itself out at a subtle, unintentional level. There is normally no conspiracy, no pre-mediation by such entrepreneurs or managers to bring about this effect. But instead:

"[the] signs, signals, barriers and road markings are not the work of any single planner; they are the cumulative result of numbers of uncoordinated interventions...[and] the primary justification for almost all the clutter will be safety..." (Adams 2005: 39)

Whilst many commentators (e.g. Blair 2005; BRC 2006; Letts 2009) have stepped forward to echo the views described above (often within the context of debates about the alleged adverse effects of 'compensation culture' and 'over-regulation') there has been little research in the United Kingdom to map the effects of safety and liability fears within actual place management scenarios. Much is left to bold assertion. As Bennett and Crowe (2008: 78) argue, the debate would be greatly served by research to establish whether any evidence can actually be found of such alleged effects.

Accordingly, the aim of this article is to evaluate the impact and interpretation of liability risk fears solely within one place management scenario – that of the management of memorial safety within municipal cemeteries in England.

Through this analysis the operation of the ratchet effect, and of risk entrepreneurs, will be shown to be a complex, contested – and uncertain - process. Indeed, this is

the case both at the level of 'policy' framing and at the level of 'on the ground' interpretation of what 'reasonable safety' means to individual managers. This case study will show the extent to which these effects have been met by 'resisting-forces' (CABE Space 2007a: 38). It also will show how promulgation of guidance by national stakeholders cannot be guaranteed, of itself, to automatically bring about a change in liability perception or site management behaviour.

The case study examined here is approached from a constructionist perspective (Berger and Luckmann 1971; Velody and Williams 1998). It specifically seeks to show how the 'reality' of liability under civil and criminal laws for premises safety is 'constructed' by the interaction of stakeholders, and the personal interpretations of place managers. This approach derives from a blend of traditional descriptive policy analysis and interpretive social theory. As an approach, it has its roots in socio-legal studies of the operation of 'law-in-practice', such as Hutter (1988) and Ewick & Sibeby (1998).

Whilst this case study is largely descriptive (because the debate currently needs more empirical examples, rather than more theorising) the article's approach is informed by theoretical perspectives that argue that risk perception is an inherently cultural process (Douglas and Wildavsky 1983; Wildavsky and Dake 1990; Slovic 1992; Douglas 1992; Tulloch 2008), and that it is necessary to study why and how a particular risk issue does or doesn't take hold (the so-called 'social amplification of risk' model: Pidgeon et al 2006). The research approach used for this study also draws upon 'reader/reception' perspectives from cultural / communication studies and literary theory – perspectives which suggest that what needs to be studied is how people react to texts, and what meaning they make of them, rather than solely to focus upon what the author intended to convey or impose by his text. In particular the aim is to observe and analyse how 'interpretive communities' (Fish 1980) come to shape the way in which 'the law' is collectively interpreted and applied within a particular community: in this case study, municipal cemetery managers, the organisations within which they work, and the professional associations to which they belong.

The focus of this case study is therefore upon illustrating how a practical, and largely 'lay', interpretation of 'reasonable safety' evolved over the last 10 years due to the interplay of concern for public safety and respect for the bereaved. In short, how in each manager's mind a 'common-sense' understanding of what the level of risk is, and what he must do in response to it, was constructed as a result of the local and professional culture in which the manager was situated<sup>5</sup>.

This perspective does not, however, seek to argue that all possible interpretations of what the law requires have equal validity. Accordingly, an interpretation of how risk

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<sup>5</sup> This 'social constructionist' analysis of meaning formation is common in studies of risk perception. For example it is found in the work of Backett-Milburn, and Harden (2004) on the construction and negotiation of risk and risk management notions at the level of the family unit.

of liability is perceived needs to be situated within at least a brief outline of what the applicable law appears to be trying to achieve.

Place managers' liabilities in England regarding safety provision for lawful visitors and trespassers are set by the Occupiers' Liability Acts 1957 & 1984 and the Health & Safety at Work Act 1974: a mix of criminal and civil legislation augmented by case law, regulations and guidance. In deciding their place management strategies, it is this matrix of law and policy that cemetery managers are attempting to interpret and apply to their specific sites.

Both occupiers' liability law and the health & safety law require an employer / place occupier to do that which is *reasonable* in relation to the provision of safety. Whilst the Health & Safety Executive ("HSE" - the applicable occupational health and safety regulator), professional associations and other groupings provide interpretations of what they regard as "reasonable" provision in defined circumstances, the ultimate choice is left to the duty holder (with the risk that they will be judged with the benefit of hindsight if something goes wrong).

It is this broad opportunity for subjective judgment about what the law requires that gives rise to the broad range of interpretations that the case study will show.

## **2. Cemeteries and their management**

To understand the pressures shaping management of municipal cemeteries, and therefore the context within which judgments about 'reasonable safety' are made, it is necessary to present a concise historical summary of the origins of cemeteries and the manner in which they came to be managed.

In England cemeteries are municipal (or privately owned) graveyards. They are predominantly an innovation of the Nineteenth Century, built from the early part of the 1800s in a response to the severe lack of burial capacity in the rapidly growing urban centres following the Industrial Revolution. Whilst they may have consecrated areas they are not primarily religious in their provision and management and can be contrasted with the traditional burial areas of churchyards in this respect. They also differ in size - municipal cemeteries were constructed on an "industrial" scale, developments such as Brookwood Necropolis (opened 1854 near Woking, Surrey), were literally envisaged as "cities of the dead", with Brookwood even featuring its own rail connection to London's Waterloo station (Arnold 2006: 166).

Much has been written of the Victorian "cult of the dead", the rich cultural prominence of mourning in that era (e.g. Curl 2000). Cemeteries are the built environment legacy to that time and civic focus. As noted in a submission to a Parliamentary inquiry on cemeteries in 2001, cemeteries are a showcase of Victorian landscape design, architecture and sculpture (ETRA 2001: para 22). The design and management of cemeteries was the subject of considerable thought and publication, with John Claudius Loudon's 1843 manual *On the Laying Out, Planting and*

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*Management of Cemeteries* (Loudon 1843) having formative impact upon the emerging large urban cemeteries. It promoted a rationalist cemetery design style, one focussed upon ordered (often grid-layout) arrangement and moral and educational instructional from the built form presented there. These cemeteries were designed for both the living and the dead.

In the Twentieth century cemetery design style moved more towards a lawned "memorial gardens" approach, ordered rows of gravestone memorials but without curbs or railings. This was a move towards functionalism in maintenance, and perhaps a sign of the decline in the symbolic importance of cemeteries as a place for the living, but it also reflected the memorial style developed by the Commonwealth War Graves Commission following the carnage of the Great War (Brooks 1989: 76).

In the opinion of the Parliamentary committee that examined the parlous state of cemeteries in 2001:

"The mid Victorian crisis (urban burial needs) provided a short term solution, but left Britain with a disastrous long-term legacy." (ETRA 2001: para 2)

In the committee's view the Victorian focus upon perpetual (or at least as long as living memory) memorialisation of the dead, and the long term grant of exclusive rights to burial and restrictions on exhumation, which arose out of that, created an unsustainable burial culture. In particular a 'spiral of decline' (ETRA 2001: para 4) sets in when burials cease, and revenue correspondingly starts to fall. The size of Victorian cemeteries, their elaborate monumental structures and the upkeep of extensive pathways and perimeter fencing render these expensive legacy land assets to manage, there being little scope for redevelopment or supplemental revenue generating streams.

In consequence, memorial structures remain in the cemetery unless and until removed by the local authority.

Local authorities, in their capacity as "burial authorities", have express powers and responsibilities in relation to the use and management of their cemeteries. These are now set out in the Local Authorities' Cemeteries Order 1977 ("the Order"). The Order addresses both the management of the fabric of the cemetery and public access to, and use of, the cemeteries.

The Order obliges local authorities to keep their cemeteries in "good order and repair"(Article 4). However the conferred powers are qualified, there is no general right for a local authority to remove or otherwise undertake works to a memorial, as such structures are technically owned by the relatives of the deceased. The qualified power under Article 16 of the Order to carry out works only arises for memorials which are "illegible or dilapidated by reasons of long neglect" (and even for these the deceased's relatives must be given three months notice of intended action).

The Order also provides the main reference point for cemetery managers in terms of their regulation of public use of their cemeteries. Article 18(1) of the Order prohibits wilful disturbance, nuisance, ball games or wilful interference with any memorial.

However the maximum penalty that can be imposed following any successful prosecution is only £100 (Article 19).

Yet the restricted nature of memorial repairing powers and the limited scope of powers for dealing with anti-social behaviour within the cemetery, of themselves, provide no release for the cemetery manager from responsibility to provide for safety within the cemetery. Under the Occupiers' Liability Acts a local authority owes a duty of care to visitors, and also to trespassers, to provide 'reasonable' safety within the cemetery – and this includes some extent of protection against dangers which such persons might cause to themselves, or others by inappropriate use of the cemetery and its structures.

This is significant, because whilst the cultural focus upon death and cemeteries has faded, cemeteries remain visited places. Indeed, even despite the Twentieth century shift away from burial towards cremation, graveyards remain a significant destination for the dead and their bereaved relatives. A 2000 survey by English Heritage survey recorded 2,047 churchyards and cemeteries in England, with 83% still receiving burials (English Heritage 2007)<sup>6</sup>.

An ethnographic study of major London cemeteries by Francis et al (2005), which was specifically targeted at "studying the living in cemeteries", found higher than expected usage of cemeteries by the bereaved, particularly in the early years following burial. In their study Francis et al looked at the ritual behaviours of those visiting graves and noted the strong sense of (emotional) ownership over graves. Their study found evidence of long term visitation, and that such visitors were observant and cherishing of the cemetery as a whole.

Indeed, as Francis et al (2005: 106) note, public expectations of cemetery management are not principally about grounds maintenance, they are about creating and maintaining surroundings of mourning. Cemetery users are particularly connected to "their cemetery", and their graves<sup>7</sup>. Given this, it is perhaps not surprising that strong feelings can quickly emerge when local authorities embark upon schemes to remove memorials, stake them or lay them flat.

### **3. Memorial safety: reaction and counter reaction**

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<sup>6</sup> Whilst this study is concerned with the tension between safety and the interests of the bereaved it should be acknowledged that cemeteries, in particular the elegant Victorian ones, like Highgate, Brompton and Kensal Green in London also attract visitors motivated by aesthetic appreciation (Meller 1994). Urban cemeteries are increasingly praised by heritage and conservation groups as valuable 'green spaces' within now crowded cities (CABE Space 2007b). In recent decades this heritage value has resulted in many cemeteries (and/or memorials within them) receiving protected status either as listed gardens, listed buildings or conservation areas (English Heritage 2007).

<sup>7</sup> They also are well organised, with many cemeteries having groups of volunteers who take it upon themselves to be the defenders of 'their' cemetery, for example in Stoke-on-Trent Grave's Group (SOTGG 2009). These groups can affiliate to the National Federation of Cemetery Friends (NFCF 2009).



The tension between bereavement and safety management can now be examined through a policy history of memorial safety management over the last decade and by analysing interviews with municipal cemetery managers.

### **3.1 Methodology**

The policy analysis presented here is based upon a review of stakeholder websites, local and central government reports, law reports and media coverage.

The cemetery manager interviews were carried out in Spring 2008. Our interviews were semi-structured face to face meetings with cemetery managers at their place of work. Five local authorities managing municipal cemeteries were selected and targeted questions asked of a cemetery manager from each authority. For convenience the interview sample was located in the same region of England, representing urban or fringe urban local authorities.

In order to respect their confidentiality, this article intentionally excludes any information that would identify our interviewees. Their voices largely spoke consistently, with little evidence of deviation between the different authorities. There was however differing emphasis in each interviewees' replies, and one respondent in particular appeared more pessimistic and fearful of liability than the others, and that appeared reflected in that council's particularly zealous approach to memorial safety.

### **3.2 Memorial safety: a policy history**

A policy history must account for how risk of injury from unstable memorials came to emerge as a point of specific concern, and how policy and guidance then emerged to shape (and later 'correct') appropriate response to that initial concern following media and public complaints.

Two interviewees made passing reference to fatal tombstone accidents in Preston in 1992 and Liverpool in 1995, but it is the death of a six year old child, Reuben Powell, in Grove Road Cemetery, Harrogate in July 2000 that appears for most to have been the "trigger" of current concern about the risk posed by memorials.

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 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, as the spur for the ensuing cemetery survey programmes, and mass precautionary action (laying down or staking gravestones). Service of an Improvement Notice upon Harrogate Borough Council in the aftermath of Reuben Powell's death, requiring it to accelerate its memorial testing programme, was further cause for anxiety and severe reaction amongst local authorities (LGO 2006:15).

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It appears that a number of local authorities embarked upon severe risk reduction strategies in the light of Harrogate's fate, and that that fear of HSE enforcement remained at the forefront still of some cemetery managers interviewed for this study in Spring 2008, as one respondent noted:

"All authorities have had letters from the HSE...telling us to look at gravestone safety. I mean look at what Harrogate got...that speaks volumes."

The evidence of widespread laying down programmes comes from press reports, stakeholder websites and subsequent inquiries reviewed by the Local Government Ombudsman in 2006, who concluded:

"Spurred on by concerns of public safety, many local authorities saw 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." (LGO 2006:13).

Memorials that were at risk of toppling were cordoned, laid flat, staked or internally doweled. Yet the zealous (i.e. particularly risk adverse) cemetery authorities soon encountered a wave of local protest, and consequent unwanted media attention, for example the following headline from the Sun, a popular English newspaper, in September 2004 (LGO 2006):

"Desecrated. 372 tombstones felled...but not by louts...this time it's council morons."

Adverse response to the great laying down was swift, with the 2001 Parliamentary committee's plea that:

"...the Health & Safety Executive could act with greater sensitivity towards the historical and cultural significance of...memorials" (ETRA 2001: recommendation (kk))

And that:

"Cemeteries with decrepit memorials, rows of gravestones laid flat, and areas cordoned off with red and white tape are not, in our view, fit places for the service of the bereaved." (ETRA 2001: para 108)

However, the main driver for the repositioning of the issue was complaints raised by members of the public (usually relatives of the deceased interred in the affected graves) and the local media. For example, following a mass laying down of gravestones in Stoke on Trent, public outcry led to an independent inquiry and recommendation of compensation in 2003 (LGO 2006: 17; SOTGG 2009). In other areas aggrieved relatives sought action either through the civil courts, as a claim for

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compensation for the costs of re-erecting their memorials, or sought rulings from the Local Government Ombudsman alleging maladministration on the part of their local authority in its approach to memorial safety (LGO 2007).

Claims for compensation via the courts tended not to succeed, for example a claim heard before Staines County Court (judgment 19 February 2004) (ICCM 2004) saw a District Judge uphold as valid the pressure test applied to the gravestone in question, basing his decision upon the belief that the Council had a legal obligation to take some action on memorial safety, and noting that the Council's policy was in accordance with the Institute of Cemetery & Crematorium Management's (ICCM) guidance on memorial safety.

Claims of maladministration proved to be a more successful avenue of complaint. The Local Government Ombudsman (LGO) exercises a quasi-judicial public law review function in relation to complaints about local authorities' exercise of their powers and functions. It has power to issue censure and/or compensation awards against local authorities. The Ombudsman considered there to be sufficient public interest (and need for the introduction of clarity) for him to issue a *Special Report: Memorial Safety in Local Authority Cemeteries* (LGO 2006), the report opened with the declaration that:

"We have found maladministration in the failure to ensure adequate publicity/notification before carrying out stability testing or laying down individual monuments which failed the test; not having in place a proper system for risk assessment and subsequent prioritisation of work; lack of proper training for those carrying out testing and the failure to seek advice from a suitably qualified person." (LGO 2006:3)

Local authorities were criticised for over zealous laying down, failure to use properly trained staff and lack of prior consultation (or at least notification of grave and memorial owners).

The Health & Safety Executive was quick to distance itself from the laying down. LAC 23/18 was withdrawn, and the HSE adopted the stance that it had issued no guidance on the matter - other than pointing out that cemetery owners should have regard to their own industry best practice on the issue.

The Health & Safety Commission's Chairman, Bill Callaghan wrote to local authorities in 2004 (LGO 2006: 34) to remind them that that guidance required gravestones to be laid down only in the most serious of circumstances and to extol the virtues of good communication with the public. Mr Callaghan reiterated this message in 2006 (Callaghan 2006), in response to an article entitled "*Relatives furious at state-sponsored grave desecration*" (Nurden 2006). The article claimed that:

"[Local authorities] say that their actions are merely following HSE guidelines" and quoted a bereaved relative's perception that:

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"countless other gravestones have been laid over. The real reason for all this madness is the insurance industry and the modern scourge of risk assessment".

Noting the sensitivity of the matter, and the challenge faced by local authorities in balancing memorial safety and the interests of the bereaved, Mr Callaghan commented that most local authorities were managing this challenge well, and that:

"...only in a small number of cases is repair work being carried out in an indiscriminate and over zealous manner." (Callaghan 2006)

Mr Callaghan's 2006 letter was followed in March 2007 by a joint letter (HSE 2007b) signed by the Chairman of the Local Government Association, Mr Callaghan and three Government ministers. The letter was sent to the Chief Executive of each local authority and to all cemetery managers.

That letter again stated that most local authorities were responding proportionately to the issue of memorial safety, but added that:

"it would seem that it is still the case that a few authorities have acted precipitously. Flattening a memorial may cause great offence and upset and should only be done where really necessary for public safety. Even warning signs and temporary supports, if garish or insensitively installed, can have a detrimental effect and appear to disregard the feelings of bereaved people and the wider community."

The letter reiterated that the memorial safety risk should be seen in context - and the issue handled with the "utmost sensitivity".

The changing mood as the decade progressed was also revealed in the decisions of Consistory Courts upon application for the grant of approval (a "faculty") for testing and/or repair works to memorials in consecrated parts of cemeteries. A decision in 2003 (*Re Keynsham Cemetery*<sup>8</sup>) had seen the judge decide that minor works to maintain safety of monuments did not require a faculty. However in a decision in 2006 (*Re Welford Road Cemetery, Leicester*)<sup>9</sup> the Consistory Court adopted a more cautious (and critical) approach - stating that the policy climate had changed and that consent for laying flat would only be forthcoming in exceptional circumstance, and then only where evidence of attempts to notify the memorial owners could be shown.

### **3.3 The emergence of guidance**

Mr Callaghan's 2006 letter (Callaghan 2006) deferred to 'industry practice':

"there are no HSE guidelines, though there is guidance produced by the various organisations representing cemeteries" (Callaghan 2006)

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<sup>8</sup> (2003) 1 WLR 66

<sup>9</sup> (2006) Fam 62

In doing so it left the door open for a proliferation of rival standards and viewpoints. A study of the competing guidance that emerged over the last decade on the memorial safety issue reveals the array of professional, governmental and voluntary bodies who have sought to have a voice in this process. By 2008 a cemetery manager was faced with:

- A *Code of Working Practice* issued by the National Association of Memorial Masons (NAMM) (revised 2003) as its design and installation standards for new memorials.
- A British Standard (BS8415 *Monuments within burial grounds and memorial sites*) which was first issued for consultation 2001 and published in 2005.
- The Association of Burial Authorities' (ABA) "*Guide to the management of safety in burial grounds*", published in 2001 in collaboration with the main local authority insurer, Zurich Municipal.
- The Institute of Cemetery and Crematorium Management's guidance *Management of Memorials* (last revised April 2007).

This guidance was additional to the 'official' interpretations (attempted) steerage contained within the HSE, Ministerial and Ombudsman interventions described above.

The rival guidance did not fit together neatly. Indeed the ICCM's response to the Ombudsman's 2006 Special Report (LGO 2006) argued that the Ombudsman's overwhelming desire to signal that laying down should not be necessary on any large scale (LGO 2006:3) was a fetter upon objective, site level, risk assessment (ICCM 2006). ICCM asserted the view that given the requirements of safety and occupiers' liability law sensitivity to the bereaved and provision of memorial safety cannot be treated as equal. ICCM concluded by rejecting the Ombudsman's special report as not having achieved the goal of a single definitive set of guidance.

A micro level analysis of the differences between the various guidance documents is beyond the scope of this article - however one technical issue will be looked at briefly to illustrate the tensions within the guidance setting process.

Public complaint and press comment about memorial testing often focussed on the role of the 'topple tester'. A topple tester is, however, merely a hand held tool used to measure the stability of a gravestone by pressing it against that gravestone. The key issue was actually what test pressure, successfully resisted by the tested memorial, should be regarded as an indicator of a 'safe' (i.e. stable) gravestone. The greater the force that a memorial is required to withstand to prove that it is 'safe', the more likely it is that it will be found to fail the test. A lesser level of force would, conversely mean that more gravestones would be found to be 'safe' (i.e. not showing signs of movement when the test's set level of force was applied to it).

LGO 2006 noted that, for testing the stability of existing monuments, a force equivalent to 35kg had been approved by NAMM, ICCM and ABA/Zurich Mutual in

their respective guidance. However, despite this LGO 2006 felt it necessary (for their desired purpose of resolving the memorial safety issue once and for all) to set out a detailed review (Appendix 2 of LGO 2006) examining the rationale of the various test force standards. In the process of doing so they introduced into the debate submissions made in two separate Ombudsman inquiries into specific incidents of laying-down. Through this, rival bases for apparently advocating 30kg and 25kg force standards became known to the cemetery management community, even though LGO 2006 ultimately decided to endorse the 35kg standard (which was itself also derived from another technical evidence submission in yet another case before the Ombudsman). Whilst intended as a process seeking to set a single 'reasonable' test standard, this extensive analysis actually emphasised the arbitrary (and contestable) nature of any particular test standard. Indeed, even the expert who had recommended the 35kg standard had regarded it as a compromise, as "It [was] less than someone clutching at a memorial to raise him / herself up would exert" (LGO 2006:47) – and therefore did not actually simulate the main cause of memorial related injuries, and was considerably less than the 50kg test standard required for use in Germany.

Whilst 35kg was seen by its proponents (including ICCM) as a modest (and compromise) force test standard, there is evidence of local authorities subsequently rationalising a lower force test level, mindful of the sensitive (and budgetary) context in which memorial safety sits. For example, four West Midlands authorities collaborated to produce a joint Memorial Management Policy (Walsall Council 2007) to remove inconsistencies in their approaches to memorial safety. The motivation appears to have been defensive, a desire to construct a 'safety in numbers' policy position on the issue across their sub-region. The key feature of the joint policy was to justify why those authorities would not be adopting a 35kg test standard. The technical appendix justifying this departure from the orthodoxy of the 35kg standard was worded very carefully. The policy adopted a lesser, 25kg test standard (although this also appeared a compromise – the document indicates that the authorities' working party had actually favoured a 20kg standard).

The policy document rationalised its deviation from ICCM guidance thus:

"Although the [ICCM] guidance provides a clearly defined structure to memorial safety, the four local authorities feel that in the light of experience to date the successful application has been patchy, and at the current time, to follow it rigidly, would be disproportionate to the risk. This also follows on from the fact that many authorities attempting to follow the guidance are finding certain aspects unmanageable and in some instances inspection programmes have been suspended. We find this situation unacceptable." (Walsall Council 2007: 17)

The authors appeared to favour an approach whereby best practice would emerge as a distillation of actual practice - rather than the imposition of theory, in stating that they would:

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"maintain contact on a regular basis with what is happening elsewhere and share our experiences so that a best practice will emerge from the distillation of what is going on throughout the burial industry." (Walsall Council 2007: 17)

This policy was a soberly argued defence of pragmatism. In particular it challenged the evidence basis of the 35kg standard, and pointed to the necessity of prioritising the truly unstable memorial (i.e. those that would be likely to fail even a 25kg force test) and the resource implications of applying a more severe test standard, given the relatively low rate of accidents involving memorials.

This pragmatism was further underscored in January 2009 with publication of the Ministry of Justice's guidance *Managing the Safety of Burial Ground Memorials* (Ministry of Justice 2009). The Ministry's guidance declared that staking should be a last resort, and that laying down gravestones was frowned upon. It also sought to question the suitability of topple testing devices and the ICCM's advocacy of a 35kg test standard.

The guidance emphasised that the enforcing authorities should consider memorial safety to be an "extremely low risk" issue (Ministry of Justice 2009a: 3), and it introduced a new statistic into the debate in support of this: that over last 30 years only eight people were killed by memorials falling on them in UK<sup>10</sup>.

The guidance also sought to reassure operators that the *liability* risk was low declaring that:

"there is no requirement to remove all risk. A criminal law prosecution will not automatically follow just because an injury or death has occurred." (Ministry of Justice 2009b)

Above all the Ministry guidance sought to advocate and support local decision taking, by emphasising the importance of basing decisions upon local knowledge of memorial design/construction, and the historic importance and visitation patterns of the cemetery in question.

The Ministry sought to present the guidance as representing a consensus across the burial services organisations – as each had been represented upon the Government's Burials and Cemeteries Advisory Group which had drawn up the guidance. However, whilst (like LGO 2006, and HSE 2007b) the Ministry's intended aim in issuing its guidance had been to end uncertainty (and over-reaction) on the memorial safety issue, early signs were that it might not achieve that end. Within days of its publication the ICCM (2009) issued a newsletter in response stating that it had received calls from members concerned that the Ministry's guidance would leave them exposed to liability under both the Occupiers' Liability Acts and the Health & Safety at Work Act 1974.

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<sup>10</sup> To attempt to put this risk into context, in one year (2008) 2,538 persons were killed in road accidents in Great Britain (DFT 2009)

The ICCM was concerned (as they were in response to LGO 2006) that the Ministry's stated preference for visual inspection and hand-only testing, signage and cordoning would fetter the very site level judgments that the Ministry appeared otherwise to be recommending. The ICCM indicated that they were not minded to change their own (conflicting) guidance. Therefore its members (cemetery managers) were left with incompatible guidance documents.

Furthermore, there were signs that despite the issue of the Ministry's guidance some local authorities were still seeking internal approval to continue inspection and remedial programmes that were closer in approach to ICCM's guidance rather than the Ministry's view of what was "reasonable" safety provision. Such approaches (e.g. NBBC 2009) appeared motivated by a belief that despite the Ministry's guidance there was a risk of maladministration or civil or criminal liability if the now-conflicting 'good practice' set down by ICCM 2007 and LGO 2006 guidance was not still followed (i.e. a 35kg force test). There was also a concern, echoing the ICCM's view, that the Ministry's guidance actually fettered site level risk management by its attempts to steer cemetery managers away from staking or laying down unsafe memorials.

Time will tell whether the Ministry's guidance proves to be the final word on the interpretation of 'reasonable' memorial safety. However it is clear that there are continuing tensions between the sensitivities (and costs) of cemetery management, the perception and reality of the risk of injury from unstable memorials and anxiety amongst cemetery managers about potential liability if an accident were to occur.

#### **4. How cemetery managers made sense of the issue**

A cemetery manager interviewed in Spring 2008, contemplating the then forthcoming Ministerial advice, expressed the feeling of confusion and flux that has been a feature of this issue over the last decade:

"...what the guidelines will be this time round I don't know. The goalposts keep changing."

The interviewees expressed the view that Governmental or HSE guidance at an earlier stage would have been helpful and it appears that the ICCM guidance may have achieved an 'embedded' status amongst some managers in that (perceived) policy vacuum. Indeed, the ICCM's guidance, training workshops and conferences were cited as key sources of information, particularly within the context of peer to peer exchange of good practice.

This points to the formative role of the managers' professional association, and peer networks as important to the formation of a sense of what is (or is not) reasonable memorial safety practice, and how accident and liability risks should be perceived. This appears to anecdotally support Bennett & Crowe's thesis (2008) that interpretive communities (Fish 1980) have an important role to play in guiding liability risk perception, although in relation to memorial safety interpretive communities appear to act to encourage - rather than to discourage - risk aversion.



A sense of pessimistic fatalism was evident amongst the interviewees, managers were proud of their cemeteries and, in most cases, positive about attracting people into cemeteries. However the ability to actually control the behaviour of visitors was seen as limited (despite the 'policing' powers available to them under Article 18 of the Order). In particular it was noted by a number of respondents that the fatalities attributable to unstable memorials have tended to arise from children playing in cemeteries, yet in the event of an accident it would be taboo to point out that the injured person was a trespasser or otherwise using the cemetery in a way that was not permitted.

The interview respondents all shared a fatalistic view, that their situation was a no-win one, and that their local authorities were, in the eyes and expectations of the media "damned if they do and damned if they do not". Most of the respondents agreed that fear of litigation and fear of adverse media coverage, were key drivers for memorial safety, with a belief that people are now more likely to claim for accidents. Most of the interviewees expressed concern about their own personal liability should an accident occur in 'their' cemetery.

All respondents agreed that memorial safety involves a delicate balancing act. For many respondents the process involves ongoing review and refinement, and listening out for warnings or innovations from peers. For many it was also a challenge that could never be solved to everyone's satisfaction, for despite these strategies, the interviewees still felt somewhat exposed, because of the inherent uncertainty of the law in this area as, in the words of one interviewee:

"The problem with "reasonably" is that it is in the eye of the beholder, it's all subjective."

The respondents acknowledged that their attempts to address memorial safety after the Harrogate fatality involved a steep learning curve. The interviewees were asked whether they considered laying down to have been a "knee jerk reaction". There was a mixed response to this. But many of the respondents felt that it had been a fair initial response to the situation local authorities felt they were facing after the Harrogate incident. Over time a more risk appraised and systematic approach had emerged - one based upon improved inspection and memorial ownership record keeping, greater supervision of monumental masons within their cemeteries (often involving registration schemes) and a more sophisticated approach to communication with the bereaved, for example on memorial hazard notices:

"...we [now] don't say dangerous, we say to contact us because it's unstable, again you see - it's the wording."

## **5. Conclusions**

The issue of memorial safety illustrates the tensions that can arise between safety and conflicting drivers, in this case sensitivity to the bereaved.

In particular it suggests that circumstances can exist in which a 'ratchet' effect will be resisted. The case study does, however, show evidence of 'risk entrepreneurs' (for

example 'topple testing' consultancies<sup>11</sup> and the stance of professional bodies like the ICCM and NAMM) – however their ability to (consciously or unconsciously) drive through ever-tightening standards was, at least partially, disrupted in this case by the 'resisting-forces' of the bereaved.

This case study also shows how guidance emerged from various quarters: but with variable degrees of uptake by its target audience - and that the simple promulgation of 'official' guidance will not automatically lead to it being accepted by all as 'good practice'. As Ball (2002), Haythornthwaite (quoted in RRAC 2008) and RRAC (2009) argue - guidance on safety and risk management is often put forward by vested interests, it represents a viewpoint. Depending on how it is written, and whether it chimes well with its intended audience it will either gain traction or fall by the wayside. Later, in a more "mature" phase, guidance may be evolved more consensually - drawing together a number of interest groups, who then attempt to distil available guidance into a more workable product, having regard to the fate of earlier attempts at putting forward guidance for the problem under examination. Whether the Ministry of Justice 2009 guidance will come to be eventually adopted by all as a final consensus position remains to be seen, but initial signs were not promising.

The interviews show how individual managers have sought to make sense of, and render workable, the memorial safety issue by drawing upon, and at times ignoring or adapting, available guidance along the way. However, a pragmatic fatalism, and a residual fear of liability (and whether criminal, civil or a ruling of maladministration) continue, to a degree, to haunt these managers, alongside a heightened appreciation of the power of local compliant and adverse media scrutiny. Above all a lingering distrust of official 'reassurance' about the low level of liability risk appears to remain, as encapsulated by one interviewee:

"we've got to recognise, irrespective of whether the HSE are now saying you know *'there's a fair degree of risk that's tolerable'* the reality is it doesn't materialise like that and I certainly won't accept that until I see evidence of that through the courts."

Another noted that the absence of any case law on precisely how the local authority's duty of care under the Occupiers' Liability Acts should be interpreted in relation to a cemetery adds to this air of uncertainty (and potential for over-cautious reaction).

Memorial safety in cemeteries clearly represents an atypical place management scenario. The 'resisting-forces' of the bereaved in this case study are rather novel and unusually strong. Therefore no extrapolation is proposed here from this case

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<sup>11</sup> For example, TCC Memorial Safety Consultants ([www.columbarium.co.uk](http://www.columbarium.co.uk)), who advertises their consultancy services within a 'home' page that presents a sequence of 2002 and 2003 press reports emphasising the compensation and adverse public relations consequences that could follow if a programme of testing and laying down is not supported by specialist knowledge in memorial safety.

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study's findings, and research into other place management scenarios must continue to map (or refute) these alleged ratchet and risk-entrepreneur effects in other types of place management. The corresponding author's work in this area is ongoing (Bennett and Crowe 2008; Bennett 2009).

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