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COMFORTED BUT NOT COMPENSATED? MOURNERS AND FUNERAL PICKETING IN ENGLISH LAW

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ABSTRACT

In recent years there have been protests at Armistice Day services and at the funeral of Margaret Thatcher, but these events seem insignificant compared to the impact of the ‘funeral picketing’ carried out in the United States by members of the Westboro Baptist Church, principally at the funerals of American forces personnel killed on active service. This has caused considerable distress to family members and wide public outrage. In 2011 the United States Supreme Court held in *Snyder v Phelps* that the right of freedom of speech of the WBC rendered them immune to claims for damages by mourners affected by their picketing. This article will firstly consider how English secular and canon law could be used to restrict the practice of funeral picketing and secondly discuss whether current law could provide a remedy for mourners distressed by funeral picketing and other forms of protest at funerals, were it to take place.

INTRODUCTION: FUNERAL PICKETING IN THE UNITED STATES

The death of family member or friend is a painful experience, and can be particularly poignant where the person is relatively young, and has died suddenly and violently. The recent conflicts in Iraq and Afghanistan have meant that the families of some forces personnel have experienced just such a loss, and have gathered together to mourn them at

funeral and memorial services. Jesus tells us that those who mourn are blessed and will be comforted, but mourning is, as Rutledge puts it, ‘one of the most private and painful of human experiences’ and is one where ‘the emotional impact of death raises the need for privacy.’¹ It seems highly likely that, if asked, most people would consider that mourners had a right to mourn privately, free from distress caused by protesters or pickets even where the funeral is a public event, such as the funeral of Margaret Thatcher which was accompanied by shouted comments from protesters as the coffin passed through streets on the way to the funeral service at St. Paul’s Cathedral.² In recent years a number of funerals in the United States (US) have been subjected to the practice of ‘funeral picketing’ by members of the Westboro Baptist Church (WBC). The WBC has picketed at the funerals of some American forces personnel who have been killed on active service and other high profile funerals such as those of the victims of the Boston Marathon bombing and the children killed in the Newton school shooting in Connecticut. These pickets have caused distress to family members and wide public outrage. The WBC is a small fundamentalist church based in Kansas whose members believe that God is bringing about these deaths as a means of punishing America for its tolerance of homosexuality. WBC funeral picketers typically gather on the route of the funeral cortege or close to the church where the funeral is to take place, singing and carrying placards with slogans such as ‘God hates Fags’ and ‘Thank God for Dead Soldiers.’ Despite the death in 2014 of the founder and pastor of the WBC, church members have announced their intentions to continue funeral picketing. In carrying out these pickets, the WBC has principally argued that it is exercising its right of freedom of speech, although it has also sometimes argued that it is exercising the right to freedom of religion. Both of these rights are guaranteed by the First Amendment of the US Constitution.³ The rights of mourners affected by the activities of the WBC are less clear because the US Constitution does not include an express right to privacy, but the protection of privacy has been regarded as a matter on which states and the federal government may legislate. For example in *Frisby v Schultz*⁴ the US Supreme Court confirmed the constitutionality of a municipal ordinance protecting a person from picketing at his home, holding that that there

¹ N.M. Rutledge, ‘A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing’, (2008) 67 *Maryland Law Review* 295, p297.

² ‘Hundreds of protesters turn backs on Margaret Thatcher’s coffin’, *Guardian* 18 April 2013, available at <<http://www.theguardian.com/politics/2013/apr/17/protesters-turn-backs-thatcher-coffin>>, accessed 11 December 2014.

³ This provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble’.

⁴ 487 US 474 (1988).

‘is no right to force speech into the home of an unwilling listener’,⁵ or to subject a ‘captive audience’ to a targeted campaign which they cannot escape or avoid. The widespread public condemnation of the activities of the WBC has led to legislation at both a federal level⁶ and a state level, with over forty states passing legislation which, whilst not banning funeral picketing, has imposed limits on the time and place where funeral pickets may be carried.⁷ Although it has wide public support the legislation has proved contentious, being the source of considerable academic debate⁸ and of litigation.⁹

Whilst US law does allow some limits on where funeral picketers may express their opinions the US Supreme Court has, in *Snyder v Phelps*¹⁰, made it clear that the expression of those opinions, however hurtful or distressing, cannot be the basis of a claim for damages against the picketers. The funeral of Matthew Snyder, who had been killed on active service in Iraq, had been picketed by members of the WBC. His father sued the WBC for damages for (inter alia) intentional infliction of emotional distress and intrusion upon seclusion and privacy. At first instance he was awarded nearly \$11million in compensatory and punitive damages. In subsequent appeal hearings the amount was gradually reduced. Finally the US Supreme Court, held by an 8-1 majority that the WBC’s right of freedom of speech on matters of public importance shielded the church from any tortious liability arising from its picketing, including actions for intentional infliction of emotional distress. The family were also required to pay the WBC’s court costs of \$16,000. The decision of the Supreme Court followed a long line of decisions in which it has been held that the right to express opinions on a matter of public interest, even where such opinions are offensive or disagreeable to others, is a ‘bedrock principle’¹¹ of US constitutional law.

Although funeral picketing of the type practiced by the WBC has not taken place in England, pickets have been threatened on a number of occasions. In 2008 members of the WBC threatened to picket the General Assembly of the Church of Scotland when it met to

⁵ Ibid at p 485.

⁶ Respect for America’s Fallen Heroes Act 2006, Respect for the Funerals of Fallen Heroes Act 2006.

⁷ For a discussion of the state and federal legislation see S McAllister (2007) ‘Funeral Picketing Laws and Free Speech’ (2007) 55 *University of Kansas Law Review* pp575-627.

⁸ For example A Phelps, ‘Picketing and Prayer: restricting freedom of expression outside churches’, 85 *Cornell L Rev* 271 (1999); S McAllister, ‘Funeral Picketing Laws and Free Speech’, (2007) 55 *U Kan L Rev* 575; C Wells, ‘Privacy and funeral protests’ (2008) 87 *N C L Rev* 151; J Kiel, ‘Crossing the line: reconciling the right to picket military funerals with the First Amendment’ (2008) 198 *Mil L Rev* 67.

⁹ The WBC has challenged the validity of some state legislation: *McQueary v Stumbo*, 453 F Supp 2d 975 (ED Ky 2006) ; *Phelps-Roper v Nixon* 509 F 3d 480 (8th Cir 2007); *McQueary v Conway* 634 F Supp 2d 821 (2009); *Phelps-Roper v Strickland* 539 F3d 356 (2008) and *Phelps-Roper v Taft* 523 F Supp 2d 612 (ND Ohio 2007).

¹⁰ 131 S Ct 1207 US, 2011.

¹¹ *Texas v. Johnson* 491 US 397 (1989), 109 S Ct 2533 (1989).

ratify the appointment of a gay minister and in 2009 members of the church intended to picket the performance of a play at Basingstoke School.¹² These pickets did not take place because members of the WBC intending to carry out the pickets were banned from entering the United Kingdom by the Home Secretary. Nevertheless, the issue raises two interesting questions. What action could be taken by police and church authorities if funeral picketing were to take place in England, and what remedies might be available to mourners subjected to the practice?

MAINTAINING ORDER AT FUNERALS AND MEMORIAL SERVICES IN ENGLAND

Some indication of how the police might treat funeral picketing can be given by looking at the response to similar events with the potential to distress mourners which *have* taken place in this country. For example, in 2010 members of a group calling itself Muslims Against Crusaders interrupted an Armistice Day service by chanting ‘British soldiers burn in hell,’ loudly and repetitively during the two minutes’ silence.¹³ Despite their claims to be exercising their right of freedom of expression, members of this group were arrested and prosecuted under section 5 of the Public Order Act 1986 which makes it an offence to use threatening or abusive words or behaviour or to display any writing, sign or other visible representation which is threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress. Such action was possible because under Article 10 of the European Convention on Human Rights (ECHR) the right of freedom of expression is a qualified right, and states may impose restrictions which are “necessary in a democratic society” in the interests of (inter alia) public safety, the prevention of disorder or crime and the protection of the reputation or rights of others. Nor would it avail protesters or funeral picketers to assert that in taking part they were manifesting their religious beliefs (as the WBC have claimed) as although the right to manifest religion is granted under Article 9 of the Convention, this too is a qualified right subject to similar restrictions as the right of freedom of expression. For example, the right of a devout Hindu to have his body cremated in accordance with Hindu religious practice was refused on the grounds of an affront to public decency when it was believed that the practice would take place in the ‘open air’ (although

¹² The play dealt with the murder of Matthew Shephard, a gay student, whose funeral was one of those picketed by members of the WBC.

¹³ *CPS v Haque and Choudhury*, City of Westminster Magistrates’ Court, March 7, 2011. The report of the case is available at < <http://www.europeanrights.eu/public/sentenze/JEW7mar.pdf>>, accessed 11 December 2014. For a discussion of this case, see A Bailin, ‘Criminalising Free Speech?’ (2011) 9 *Criminal Law Review* pp 705-11.

once it was discovered that it would in fact take place within a building the right was upheld by the Court of Appeal)¹⁴ and in *Connolly v DPP*¹⁵ the prosecution of a committed Christian who had sent photographs of dead fetuses to pharmacists in an attempt to dissuade them from selling the ‘morning-after pill’ was held not to breach her Article 9 and 10 rights. However, any limits imposed on the exercise of these Convention rights must be proportionate. In *Öllinger v Austria*¹⁶ the ECtHR held that the prohibition of a silent demonstration by 6 people at a war memorial service to SS soldiers killed in WW2 was disproportionate and a breach of the demonstrators’ Article 10 rights, even when the right of the cemetery users to exercise their Article 9 right was taken into consideration.

Although funeral picketing may appear to be a modern practice, it is clear that in the past funerals and burials have been the subject of disruption sufficient for Parliament to legislate for the maintenance of order.¹⁷ A number of provision of older statutes remain in force, and might be used by secular and church authorities were funeral picketing to take place. Under section 59 of the Cemeteries Clauses Act 1847 it is an offence for any person to wilfully and unlawfully disturb any persons assembled in the cemetery for a burial. Section 7 of the Burial Laws Amendment Act 1880 makes it an offence to interfere with the decent and orderly burial of a person by any riotous, violent, or indecent behaviour, or to wilfully obstruct a burial. Under section 36 of the Offences Against the Person Act 1861 it is an offence by threats or force to obstruct or prevent any clergyman or minister from celebrating divine service or otherwise officiating in any church, chapel, meeting house or other place of worship, or to prevent such person from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place. Finally, and for the purposes of this journal perhaps the most important of these older statutory provisions, section 2(1) of the Ecclesiastical Courts Jurisdiction Act 1860 provides for the offence of ‘riotous, violent, or indecent behaviour’:

- (a) in any cathedral church, parish or district church or chapel of the Church of England;
- (b) in any chapel of any religious denomination
- (c) in any place certified under the Places of Worship Registration Act 1855, or

¹⁴ *The Queen on the Application of Ghai v Newcastle City Council & Others* [2009]EWHC 978 (Admin)

¹⁵ [2007] EWHC 237 (Admin).

¹⁶ App no 76900/01 (ECtHR, 29 June 2006).

¹⁷ Much of the disruption giving rise to this legislation appears to have arisen out of cases involving the burial of dissenters, and objections to their burial in accordance with the rites of the Church of England.

(d) in any churchyard or burial ground whether during the celebration of divine service or at any other time.¹⁸

The police may be called to arrest those committing an offence under section 2 of the 1860 Act, but section 3 also provides that offenders may ‘immediately and forthwith’ be apprehended by the churchwardens of the parish where the offence is committed.¹⁹ The repeal of these offences was recommended by the Law Commission, but the Report of the Select Committee on Religious Offences in England and Wales 2003²⁰ noted that 60 prosecutions had been brought under the 1860 Act between 1997 and 2002, and they have been retained on the statute book.

In addition to these statutes, under canon law the churchwardens (and sidesmen) of an Anglican Church are under a duty to ‘maintain order and decency in the church and churchyard, especially during the time of divine service’²¹ and may use reasonable force to turn offenders out of church. Barber has argued in this journal that in the case of an Anglican cathedral, or a non-Anglican place of worship, where there are no churchwardens to act, ‘every person present at such an incident, although not fixed with a *duty* to do so, is entitled to use reasonable force to remove any person disturbing the decency of the time or place’ and that ‘anyone doing so would not be guilty of an offence under the ecclesiastical law, or of assault and battery.’²² This view is supported by the very old case of *Lever v Hide*²³ and by the fact that when Peter Tatchell and others from OutRage! interrupted the Archbishop of Canterbury's Easter sermon in Canterbury Cathedral in 1998, the police declined to charge a Cathedral steward who admitted attacking Tatchell..²⁴

COULD MOURNERS SEEK DAMAGES FOR EMOTIONAL DISTRESS?

In *Snyder* one cause of action was a claim for damages for emotional distress caused by the picketers. Mourners subjected to funeral picketing might be distressed by the activities of

¹⁸ On conviction by a magistrates’ court the penalty is a fine of level 1 on the standard scale or imprisonment for a maximum of two months.

¹⁹ Although they must take the person before a justice of the peace once the service comes to an end: see *Williams v. Glenister* (1824) 2 B & C 699.

²⁰ Available at <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9501.htm> >, accessed 10 December 2014.

²¹ Canons of the Church of England, Canon E1, para 4 and Canon E2, para 3. See also Canon B9, para 2 (duty to give reverent attention in the time of divine service).

²² P Barber, ‘Outrageous behaviour’ (1996) 4 Ecc LJ 584-588, at p 587.

²³ (1673) 89 ER 96. The plaintiff disturbed a funeral service, using threatening and abusive language, and the defendant laid hands on him to prevent the disturbance. When the plaintiff sued for damages in battery, the action of the defendant was held to be justified.

²⁴ See <http://www.petertatchell.net/religion/easter_sunday.htm>, accessed 9 December 2014.

funeral picketers but it is clear from the English case law that an action for damages in respect of any emotional distress falling short of the narrow limits of ‘nervous shock’ would not succeed. Although the classic case of *Wilkinson v. Downton*²⁵ was based on the intentional infliction of distress by words, liability for this category of damage was curtailed by subsequent decisions and continues to be treated warily by English courts. In *Wong v Parkside Health NHS Trust*²⁶ the Court of Appeal denied a cause of action in tort for distress falling short of psychiatric injury. The decision of the House of Lords in *Wainwright v Home Office*²⁷ also demonstrates the continuing reluctance of the English courts to grant damages for hurt feelings. Lord Scott considered such distress was ‘no sufficient reason why the law of tort should be fashioned and developed with a view to providing compensation in money to the victim.’²⁸ Hewson²⁹ has commented on the difficulties of allowing legal claims to be brought for ‘outraged sensibilities’, citing the sociologist Furedi, who having analysed actions for distress, had concluded the subjective nature of the feeling of ‘victimhood’ was one which would make it difficult to draw any clear definitions about what kinds of encounters or incidents should be compensated in law.³⁰

COULD MOURNERS SEEK DAMAGES FOR BREACH OF PRIVACY?

The second major claim in *Snyder* was for invasion of privacy. Privacy is difficult to define, but at its simplest is what Warren and Brandeis famously called the ‘right to be let alone.’³¹ Moreham has argued that privacy should be defined as ‘the state of desired inaccess or as a freedom from unwanted access’ and that the courts should recognise a right to privacy where a person has a ‘reasonable desire not to be accessed in the circumstances’.³² Funerals take place in a public place, and are generally open to all wishing to attend, but this does not mean that most mourners would accept that this meant they could be subjected to unwanted access by funeral picketers.

Under the current English law it is unlikely that mourners subjected to funeral picketing would succeed in an action for damages for invasion of privacy. As the House of Lords has

²⁵ [1897] 2 QB. 57.

²⁶ [2001] EWCA Civ 1721.

²⁷ [2003] UKHL 53. *Wainwright* involved strip searching of prisoners carried out in a manner which did not comply with the Prison Rules, which the claimants alleged had resulted in emotional distress.

²⁸ *Ibid* at para 62.

²⁹ B Hewson, ‘Privacy Claims Hit the Rocks’ [2003] 153 *New Law Journal* 1694.

³⁰ F Furedi, *Therapy Culture: Cultivating Vulnerability in an Uncertain Age*, (Abingdon, 2003).

³¹ S Warren & L Brandeis, ‘The Right to Privacy’, (1890) 4 *Harvard Law Review* 193, 195.

³² N A Moreham, ‘Privacy in Public Places’ (2006) 65 *Cambridge Law Journal*, pp 606-635, at p617. Interestingly at p 606 the author also poses the rather germane hypothetical question of whether it would be a breach of a right to privacy to take a photograph of a mourner as she left her mother’s funeral.

held in *Wainwright v Home Office*³³ and *Campbell v. Mirror Group Newspapers*³⁴ there is “no over-arching, all-embracing cause of action”³⁵ for invasion of privacy. The closest current English law comes to an action for breach of privacy is an action for breach of confidence. Article 8(1) of the ECHR provides that ‘everyone has the right to respect for his private and family life, his home and his correspondence’ but in *Wainwright* the House of Lords expressed the view that compliance with the Convention did not mean that a new general tort of invasion of privacy needed be invented, but simply that existing rules might need to be extended to protect Convention rights. The courts have proved willing to extend the tort of breach of confidence to include wrongful disclosure of information, such as publication of photographs taken at the private wedding ceremony of a celebrity couple in *Douglas v Hello! Ltd*,³⁶ the publication of information about a famous model in *Campbell* and the publication of photographs of the claimant purportedly taking part in a ‘Nazi sex orgy’ in *Moseley v News Group Newspapers Ltd*.³⁷ The courts have also dispensed with the traditional requirement of some kind of confidential relationship between the claimant and the defendant, now requiring only that the claimant show what Lord Nicholls in *Campbell* called ‘a reasonable expectation of privacy’³⁸ of the information held to have been wrongly disclosed. However this is as far as the courts have yet gone in extending the law of privacy and in absence of disclosure of information about the claimant there would appear to be no cause of action.

COULD FUNERAL PICKETING BE ACTIONABLE AS A NUISANCE?

Funeral picketing as practiced by the WBC is unlikely to be regarded as a private nuisance. It takes place on public roads and as such would not involve an interference with a claimant’s right to enjoy land. A claimant would also lack standing to bring a nuisance action as this is dependent the claimant having a legal interest in the land affected by the nuisance.³⁹ On the other hand it could be argued that as funeral picketing is a practice which most members of the public are likely to find distasteful or even abhorrent, it could be regarded as a public nuisance. Public nuisance has been described as ‘a rag-bag of odds and ends’ covering a wide

³³ [2003] UKHL 53.

³⁴ [2004] UKHL 22.

³⁵ Per Lord Nichols, *ibid*, at para 11.

³⁶ [2001] QB 967 and [2005] EWCA Civ 595.

³⁷ [2008] EWHC 1777 (QB).

³⁸ [2004] UKHL 22 at para 21

³⁹ *Hunter v Canary Wharf* [1997] AC 655.

variety of activities threatening the public welfare.⁴⁰ Picketing on a public road has been held to be a nuisance⁴¹ and in *Church of Jesus Christ of the Latter Day Saints and Others v Price*,⁴² the defendant was held to have committed a nuisance when he repeatedly accosted members of the church outside the church premises and interfered with the activities of church missionaries in a manner which caused offence to church members. Although public nuisance is generally a crime, prosecuted by the Attorney-General or by the local authority,⁴³ individual members of a class affected by the nuisance may bring an action for damages in tort if they have suffered special damage which is ‘particular, substantial and direct, over and above that suffered by the public at large.’⁴⁴ This action also has the advantage that unlike the tort of private nuisance it is not necessary to have an interest in land.⁴⁵

COMMENT

In England secular authorities such as the police and Home Secretary would clearly have powers to arrest and prosecute funeral picketers should their behaviour constitute a breach of the Public Order Act 1986. However most of the statutory powers specifically dealing with the disruption of funerals and burials are likely to be of relatively little use when faced with funeral picketing as practiced by the WBC. First, the powers granted under the Ecclesiastical Courts Jurisdiction Act 1860 relate only to offences committed in a cathedral, church, chapel, churchyard or burial ground and the WBC picketers have taken care to ensure that they display their placards and shout their slogans only whilst standing on public roads through which the funeral cortege is to pass, or in the vicinity of the church, and not in the church or churchyard. Secondly, their activities do not involve threats or force, nor have picketers been violent or riotous. Action under these statutes would only be possible if funeral picketing could be regarded as indecent behaviour. This appears to be a matter for the courts to determine on the facts of the individual case.⁴⁶ In *Girt v Fillingham*,⁴⁷ it was held to be indecent behaviour to shout out the words, ‘This is idolatry! Protestants leave this house of

⁴⁰ J Spencer, ‘Public Nuisance - a Critical Examination’ [1989] *Cambridge Law Journal* 55, p59.

⁴¹ *Thomas v NUM* [1986] Ch 20.

⁴² [2004] EWHC 3245 QB.

⁴³ Local Government Act 1972, s222.

⁴⁴ *Colour Quest plc and Others v Total Downstream UK plc* [2009] EWHC 540, para 435 per Steele J.

⁴⁵ See for example, *Corby Group Litigation v Corby DC* [2008] EWCA Civ 463.

⁴⁶ *R v Farrant* [1973] Crim LR 240.

⁴⁷ [1901] P 176.

Baal!’ during the prayer of consecration.⁴⁸ In *Abrahams and Others v Cavey*⁴⁹ it was held to be indecent behaviour for protesters objecting to perceived government support for US involvement in the war in Vietnam to interrupt the reading of the lessons during a service held at a Brighton Methodist Church in conjunction with the Labour Party Conference that year.⁵⁰ The convictions in *Abrahams* were upheld on appeal despite evidence given by the minister of the church that he considered the behaviour of the protesters to be ‘improper’ rather than indecent. The Reverend Lord Soper also gave evidence in defence of the protesters, saying that that ‘the spirit of Christian religion and in particular Methodism comprehended active and contentious disputation in church.’⁵¹ These cases suggest that funeral picketing and similar protests could constitute indecent behavior.

On the other hand there could be distinct difficulties for churchwardens or sidesmen complying with their duty under canon law to maintain order and decency in the church or churchyard even though they would be unlikely to be charged with assault. It is questionable whether it would be advisable for churchwardens and other church stewards to try to restrain or to detain those taking part in as funeral picketing. Although both canon law and the 1860 Act appear to allow the use of reasonable force, in practice few parochial church councils (PCCs) or other church governing bodies would expect churchwardens or stewards (many of whom are elderly or women) to try to physically restrain or to detain those taking part in as funeral picketing, whatever the Canons of the Church of England or the 1860 Act provide. It is also likely that insurers would counsel against such involvement. Christian church authorities might also be reluctant to be seen using these powers against protesters claiming to act in accordance with their religious beliefs, be they Christian (as in the case of the WBC picketers in the United States) or of another religion (such as the Muslim protesters at the Armistice Day service). It would seem much more advisable to rely on the police to exercise their powers of arrest under the Public Order Act 1986.

If the police or church authorities did not take action to prevent funeral picketing, could mourners sue? In *X and Y v The Netherlands*,⁵² the ECtHR held that Article 8 imposes a positive obligation on the state and public authorities to take reasonable measures to stop

⁴⁸ The words were said by a clergyman protesting at the method of celebration of the Eucharist in that parish. He was also subjected to disciplinary proceedings before the consistory court of St Albans.

⁴⁹ [1968]1 QB 479.

⁵⁰ See T. Hughie Jones, ‘Outrageous behaviour - a postscript’, (1997) 4 Ecc LJ 664-666.

⁵¹ *Abrahams and Others v Cavey* [1968] 1 QB 479, pp 481-2.

⁵² *X and Y v The Netherlands* (1986), Series A, no. 91.

incursions on the right to family life, home and possessions by private persons.⁵³ There might therefore be the potential of an action for damages against the police or the Home Secretary if they failed to take action against funeral picketers. Section 8(1) of the Human Rights Act 1998 allows for damages to be awarded against a public authority for an unlawful act if the court considers this to be ‘just and appropriate’.⁵⁴ This action therefore differs from actions in common law torts such as negligence, where damages are available as of right. Although the wording of the 1998 Act speaks of an ‘unlawful act’, it would appear that the positive obligation to take steps to stop incursion into private life would mean that an omission to act could be the subject of an award of damages. When considering whether an award of damages is just and appropriate English courts might well take into account the need for the authorities to balance the competing ECHR rights of the picketers (to freedom of expression) and the mourners (to respect for private and family life). It is unlikely that an action for damages could be brought against a PCC for failure to prevent a breach of Article 8 rights by allowing funeral picketing to take place. In *Aston Cantlow Parochial Church Council v Wallbank*⁵⁵ the House of Lords held that a PCC was not a public authority as its function was not governmental, but was concerned with the administration of church affairs. It also rejected the argument that the PCC was performing a public function under section 6(3)(b) Human Rights Act 1998 when it enforced a statutory obligation to repair the chancel of a parish church.⁵⁶ The fact that the PCC was part of the administrative structure of the Church of England was not relevant as ‘despite the particular recognition which establishment afforded, the Church of England remained an essentially religious rather than governmental organisation.’⁵⁷

Can a case be made for an extension of the law of privacy to allow mourners to sue funeral picketers? The decision of the ECtHR in *von Hannover v Germany*⁵⁸ suggests that the

⁵³ The doctrine of positive obligations is a central principle of ECHR law and means that in addition to a duty not to interfere with Convention rights in some circumstances the state must take active steps to protect against interference by others. This principle arises in part from Article 1 of the ECHR which requires states to “secure” Convention rights.

⁵⁴ See, for example, M Amos, ‘Damages for Breach of the Human Rights Act 1998’ (1999) *European Human Rights Law Review* 178; R. White, ‘Remedies in a Multi-Level Legal Order: The Strasbourg Court and the UK’ in C. Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (London, 2000) pp 192-204.

⁵⁵ [2003] UKHL 37.

⁵⁶ The defendants, the owners of the property, alleged an infringement of their property rights under the Human Rights Act (Article 1, Protocol 1 EHCR).

⁵⁷ Report of the House of Commons and House of Lords Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act (2004)*, para 16. Available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/39/39.pdf>, accessed 18 December 2014.

⁵⁸ See *von Hannover v Germany* Application no. 59320/00, (ECtHR, 24 June 2004).

positive obligation to secure Convention rights could be regarded as including an obligation to provide a means of securing damages from those who invade another person's Article 8 rights. There is some support in the jurisprudence of the ECtHR for the view that these rights extend to burying the dead and to attending funerals. In *Girard v France*⁵⁹ lack of diligence on the part of the authorities had led to a considerable delay in finding the body of the applicants' daughter who had been murdered. The Court held that the right to give their daughter's remains a final burial place was inherent in their right to respect for their private and family life under Article 8. In the earlier case of *Hadri-Vionnet v Switzerland*⁶⁰ the ECtHR also considered there had been a breach of the mother's Article 8 rights when, having given birth to a stillborn baby whilst in a centre for asylum seekers, the baby's body had been buried in a communal grave for stillborn babies, without any form of ceremony and in the absence of the mother. Similarly, in *Hachette Filipacchi Associates v France*⁶¹ an article in *Paris-Match* magazine about the murder of a prefect in Corsica which included a photograph of the scene showing the murdered man's body was held to be a breach of the family's rights under Article 8, at a time when they were in mourning. The magazine was required to publish a statement in the next issue acknowledging the distress caused to the family. If causing delay in burying a family member, denying parents the right to take part in a funeral for their child, and mourning free from press intrusion can be regarded as a breach of the right to respect for family life it would seem that taking part in a funeral or memorial service free from outside interference by funeral picketers could also be considered to be a breach of Article 8 rights.

It is difficult to see how the breach of confidence action could be extended to cover invasion of mourners' rights by funeral picketers. However the jurisprudence of the ECtHR would support the introduction of a novel cause of action into English law allowing an action to be brought by those whose privacy as mourners has been invaded. The difficulty is that the government has made it clear that it does not intend to introduce legislation on the requirements of the ECHR but rather to rely on the judges to develop the law (including the law of privacy) appropriately, a role which Lord Phillips pointed out in *Douglas* has not been accepted 'with whole-hearted enthusiasm' by the courts.⁶² In the absence of legislation there would seem to be little likelihood of a change in the law in the near future.

⁵⁹ App no 22590/04 (ECtHR, 30 June 2011).

⁶⁰ App no 55525/00 (ECtHR, 14 February 2008).

⁶¹ (2009) 49 EHRR 23.

⁶² [2005] EWCA Civ 595, para 46.

There are many aspects of this discussion which strike the author as ironic. It is ironic that in English law it appears to be possible to obtain damages for publication of photographs of a person participating in a sex orgy but not where a mourner at a funeral has been subjected to grossly disturbing behaviour at a time when they were particularly emotionally vulnerable.⁶³ It is ironic that in a situation where people have suffered distress whilst taking part in a private family and religious ritual that their best cause of action might be for special damage in public nuisance, requiring funeral picketing and the distress it causes to be equated with activities as diverse as making obscene telephone calls, laying manure in the street, building a thatched house in the borough of Blandford Forum, digging up the wall of a church and keeping a tiger in a pen adjoining the highway.⁶⁴ It is ironic that whilst they might be comforted by the possibility that picketers could be prosecuted, they would not have the comfort of compensation for their distress. Finally, it is ironic that no-one was able to picket the funeral of Fred Phelps, the pastor and founder of the WBC who died in March 2014. Members of the WBC consider funeral services to be “worshipping the dead”.⁶⁵

⁶³ In this conclusion I am grateful for a comment made by an anonymous reviewer of an earlier draft of this article.

⁶⁴ All are, or at some time have been said to be, a common (or public) nuisance, see J Spencer, *op cit* note 40.

⁶⁵ < <http://edition.cnn.com/2014/03/20/us/westboro-church-founder-dead/> >, accessed 11 December 2014.