Fly-tipping: the law, procedure and traps for the unwary prosecutor

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Background

Fly-tipping

- Is a criminal activity that can cause serious pollution of the environment, may be a risk to human health and can harm wildlife and farm animals
- Spoils our local neighbourhoods
- Costs landowners and the taxpayer an estimated £100 million per year to clean up
- Costs local authorities £44 million per year to clear up
- Undermines legitimate waste management companies who are undercut by illegal operators

Penalties were increased in England and Wales by Part 5 Chapter 2 of the Clean Neighbourhoods and Environment Act 2005. Fly-tippers can be fined up to £50,000 in the Magistrates’ Courts, face unlimited fines in the Crown Courts, as well as community punishment orders or prison sentences of up to 5 years.

In addition, those found guilty may also have to pay legal costs and compensation. In 2010 a firm was fined £95,000 for the illegal dumping of waste (see Environment Agency press release August 2010 “Dumping waste costs Derbyshire scaffolding firm nearly £95,000)). In addition, under the Proceeds of Crime Act 2002 offenders can have assets frozen and confiscated: in 2010 two men were ordered to pay £234,393 under the provisions of the Act, the second highest confiscation achieved by the Environment Agency at the time (see Environment Agency press release August 2010 “Skip hire bosses pay high price for waste mountain”). There are a range of other possible penalties e.g. driving bans, forfeiture of vehicles involved in fly-tipping, an electronic tagging curfew and community service. For an interesting discussion on sentences see R v Kelleher [2008] EWCA Crim 3055 where the appellant unsuccessfullly appealed against a sentence of 14 months imprisonment for an organised fly-tipping operation. His co-accused was sentenced to 22 moths’ imprisonment. The defendants had fly-tipped over 14,000 tons of waste and received £550,000. Removal and clean up costs amounted to some £347,000.

Government has launched a major review of waste policy which will consider “how best to reduce fly-tipping”. A consultation period ends in October 2010 with the results expected to be released in spring 2011.

What is the scale of the problem?

No database until establishment in 2004 of Flycapture database (managed by the Environment Agency) assisted by Defra, the Welsh Assembly and local authorities. Database records the number, size, waste and location of fly-tips on public (as opposed to private)
land recorded each month in each local authority area. Figures are only approximations given difficulties in ensuring the consistency of recording of incidents. However figures do show:

<table>
<thead>
<tr>
<th>Year</th>
<th>Incidents</th>
<th>Cost of clearance</th>
<th>Prosecutions</th>
<th>Successful prosecutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008/09</td>
<td>1.16 million</td>
<td>£54.9 million</td>
<td>1,992</td>
<td>1,941 (97%)</td>
</tr>
<tr>
<td>2007/08</td>
<td>1.28 million</td>
<td>£73.8 million</td>
<td>2,176</td>
<td>2,077 (95%)</td>
</tr>
</tbody>
</table>

Fly-tipping on private land is believed also to be a major problem but no comparable reliable data available. Defra is undertaking research at the moment into the scale of the problem. On private land it is the responsibility of the landowner to remove the waste and dispose of it legally. If the fly-tipper is caught then it is possible that the costs involved could be recovered from the fly-tipper. Some landowner associations such as the NFU claim that the problem is getting worse and are calling for a change in the law to make local authorities responsible for clearing it. So far Government has resisted this call. Some estimates suggest that 67% of farmers are affected by fly-tipping.

What is fly-tipping?

In short, fly-tipping is the illegal dumping of waste. REMEMBER: all types of waste gets fly-tipped: some of it can be dangerous. Investigating officers should take care when examining fly-tipped waste.

Most common fly-tipped waste is household waste. Other wastes include old appliances like fridges and washing machines, building and demolition waste, animal carcasses, vehicle parts and tyres. Also some hazardous wastes are dumped such as asbestos sheeting, chemicals and oils.

What is the relevant legislation?

(a) Section 33 of the Environmental Protection Act 1990:

It is illegal for any person to deposit controlled waste, knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence (environmental permit) is in force and the deposit is in accordance with the licence.
Controlled waste is any household, commercial or industrial waste.

Section 33 also makes it an offence if a person has treated, kept or disposed of controlled waste in or on land that does not have a licence. It is a defence to prove that all reasonable precautions and exercised all due diligence to avoid the commission of the offence or that the act was necessitated by an emergency in order to avoid a danger to the public. It is not a valid defence to claim to be acting under an employer’s instructions.

Where a person is convicted under this section the court may make an order requiring the offender to pay the costs associated with the enforcement and investigation of the case, the seizure of any vehicles that were involved in the offence and costs for the removal of the illegally deposited waste. The court may also order the confiscation of the vehicle if it is satisfied that it was used in or for the purpose of the commission of the offence.

Whilst householders do not need licences for their waste section 33(2) was amended in 2006 to prohibit the disposal etc of waste by private individuals, within the curtilage of their property, in a manner likely to cause pollution of the environment or harm to human health.

(b) **Section 34 of the Environmental Protection Act 1990: the Duty of Care**

A waste holder (any person who imports, produces, carries, keeps, treats or disposes of controlled waste or, as a broker, has control of such waste) has a statutory duty of care with regard to that waste and it is an offence if they fail to take all reasonable measures to prevent another person from committing an offence under section 33 or prevent the escape of the waste from his or another person’s control and to transfer the waste to an authorised person or to any person for authorised transport purposes and to provide that person with a written description of the waste.

Section 34A enables an authorised officer (i.e. of the Agency or the waste collection authority) to issue a fixed penalty notice to any person who has failed to comply with a requirement to furnish documentation as specified under section 34(5). The current penalty is £300.

Householders also have a duty of care to check that anyone they commission to take away and dispose of their domestic waste is registered. Householders are not required to supply documentation such as a waste transfer note but they could face a maximum fine of £5,000 if they fail to take reasonable measures to ensure their
domestic waste is handled by an authorised waste carrier. It is for the court to
determine whether or not “reasonable measures” were taken in a particular case.

(c) **Section 59 of the Environmental Protection Act 1990:**

Under section 59, as supplemented by section 59ZA, local authorities and the
Environment Agency can require occupiers and landowners to remove waste they
knowingly caused or permitted to be deposited illegally. If the occupier or landowner
does not remove the waste, the authorities can enter on to the land, clean up the
waste and charge the landowner or occupier with the costs of so doing. They can
also enter land to clear it of waste if there is no occupier or if the occupier neither
knowingly caused nor permitted the deposit of the waste or in order to prevent
pollution.

(d) **Sections 1, 2 and 5 of the Control of Pollution (Amendment) Act 1989:**

It is an offence under section1 for anyone who is not a registered carrier of
controlled waste to transport any waste in the course of a business or with a view to
making a profit.

Section 2 specifies requirements for the registration of carriers of waste, as well as
regulations for vehicles used for the transportation of waste to comply with certain
conditions.

Section 5 gives waste regulation authorities such as waste collection authorities, the
police and other enforcement agencies to stop and search any vehicle believed to be
used for the transportation of waste without being registered. Only a constable in
uniform can stop a vehicle on a road. It is an offence to fail to assist or to obstruct an
authorised officer or a constable. Where it appears to an authorised officer that a
person has failed to produce authority for transporting controlled waste, the officer
may issue a fixed penalty notice. The penalty is £300.

(e) **Other powers:**

**Refuse Disposal (Amenity) Act 1978,** section 6 – local authorities have a power to
remove articles other than vehicles abandoned without lawful authority on any land
in the open air. If the land is occupied the authority is required to serve notice of its
intention on the occupier. There is an appeals procedure. Costs may be recovered
from the person who deposited the articles.
Public Heath Act 1961, section 34 – local authorities have the power to deal with any rubbish which is in the open air and which is seriously detrimental to the amenities of the neighbourhood. The power is effective 28 days after service of notice on the landowner but there is no power to recover costs. For the purposes of section 34 “rubbish” does not include material accumulated in relation to a business.

Town and Country Planning Act 1990, sections 215-219 – if it appears to a local planning authority that the amenity of part of their area or an adjoining one is adversely affected by the condition of land in their area they have the power to serve a notice on the owner or occupier requiring them to remedy its condition within a certain time. There is an appeals procedure. Also the owner or occupier can recover the costs of complying with the notice from anyone who caused or permitted the land to be in the condition that caused the notice to be served.

Highways Act 1980, section 149 – if anything is deposited on the highway (including a verge) as to constitute a nuisance, the highway authority can serve a notice on the person responsible for the deposit requiring its removal. If the deposit is a danger the highway authority may remove the deposit forthwith or apply to the magistrates’ court for a disposal order. The highway authority may recover its reasonable expenses from the person who deposited the material or the person claiming to be entitled to it. Section 130 – duty of highways authority to prevent stopping up or obstruction of highway.

Other points to note


National Fly-tipping Prevention Group brings together organisations with the common aim of combating fly-tipping.

Procedure

“Knowingly cause or knowingly permit” – the courts have interpreted the phrase “knowingly” very strictly. In Shanks and McEwan (Teeside) Ltd v Environment Agency [1997] Env LR 305 the defendant was charged with knowingly permitting the deposit of controlled waste in contravention of a licence condition. It was argued that although the defendant knew of the deposit of the waste it did not know it was in breach of condition. The court followed the decision in Ashcroft v Cambro Waste Products Ltd [1981] 1 WLR 1349 in taking a very strict view of the phrase. The prosecution need only prove knowledge of the deposit of the waste material. It is not necessary to demonstrate knowledge of the breach of licence.
condition which gives rise to the offence. Thus, once the prosecution demonstrate that waste had been knowingly deposited, the burden of proof then falls on the defence to establish that the deposit was made in accordance with the conditions of the licence.

It is also possible to infer knowledge. In *Kent County Council v Beaney* [1993] Env LR 225 it was held that knowing permission may be inferred from the facts of a case where the deposit of waste was obvious from surrounding events. This concept of constructive knowledge was developed further in the *Shanks and McEwan (Teeside)* decision. In that case Mance J took the view that it was sufficient that the defendant company (including its senior management) knowingly operated and held out its site for the reception and deposit of controlled waste. Once this was established it was not necessary to demonstrate that there was any knowledge of the specific breach of the licence condition. Arguably this places the operators of landfill sites under strict liability for breaches of condition.

**Vehicle ownership and waste offences** – *Environment Agency v Carl Mellan* [2002] EWHC 904 Admin. The defendant was prosecuted for fly-tipping offences on an industrial estate. The evidence was that the defendant was the owner of the vehicle which had been seen at the site although the defendant was not the driver. He was acquitted of the offence on the basis that although he owned the vehicle, the element of control required under section 33(5) was not present. On appeal, the High Court (Harrison J.) held that evidence of ownership was capable of amounting to evidence of control. This is a presumptive test and there will be other occasions where ownership would not indicate control (e.g. if the owner was a hire company like Hertz or Avis).

**The due diligence defence.** The nature of this defence can be illustrated by two cases. In *Durham County Council v Peter Connors Industrial services Ltd* [1993] Env LR 197, a system of operation which relied upon the person disposing of waste regularly collecting a skip which had been filled with waste by another without checking on the contents of the skip every time, was not sufficient to come within an analogous defence under section 3(4) of the Control of Pollution Act 1974. It was held that the collector of the waste had to take care to inform itself on each occasion that it collected the waste as to the nature of the contents of the skip. The defence required specific inquiry to be made of any person who knew what the waste was and whether the future deposit of that waste would involve a breach of the Act. In *Environment Agency v Short* [1998] Env LR 300, the defendant left waste timber at a construction site to be burnt after being told incorrectly by the site owner that the site did not require a waste management licence because it was exempt. The High Court held that the onus was on the defendant to make specific inquiries as to whether the exemption extended to the timber.

**The meaning of deposit.** In *R v Metropolitan Stipendiary Magistrate, ex parte London Waste Regulation Authority* [1993] All ER 113 the divisional Court held that “deposit” applied to temporary deposits as well as to permanent ones, which seems to reflect other common sense and the wider scope of the Act in dealing with waste management rather than
disposal. This decision was widened further by *Thames Waste management Ltd v Surrey County Council* [1997] Env LR 148 where it was held that “deposit” could cover continuing activities where the context of the waste management licence would suggest that it was appropriate to do so. Thus a deposit can continue over a significant period whilst other activities are carried out.

**The division of responsibilities.** Anyone can bring a prosecution for fly-tipping under the EPA. However normally prosecutions are brought by the Environment Agency or the local authority and the Protocol contains guidance (not a statement of law) on which authority should act. With regard to local authorities the Protocol states that where fly-tipping on private land is having an adverse effect on the environment, local authorities are encouraged to take steps to ensure that the waste is removed, appropriate enforcement action taken and costs recharged wherever possible. Local authorities normally investigate and take appropriate enforcement action against

- Fly-tipping of quantities of waste up to and including a single tipper load of waste deposited at one time (i.e. up to about 20 cubic metres in a single deposit)
- Accumulations of waste from several small-scale fly-tipping incidents
- Householders abandoning or dumping waste
- Waste management operations that do not have the appropriate planning consents
- Waste producers not complying with the duty of care
- Waste producers who illegally dump or abandon their wastes
- Unregistered waste carriers and brokers (for example through organised vehicle stop checks)

Local authorities will normally remove, investigate and take appropriate enforcement action with regard to:

- Illegal dumping and fly-tipping of waste on public land including a road or other public highway
- Illegally dumped or abandoned hazardous waste other than those which the Environment Agency deals with
- Fly-tipped waste (including animal carcasses or remains) on private land or in watercourses that is giving rise to an adverse effect on the amenity or that is impeding the flow of water such as to give rise to an actual or imminent threat of a significant flood risk from an Ordinary Watercourse.

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