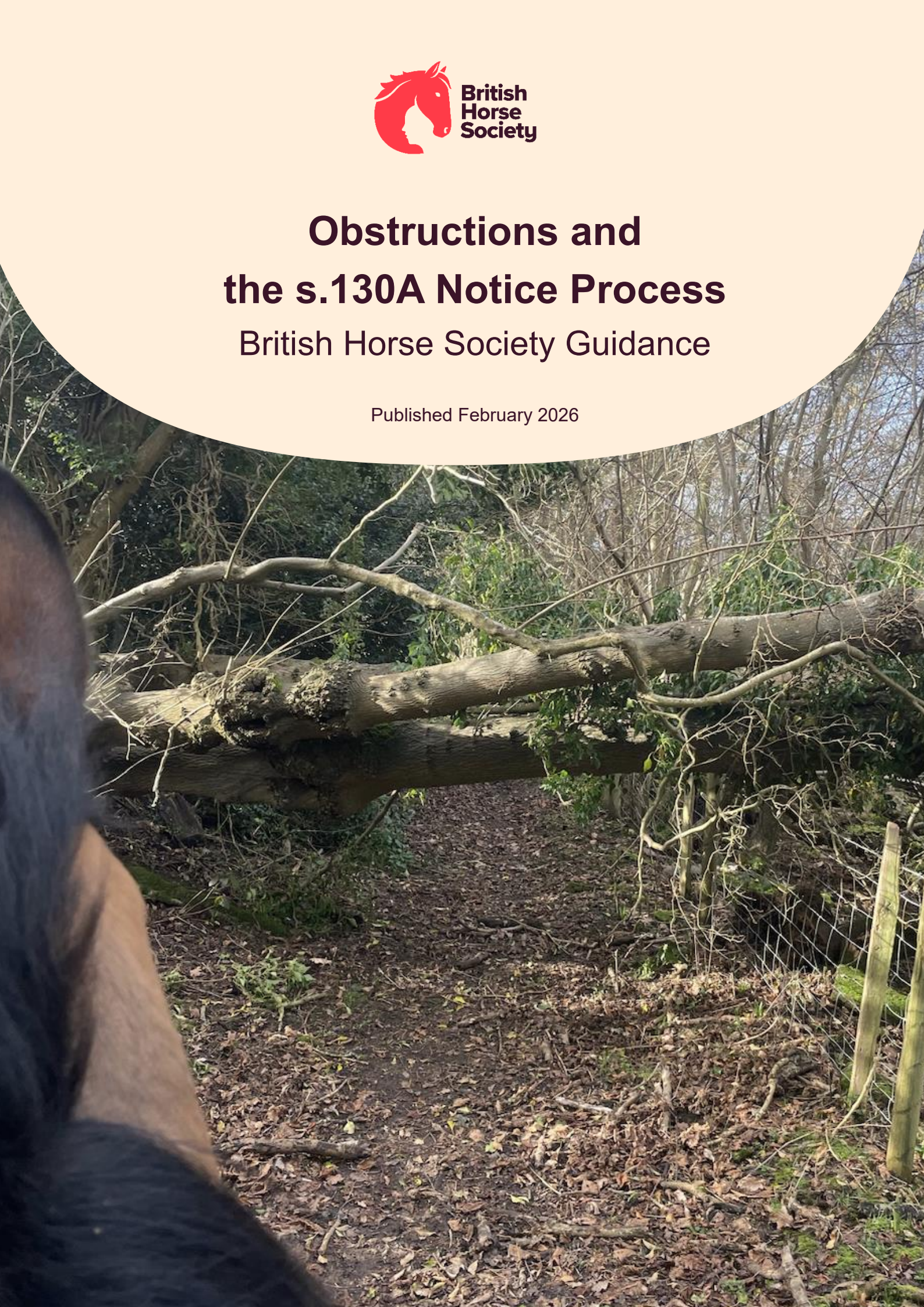
Obstructions and the s.130A Notice Process

British Horse Society Guidance

Published February 2026



Obstructions and the s.130A Notice Process

Caution. This guidance is based on first-hand experience of the s.130A notice process up to, and through, the courts. While it is a process intended for use by 'the public', a case that ultimately reaches the magistrates' court engages statutory forms and procedures that demand understanding and care.

If you have a case where you want a notice to be served in the name of British Horse Society please contact the Access Department *access@bhs.org.uk*. A notice can only be served in the name of the Society by the Director of Access.

Government Guidance

Removal of obstructions from highways: enforcement of local highway authorities' duty to prevent obstructions on rights of way

Notes to accompany Statutory Instrument 2004 No. 370

Contents

Removing an obstruction oneself: abatement

1. There is a thread of case law that makes it clear that a member of the public, in using a highway, may lawfully remove enough of an obstruction to allow her or him to continue along the way.[1]
2. This does not extend to removing all of the obstruction, where partial removal is sufficient for passage. Removal of all of the obstruction was formerly a matter for indictment in the courts, and now falls to the highway authority under Highways Act 1980 procedures. As regards byways and public paths the s.130A procedure (below) may be available.
3. As regards taking and using tools, many path users carry (legal) pocket knives or multi-tools, anyway. If a way was so obstructed that these cannot make a sufficient passage, would a user be doing anything wrong by taking a more substantial tool on a subsequent visit, in anticipation? Carrying bolt cutters to open a chained and locked gate is rather different from hiring a small JCB and removing the gate entirely.[2] [3]
4. Parliament is content that the public has a right to abate obstruction nuisances, and has legislated that the engagement of a highway authority in dealing with an obstruction does not of itself oust that public right.
5. In the Highways Act 1980, s.333, saving for rights and liabilities as to interference with highways:

   (1) “No provision of this Act relating to obstruction of or other interference with highways is to be taken to affect any right of a highway authority or other person under any enactment not contained in this Act, or under any rule of law, to remove an obstruction from a highway or otherwise abate a nuisance or other interference with the highway, or to affect the liability of any person under such an enactment or rule to proceedings (whether civil or criminal) in respect of any such obstruction or other interference.”

---

[1] Seaton v. Slama (1932) 31 LGR 41, Colchester Corporation v. Brooke (1845) 7 QBD 339, 115 ER 518.

[2] Dimes v. Petley (1850) 15 QBD 276, 117 ER 462.

[3] In the early 1970s trail riders often carried machetes so as to hack a passable route along neglected minor roads.

What is an obstruction?

1. ‘Obstruction’ is judicially defined as “A nuisance to a way is that which prevents the convenient use of the way by passengers”,[4] and, “It is perfectly clear that anything which substantially prevents the public from having free access over the whole of the highway which is not purely temporary in nature is an unlawful obstruction”.[5]
2. In Wolverton UDC v. Willis [1962] 1 WLR 205, the Court of Appeal held that Seekings v. Clarke so decided:

   > “That every member of the public is entitled to unrestricted access to the whole of a footway, save in so far as he may be prevented by obstructions lawfully authorised. (2) That subject to the *de minimis* principle any encroachment upon the footway which restricts him in the full exercise of that right and which is not authorised by law, is an unlawful obstruction; and (3) that every member of the public so restricted in the use of the footway is necessarily obstructed in that to the extent of the obstruction he is denied access to the whole of the footway; that is, he is obstructed in his legal right to use the whole of the footway.”[6]

3. There is no doubt that ‘highway’, at common law, and for the purposes of the Highways Act 1980 encompasses the different types of ‘public rights of way’.[7]
4. Obstruction is a wide term, and there is a raft of case law over 200 years. There can be e.g. ‘psychological obstructions’ frightening the public away from using a particular right of way, but the s.130A process is restricted to certain types of obstruction (see below).

---

[4] R v. Mathias [1861] 2 F&F 570.

[5] Seekings v. Clarke [1961] 105 Sol Jo 181; 59 LGR w268.

[6] See also Wolverton v. Willis [1961] QB 243.

[7] Unless the context indicates otherwise.

The duty of highway authorities

1. In the Highways Act 1980, s.130 Protection of public rights:

   (1) It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.

   (3) Without prejudice to subsections (1) and (2) above, it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of—

   (a) the highways for which they are the highway authority …

2. In R v. Surrey CC *ex parte* Send Parish Council (1979) 40 P. & C.R. 390, Lord Justice Lane:

   "The local authority must at all times act with the object of preventing or removing any obstruction, and, more broadly speaking, of promoting the interests of those who enjoy the highway or should be enjoying the right of way and the county council must likewise operate against the interests of those who seek to interrupt such enjoyment of the highway."[8]

3. Highway authorities know this duty, even if sometimes they choose not to act on it. In a letter from the county solicitor of Powys County Council:[9]

   "… it has been pointed out quite correctly that the county council is in breach of its duty to protect and assert the right of way … Any obstruction is illegal and the county council has an absolute duty placed upon it by parliament to take such steps as are necessary to remove any obstruction on a right of way. I must emphasise that there must be no obstruction to this right of way whilst it remains a right of way and over which the public have free and unobstructed access."

[8] Lane LJ would have decided this application under the regime of the Highways Act 1959, s.116 Protection of public rights.

[9] Letter of 15 April 1991 from Michael Rolt, the County Solicitor of Powys County Council, to a landowner, covering a notice under s.143 of the Highways Act 1980.

The genesis of the s.130A provisions

1. Hansard records ministerial contributions to the debate on the Countryside and Rights of Way Bill in 2000. Plainly, the government and parliament regarded obstruction of public rights of way to be such a serious and intractable problem that the s.130A–D process was brought into law. These extracts from Hansard make that clear:

2. 20 January 2000 The Minister for the Environment, Michael Meacher:

   "We are also tackling the long-term problem of obstructions to public rights of way. There will be a new right for people to serve notice on local highway authorities to have certain obstructions removed from public rights of way. If the local highway authority ignores the notice, the person can apply to the magistrates' court for an order requiring the authority to remove the obstruction. Where someone has been convicted of wilfully obstructing a highway, magistrates will be able to order him to remove the obstruction. That is very important because at present magistrates only have the power to fine offenders, which does not directly address the problem. We are addressing that longstanding problem."

3. 26 June 2000 The Parliamentary Under-Secretary of State, Department of the Environment, Transport and the Regions, Lord Whitty:

   "In addition, the Bill provides stronger powers for dealing with obstructions on rights of way. People will be able to serve notice on local highway authorities where a right of way is obstructed and, if necessary, seek an order from the magistrates' court requiring the authority to secure the removal of the obstruction. Magistrates' courts will also have a new power, when convicting a person of wilfully obstructing a highway, to order that person to remove the obstruction."

Ministerial guidance

1. The Minister for Rural Affairs and Local Environment Quality said in a letter:

   "Keeping rights of way clear of obstruction which interfere with the public's use and enjoyment has always been the responsibility of local authorities, but this is the first time a limit has been put on the window in which they must act. Now if a council fails to act, a magistrates' court order can be served to compel it to do so. We should all be encouraging the use of these powers."[10]

2. Parliament made Regulations to give effect to ss.130A–D: Statutory Instrument 2004 No. 370 The Removal of Obstructions from Highways (Notices etc.). These Regulations set out the form of notices to be used in the process. These are 'Form 1', Form 2', *et seq*.

3. The Minister issued guidance on the interpretation and application of these new provisions:

   Removal of obstructions from highways: enforcement of local highway authorities duty to prevent obstructions on rights of way. Notes to accompany Statutory Instrument 2004 No. 370.

4. These notes say (our emphasis):

   [2] "These provisions provide a formal means for any person to draw to the authority's attention ways which are obstructed and to take court action where the authority fails to act without good reason. The provisions are intended to encourage authorities to be more proactive in keeping rights of way free from obstructions, leading to greater use and enjoyment of rights of way.

   [5] "Local highway authorities are under a duty to assert and protect the rights of the public to use and enjoy those public rights of way for which they are responsible.

   [6] "It is important that authorities act quickly to investigate and resolve complaints about obstructions (or other difficulties).

   [7] "The most common problem is likely to be obstructions on public rights of way. The public are entitled to expect that rights of way will be kept open and available for use. It is an offence for a person to obstruct a highway without lawful authority."

5. In Rights of Way Circular (1/09) Guidance for Local Authorities Version 2 October 2009:

---

[10] This letter was from Alun Michael MP, published in Horse and Hound. It references 'Section 63', which was the provision in the Countryside and Rights of Way Act 2000 which was incorporated into the Highways Act 1980 as ss.130A–D. Mr Michael was Minister for Rural Affairs 11 June 2001 to 10 May 2005. The Highways Act was amended effective 13 February 2004 in England, and 1 April 2004 in Wales.

[1.8] “The content of this circular does not place any extra obligations on local authorities and therefore in itself has no further implications for additional manpower or increased expenditure. Funding for rights of way functions, including additional burdens imposed through the Countryside and Rights of Way Act 2000, is provided through the revenue support grant. Authorities should ensure that sufficient resources are devoted to meeting their statutory duties with regard to the protection and recording of public rights of way, and that the rights of way network is in a fit condition for those who wish to use it.

[6.15] “Under section 130(1) of the 1980 Act highway authorities are under a duty to assert and protect the rights of the public to use and enjoy those public rights of way for which they are responsible. They are also under a duty under section 130(3) of the 1980 Act to prevent, as far as possible, the stopping-up or obstruction of those public rights of way for which they are responsible.

[6.16] “The public are entitled to expect that all rights of way will be kept open and available for use. It is important that authorities act quickly to investigate any complaint made to them. Authorities should ensure that any obstructions they discover or have reported to them are removed as soon as is reasonably practicable. Section 143 of the 1980 Act enables authorities to secure the removal of structures on the highway by serving notice on the person responsible and by removing the obstruction themselves at the person’s expense should that person fail to comply with the notice. Section 149 of the 1980 Act also enables an authority to have any ‘thing’ deposited on a highway so as to constitute a nuisance or danger to users removed forthwith. Where voluntary means do not work, authorities should give preference to using the powers which enable them to carry out works and recover the costs of doing so from the person responsible.

[6.18] “Sections 130A–130D of the 1980 Act enable any person to serve a notice on a local highway authority, requesting it to secure the removal of an obstruction on a public right of way. Should the authority refuse or fail to take action, the applicant can seek a magistrates’ court order compelling the authority to act.”

What types of obstruction are vulnerable to a s.130A notice?

1. The s.130A process can be brought to bear on footpaths, bridleways and restricted byways, whether these are on the definitive map and statement or not, but only against BOATs that are on the definitive map and statement. Subsection 1 also refers to restricted byways 'in the definitive map and statement', but this is a transitional 'belt and braces' for former RUPPs statutorily converted to RBs. See s.130A(10).
2. S.130A(3) provides:

   (3) Subject to subsection (4) below, this section applies to an obstruction of the highway if the obstruction is without lawful authority and either—

   (a) the powers conferred by section 143, 149 or 154 below are exercisable in respect of it, or

   (b) it is of a description prescribed by regulations made by the Secretary of State and the authority have power (otherwise than under any of those sections) to secure its removal.

   (4) This section does not apply to an obstruction if—

   (a) it is or forms part of—

   (i) a building (whether temporary or permanent) or works for the construction of a building, or

   (ii) any other structure (including a tent, caravan, vehicle or other temporary or movable structure) which is designed, adapted or used for human habitation,

   (b) an order may be made in respect of it under section 56 above, or

   (c) the presence of any person constitutes the obstruction.
3. Taking the sections referenced in s.130A(3)(a) in turn:
4. S.143 Power to remove structures from highways, provides:

   (1) Where a structure has been erected or set up on a highway otherwise than under a provision of this Act or some other enactment, a competent authority may by notice require the person having control or possession of the structure to remove it within such time as may be specified in the notice.

   (4) In this section "structure" includes any machine, pump, post or other object of such a nature as to be capable of causing obstruction, and a structure may be treated for the purposes of this section as having been erected or set up notwithstanding that it is on wheels.
5. In Herrick v. Kidner [2010] EWHC 269 (Admin), Cranston J:

   [15] "Section 143 confers power upon a highway authority to secure the removal of an unauthorised structure – a structure 'otherwise than under a provision of this Act or some other enactment' – which has been erected or set up on a highway. 'Structure' is defined widely to include 'any machine

pump, post or other object of such a nature as to be capable of causing obstruction', even if it is on wheels. Section 149 allows the removal of things deposited on a highway which are a nuisance.

[65] "In my view section 130B(4)(c) of the 1980 Act has the effect that any structure erected within the legal extent of the footpath, and which prevents public passage or the enjoyment of amenity rights over the area of its footprint, significantly interferes with the exercise of public rights of way. Highway authorities which refuse to take action to secure the removal of such structures may be subject to an order under section 130B."

6. S.149 Removal of things so deposited on highways as to be a nuisance etc., provides:

   (1) If any thing is so deposited on a highway as to constitute a nuisance, the highway authority for the highway may by notice require the person who deposited it there to remove it forthwith and if he fails to comply with the notice the authority may make a complaint to a magistrates' court for a removal and disposal order under this section.

7. S.154 Cutting or felling etc. trees etc. that overhang or are a danger to roads or footpaths, provides:

   (1) Where a hedge, tree or shrub overhangs a highway or any other road or footpath to which the public has access so as to endanger or obstruct the passage of vehicles or pedestrians, or obstructs or interferes with the view of drivers of vehicles or the light from a public lamp, or overhangs a highway so as to endanger or obstruct the passage of horse-riders, a competent authority may, by notice either to the owner of the hedge, tree or shrub or to the occupier of the land on which it is growing, require him within 14 days from the date of service of the notice so to lop or cut it as to remove the cause of the danger, obstruction or interference. and "hedge, tree or shrub" includes vegetation of any description.

Trees in and over rights of way

1. Trees (including hedges and bushes) causing obstructions are not clearly addressed by the Highways Act 1980. Trees can cause any of five types of obstruction:
2. Trees self-rooted, rather than cultivated. Trees 'Growing wild' in the surface of a highway make the way out of repair, rather than obstructed. A s.130A notice is not applicable.[11]
3. Trees cultivated: decorative or plantations. For example, a stand of trees grown as a crop does not fit into s.143, s.149, s.154 (above) and so a s.130A notice is not applicable.[12] A highway authority can prosecute for wilful obstruction under s.137(1) and is under a duty to "assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority …"[13]
4. Trees with branches blocking the way. This is reasonably straightforward and falls under s.154 (above). Branches can 'overhang' a highway whether or not the tree (or hedge or shrub) is rooted in the highway or not.
5. Trees felled in or across rights of way. Felling a tree 'deposits' that tree on to the ground. S.149 is engaged.
6. Trees blown over (wind-blow), or fallen through other natural forces. For s.149 to be engaged, the falling of the tree would have to be due to its 'deposit by a person', and other than a person responsible for the tree knowing it is blocking the way, but afterwards doing nothing to remove it, it is hard to see that s.149 even possibly applies. A remedy lies in s.150 duty to remove snow, soil etc. from highway. Subsection (1) provides (our emphasis):

   > If an obstruction arises in a highway from accumulation of snow or from the falling down of banks on the side of the highway, or from any other cause, the highway authority shall remove the obstruction.

7. S.150(2) provides that any person may make a complaint to a magistrates' court for an order requiring the highway authority to remove a fallen tree. There is no specified procedure for a notice to be served on the highway authority first. A letter in much the same format as a s.130A notice, but relying on s.150, should be sent to the authority so that it knows about the problem.[14]

---

[11] Hereford and Worcestershire County Council v. Newman (CA) [1975] 1 WLR 901.

[12] It might be argued that a planted tree is 'deposited' for the purposes of s.149.

[13] Highways Act 1980 s.130 Protection of public rights. This is also subject to crown exemptions as outlined below.

[14] This provision seems not to be subject to crown exemptions (as outlined below) because the notice bites on the highway authority, rather than on the landowner or occupier.

Disapplication of provisions from certain obstructions

1. S.130A(4) expressly disapplies the process from specific obstructions that might otherwise fall into the scope of s.130A(3):

   (4) This section does not apply to an obstruction if—

   (a) it is or forms part of—

   (i) a building (whether temporary or permanent) or works for the construction of a building, or

   (ii) any other structure (including a tent, caravan, vehicle or other temporary or movable structure) which is designed, adapted or used for human habitation,

   (b) an order may be made in respect of it under section 56 above, or

   (c) the presence of any person constitutes the obstruction.

Disapplication from crown land

1. The obstruction provisions of the Highways Act 1980 do not apply to crown land, unless made to apply, by agreement, in accordance with s.137(2). Similarly, a highway authority cannot serve notice on, or commence court proceedings against, the crown for an obstruction on land other than crown land. Even so, there is an expectation that the crown in its activities will comply with the law, and so a highway authority can make a request that an obstruction is promptly removed, and follow up to a superior level if it is not. S.130(1) of the Highways Act 1980 places a duty on a highway authority to get such an obstruction removed.

The form of the notices to be used

1. The form of the series of notices used in the process is set out in:

   The Removal of Obstructions from Highways (Notices etc.) (England) Regulations 2004 No. 370.

Failure of the highway authority to respond to a s.130A notice

1. S.130A(6) deals with what a highway authority must do when served with a notice under s.130A(1):

   (6) A highway authority on whom a notice under subsection (1) above is served shall, within one month from the date of service of the notice, serve—

   (a) on every person whose name and address is, pursuant to subsection (5) above, included in the notice and, so far as reasonably practicable, on every other person who it appears to them may be for the time being responsible for the obstruction, a notice informing that person that a notice under subsection (1) above has been served in relation to the obstruction and stating what, if any, action the authority propose to take, and

   (b) on the person who served the notice under subsection (1) above, a notice containing the name and address of each person on whom notice is served under paragraph (a) above and stating what, if any, action the authority propose to take in relation to the obstruction.

2. This stage of the process is not optional for the highway authority. Even if the authority believes that there is no case to answer under s.130A(1), it must still serve these notices, indicating “what, if any, action the authority propose to take in relation to the obstruction”. What if the highway authority defaults on this stage? Does it prevent to complainant pursuing the matter to the magistrates’ court? See below, regarding the ‘Form 4’ stage of the process.

‘Significantly interferes …’

1. S.130B Orders following notice under s.130A, provides:

   > Subject to subsection (5) below, the court may make an order under this section if it is satisfied—
   >
   > (c) that the obstruction significantly interferes with the exercise of public rights of way over that way.

2. ‘Significantly interferes’ is a key issue, and is examined at some length in Herrick, Cranston J:

   > [48] “Next, the interference has to be significant. Significant means more than *de minimis*. Size is one factor, but so is the nature of the obstruction, its location and the character of the neighbourhood. All these factors in combination must be assessed to determine whether there is a significant interference. The issue needs to be considered on a case by case basis, since the same obstruction might be a significant interference in one context but not in another.
   > [53] “Thus in my judgment the public is entitled to use and to enjoy everything which is in law part of a footpath. The construction to be placed on sections 130A–130D, read in the context of section 130, and section 143 to which section 130A(3)(a) refers, is that they are designed to enable members of the public to compel highway authorities to protect and assert the rights of the public to go wherever they choose on a footpath so long, of course, as it is reasonable, usual and appropriate. Any obstruction which significantly interferes with their ability to exercise their right to pass and repass and to enjoy amenity rights over each and every part of the footpath is caught by subsection 130B(4)(c). The public are not to be confined to a particular part or parts of a footpath …”

3. In Durham County Council v. Scott [1981] JPL 362, case stated, the respondent had erected “metal farm gates tied by twine to hedges on either side of a bridlepath … Evidence disclosed that the gates could be negotiated easily and persons could still pass and repass along the bridleway”.

4. Potts J, regarding whether the justices were correct to dismiss an action for removal of an obstruction. This was the gates, which could be opened, but were left closed, with a ‘loop of twine’ securing. There was no doubt that the gates were an obstruction notwithstanding being openable, nor that they were not authorised. Potts J. Considered the authorities and approached this case accordingly.

5. On page 364 Potts J looks at Seekings v. Clarke [1961] 105 Sol Jo 181; 59 LGR w268: “It is perfectly clear that anything which substantially prevents the public from having free access over the whole of the highway which is not purely temporary in nature is an unlawful obstruction. There are, of course, exceptions to that. One possible exception would be on the principle of *de minimis* … [or a ‘reasonable user’ of the highway such as scaffolding]”

6. Potts J then considers Seekings as applied in Wolverton UDC v. Willis [1961] QB 243, and says “That passage was particularly appropriate to the instant case.” So while Seekings and Wolverton were regarding encroachments on footways, Potts J holds that the same point of law applies to openable gates. He continues [foot of page 364]: “It was necessary for the justices, having found the facts, to ask themselves whether on those facts the obstruction caused by the gates substantially prevented the public from having free access over the whole of the bridleway. Had they asked themselves that question, they could not have failed to answer ‘yes’”.
7. Potts J continues [page 365] to consider whether the gates were a reasonable use of the highway. He concludes “… magistrates … have clearly found that, in the circumstances, there was an unreasonable use of the highway. Indeed, on the facts stated, it is difficult to see how they could conceivably arrive at any other conclusion”.
8. Note the ‘Comment’ on page 366 regarding a stock-retaining gate being a reasonable use of the highway. S.147 exists to authorise appropriate gates for this very purpose.
9. Consider ‘substantially prevents’. ‘Substantially’: to a great or significant extent. ‘Prevents’: keep (something) from happening. So, ‘interferes’ and ‘prevents’ have much the same meaning here.
10. If ‘substantially’ means to a ‘significant extent’, and ‘significantly’ means ‘sufficiently great’, then in this context it is hard to see how ‘significant extent’ can be a test of higher threshold than ‘substantially’.
11. Potts J holds that a pair of gates across a bridleway, which could be “easily negotiated”, “substantially prevented” use by the public.
12. In Herrick v. Kidner, Cranston J, looked at the finding of the court below at [51]:

    > “An obstruction which significantly interferes with the exercise of public rights of way over any part of the way falls within section 130B(4)(c). That will certainly be the case where it prevents passage over part of the way.”

    Cranston J continued at [11]:

    > “Thus the court found that parts of the structure were on the footpath and did significantly interfere with the exercise of public rights of way over it. Those parts of the structure on the footpath included at least the first two pillars and the gates mounted on them.”
13. At [13], the second question posed by the Crown Court, “Did we err in law in determining in paragraph [51] of our Judgment that, for the purposes of section 130B(4)(c) of the 1980 Act, an obstruction which actually prevents passage on foot over any part of the highway significantly interferes with the exercise of public rights of way over that way?”

14. At [47] “In my view interfere in this context means to get in the way of, in other words, the structure must impede the right of passage or prejudice other amenity rights, either generally or in particular.”
15. At [65] “In my view section 130B(4)(c) of the 1980 Act has the effect that any structure erected within the legal extent of the footpath, and which prevents public passage or the enjoyment of amenity rights over the area of its footprint, significantly interferes with the exercise of public rights of way.”

‘Reasonable obstruction’ as a reason not to make an order

1. ‘Reasonable obstruction’ is where something relatively minor and short-lived happens so as to inconvenience the public in their enjoyment of the whole of the highway. The necessity to erect scaffolding to repair a house is an example. In Harper v. Haden & Sons [1933] Ch 298, Romer LJ: “The law relating to the user of highways is in truth the law of give and take. Those who use them must in doing so have reasonable regard to the convenience and comfort of others, and must not themselves expect a degree of convenience and comfort only obtainable by disregarding that of other people. They must expect to be obstructed occasionally. It is the price they pay for the privilege of obstructing others.”
2. In R v. Nottinghamshire County Council, *ex parte* East Midland Development [2000] CO/2228/97, Hooper J, considering the legitimacy of an order to remove unauthorised bollards from a public bridleway. “I have additionally reached the conclusion … that these posts are an unreasonable obstructions in that they constitute an eyesore. They are extremely ugly. People in this country are fortunate to have access to a wide-range of off-road paths, bridleways and byways. They form a very important part of the traditions of this country and provide to both urban and rural dwellers an opportunity to walk or ride along them. Posts like these are completely out of place. I take the view, therefore, that in no circumstances could this possibly be described as a reasonable obstruction of the highway.”

Defences against a complaint in s.130B

1. (5) No order shall be made under this section if the highway authority satisfy the court—

   (a) that the fact that the way obstructed is a highway within section 130A(2) above is seriously disputed,

   (b) on any other grounds, that they have no duty under section 130(3) above to secure the removal of the obstruction, or

   (c) that, under arrangements which have been made by the authority, its removal will be secured within a reasonable time, having regard to the number and seriousness of obstructions in respect of which they have such a duty.

Taking these in turn:

2. (a) 'seriously disputed'. In a letter[15] DEFRA's Countryside and Access Policy Department answers a question about the DEFRA guidance (above) what is 'seriously disputed':

   "The text in paragraph 40 simply reproduces the relevant provision in the primary legislation, which is section 130B(5)(a) of the Highways Act 1980. Section 130B(5)(a) indicates that what may be 'seriously disputed' is whether the obstructed way is a 'highway defined in section 130A(2)'. Section 130A(2) includes in its definition:

   • footpaths, bridleways and restricted byways; and,

   • restricted byways and byways open to all traffic shown on the definitive map and statement;

   "the clear implication of this section being that the procedure can be used to remove obstructions from footpaths, bridleways and restricted byways that are not shown as such on the definitive map and statement. I would have thought that ways such as these would be the primary source of disputes about whether the way obstructed was a public right of way and it was these that section 130B(5)(a) was intended to cover.

   "However, I can see that section 130B(5)(a) could be invoked in a case where a way shown on the definitive map and statement faces possible removal through the definitive map modification process. I don't think we can draw any conclusions about what Parliament intended in terms of whether particular statutory process had been invoked, otherwise those processes would have been stipulated in the legislation.

   "What I think would matter in such cases is, regardless of whether there is an application to modify the definitive map and statement, whether the surveying

[15] Letter dated 6 November 2008, in reply to a letter dated 22 October 2008 from the Byways and Bridleways Trust.

authority believe the way to be seriously disputed and whether they can a convince the Magistrates' court that it is seriously disputed. In my view, that would depend, not on whether a statutory process had been invoked, but on what evidence existed to support the removal of a right of way from the definitive map and statement."

3. 'Seriously disputed' gets some consideration in R v. Lancashire County Council *ex parte* Guyer [1980] (CA) WLR 1024. The claimant asserted that a public footpath existed, even though it was not on the definitive map and statement, and was unlawfully obstructed. Lancashire County Council internally investigated the claim (this was before the availability of Wildlife and Countryside Act 1981 applications) and decided that there was insufficient evidence of public status. Mr Guyer went to the Divisional Court in 1977 seeking an order of mandamus (judicial review was then in its infancy) to oblige LCC to 'assert and protect' the public's interests. The application failed, and Mr Guyer appealed. The Court of Appeal dismissed the appeal. Held (from the headnote):

   "… subsection (1) of section 116 of the Act imposed a duty on a highway authority to assert and protect the rights of the public in the case of a highway which was clearly in existence and for which they were responsible; that the phrase [to] 'assert and protect' did not have the effect of requiring an authority to assert claims made by members of the public in which they had no faith and, therefore, since there was a serious dispute concerning the nature of the footpath with conflicting evidence as to whether it was public or private, the council had been under no duty to assert the applicant's claim."

4. (b) 'no duty under section 130(3)'. 'Structure' for s.143 is reasonably straightforward. S.149, things 'deposited on the highway so as to be a nuisance' attracted some judicial consideration in Kate Marlow v. Derbyshire County Council, judgment of District Judge Andrew Davison, 8 May 2012.[16]

   Page 5, paragraph (vi), "Reference was made briefly to a Hansard Debate on 11 October 2000 – in particular Ms Stockley referred to examples given of the types of obstruction envisaged by Parliament, under s.130A as being 'fences, gate, piles of machinery and so forth'".

   Page 7, final paragraph, "So far as the Hansard point is concerned, I reject it – I do not find that it assists Ms Stockley's case in any way – arguably the opposite – it merely gives examples of the types of obstruction possibly actionable under Section 130A and specifically includes, 'fences, gates, piles of machinery and so forth'. This is not an exhaustive list and could in my judgment include all the elements of the alleged obstruction(s) in this matter."

[16] Marlow v. DCC [2013] EWHC 1762 (Admin); Judgment of District Judge Andrew Davison 8 May 2012.

5. S.154 ‘Trees that overhang …’ is not wholly clear in the context of s.130A. The provision has been extended to include a tree that “overhangs a highway so as to endanger or obstruct the passage of horse-riders”, and the highway authority can take action against the owner of the tree, or against the occupier of the land on which it is growing. “Occupier of the land” seems to suggest trees on land to the side of the highway, overhanging into the highway.

6. But s.142 Licence to plant trees, shrubs, etc. in a highway, provides,

   (1) The highway authority for a highway may by a licence granted under this section permit the occupier or the owner of any premises adjoining the highway to plant and maintain, or to retain and maintain, trees, shrubs, plants or grass in such part of the highway as may be specified in the licence.

7. So for any tree planted under licence in a highway, the owner of the tree would be known to the highway authority. If trees are planted in a highway as part of a plantation, or shelter-belt, and not licensed, then the owner would be easily found by enquiry. It would seem to defeat the intentions of parliament to stop the obstruction of rights of way if overhanging trees rooted outside the highway are actionable, but overhanging trees, licensed to be rooted in the highway (or not licensed, but should be) are not actionable.

8. What about self-seeded trees (bushes, scrub, etc) in the surface of a highway? These would not be obstructions, or at least not obstructions actionable under this provision: s.130A(4)(b). The remedy would lie in repair, and the highway authority is vulnerable to service of a notice under s.56(1) of the Highways Act 1980.[17] If in doubt about which provision might apply, serve both notices s.130A and s.56. The highway authority is anyway under a duty to keep clear, and a duty to keep in repair.

9. (c) “removal will be secured within a reasonable time, having regard to the number and seriousness of obstructions in respect of which they have such a duty”. Any highway authority intending to plead this defence will have to substantiate its backlog of known/reported obstructions, and set out evidence of its clear-up rate. If an authority is processing obstructions reasonably (sufficiently) quickly, then it will anyway tell the complainant what it intends to do in the Form 3 notice that the authority must serve on the complainant, inside one month of receipt of the Form 1 notice. A complainant needs to weigh up whether a Form 3 ‘promise of an outcome’ is swift enough to make an application to the magistrates unnecessary, or unlikely to succeed.

[17] Hereford & Worcester County Council v. Newman [1975] WLR 901.

S.130A notices are not a ‘last resort’

1. The s.130A process is not provided by parliament as a ‘last resort’ after a highway authority has failed to take action for a long time. This is clear from Alun Michael’s letter in Horse and Hound, “Keeping rights of way clear of obstructions which interfere with the public’s use and enjoyment has always been the responsibility of local authorities, but this is the first time a limit has been put on the window in which they must act”. Note that this is ‘act’. Not every obstruction will be removed inside the 6-month ‘window’ available to take the matter to court. The highway authority saying e.g. ‘we will tackle this as soon as the ground dries next summer’, or ‘we need to wait until the end of the bird nesting season’, is ‘acting’, leaving aside the question whether this is acting promptly enough.
2. Similarly, the DEFRA guidance does not set out, or advise, any necessary prior dialogue with the highway authority. Service of a s.130A notice is the opening shot of the whole process, rather than the culmination of fruitless exchange. The one-month response period, inside the six-month window for action, is sufficient for the highway authority to get hold of a problem that it should, anyway, have already actioned on its own initiative.

Applying to the magistrates' court

1. The process for applying to the magistrates' court for an order is straightforward, and is set out in s.130C.
2. The process in the magistrates' court is initiated by the submission of Form 98 Complaint, as prescribed in The Magistrates' Courts (Forms) Rules 1981 SI No. 553 (L.2).
3. An issue arises in s.130C where the highway authority has failed to proceed in accordance with s.130A. S.130A(6) provides,

   > A highway authority on whom a notice under subsection (1) above is served shall, within one month from the date of service of the notice, serve—
   >
   > (a) on every person whose name and address is, pursuant to subsection (5) above, included in the notice and, so far as reasonably practicable, on every other person who it appears to them may be for the time being responsible for the obstruction, a notice informing that person that a notice under subsection (1) above has been served in relation to the obstruction and stating what, if any, action the authority propose to take, and
   >
   > (b) on the person who served the notice under subsection (1) above, a notice containing the name and address of each person on whom notice is served under paragraph (a) above and stating what, if any, action the authority propose to take in relation to the obstruction.

4. S.130B(5) requires the applicant for an order to provide to the court the information provided by the highway authority by virtue of S.130A(6)(b) (above), because the court will serve notice of the hearing on these persons (s.130C(7)).
5. What if the highway authority has not served notice on the applicant as required by s.130A(6)? How can the applicant then fulfil the requirements of s.130C(5) when applying to the court? It is improbable that parliament would make a public policy provision like s.130A which could then be stalled completely by a public authority simply failing to serve notice according to the statute. The answer looks to lie in the wording of s.130C(5), "On making the application the applicant must give notice to the court of the names and addresses of which notice was given to the applicant under section 130A(6)(b) above." If no names and addresses were given, then the applicant cannot provide these. If an application was made without this information, then the court could direct the highway authority to provide it, early in the process.
6. If a highway authority provides the s.130A(6) response to the complainant late, but before an application to the court is made, then the complainant should act upon this response accordingly. If the response offers an acceptable outcome, there is anyway no purpose in applying to the court. If the response does not offer an acceptable outcome, then the timetable for applying to the court is not affected anyway.

Magistrates' court procedure

1. Unlike the High Court, there is little prescribed procedure for civil jurisdiction cases before the magistrates. There is the Magistrates' Courts Rules 1981 No. 552 (L.1), but these Regulations seem to have little of relevance to s.130A.
2. Matters like s.130A or s.56 notice applications to the justices are both rare and arcane, and because of this the cases sometimes end up being heard by a district judge, either solo, or with one or two lay magistrates.
3. Where the case is heard by a bench of lay magistrates these will be assisted and guided by a legally qualified justices' clerk.[18]
4. The justices' clerk manages the process, and will expect the parties to provide and exchange 'skeleton arguments' and evidence in advance of the hearing. Applicants should show in their arguments how they have sought resolution of the issue, and are engaging the court process because the highway authority has not taken, or promised, appropriate action.
5. Going to court is a serious business, although the s.130A process is intended as something that can be done by a non-specialist complainant in person.
6. A complainant should make sure that there is proof of service of notices: signed-for, or guaranteed delivery mail, or witnessed delivery by hand. If using email (caution that the rules on email service are badly out of date in some respects) ensure that the attached notice is signed, and say in the email that a copy is being posted.
7. Experience shows that the justices' clerks are extremely helpful to applicants in explaining procedure, but they will not advise on matters of law. Applicants with no experience of the process would benefit from some mentoring from people who have done this before.

[18] Experience shows that a district judge is not necessarily best for a lay applicant. Lay benches take the cases seriously and enquire properly into the circumstances. District judges do not sit with clerks. Again, experience is that the justices' clerks inform themselves fully about the context of the law here and advise justices accordingly.

Alleged obstructors' engagement in the court process

1. S.130C provides,

   > (6) On the hearing of the application any person who is, within the meaning of section 130A above, a person for the time being responsible for the obstruction to which the application relates has a right to be heard as respects the matters mentioned in section 130B(4) above.

2. This provision goes to the overall fairness of the process. A person on whose land an alleged obstruction is situated might take a different view from the highway authority, but if the issue has got to court the highway authority is not acquiescing with the applicant anyway. Third party engagement with the court process does happen, but is not reported to be common.[19]

3. Any party being heard under s.130C(6) has no right to an award of costs in their favour, regardless of the outcome of the case.[20]

[19] Not that many of these cases reach the courts anyway. The provision commenced in February 2004. In July/August 2005 DEFRA surveyed all relevant authorities (116 councils) in England about how many notices each had received. They received 106 responses, showing that 391 notices were served but only five reached the magistrates. DEFRA concluded, "We see no reason why the number of cases should go up substantially in the future. The legislation is now well bedded in and has been widely publicised. Far fewer members of the public are using the new procedure than expected, and it is clear that most of these can be resolved without recourse to the courts. It is possible that the problem this legislation was meant to deal with is not as bad as was first thought i.e. on the whole local highway authorities do act promptly to clear obstructions; or that the new legislation has spurred local highway authorities into action much earlier than anticipated. We suspect it is a mixture of both."

[20] Wheeler v. Norfolk Co Co [2014] EWHC 2232 (Admin).

Partial obstructions

1. Moore-Bick LJ in Kind v. Northumberland County Council [2012] EWHC 603 (Admin), [2013] 1 WLR:[21]

   > [56] "If the obstruction in question is partial, questions of convenience in the use and enjoyment of the highway may arise, but where, as here, the obstruction is to the whole width of the highway its effect is to stop up the highway at that point. Clearly that is far more serious than a partial obstruction, or and obstruction such as a stile that can be surmounted, albeit with some effort."

2. Is Moore-Bick LJ intimating to the inferior courts that they should exercise discretion not to make an order in respect of a partially obstructed way? His Lordship speaks of "a stile that can be surmounted, albeit with some effort". Does he mean an unauthorised stile, or an authorised stile? If this stile is authorised (probably by s.147), or is a limitation on the dedication of the way, then it is anyway not susceptible to an application or order under s.130A. If it is an unauthorised stile then it is necessary to "surmount" it only if the rest of the way is obstructed enough to prevent the passage of the public.
3. If His Lordship is saying that an unlawful obstruction, where the only public passage is by way of an unauthorised stile, is a case fit for exercise of discretion not to make an order, then this goes against the intention of parliament in s.147: either the stile can be authorised (with safeguards and standards), or it should be removed. A court exercising discretion not to make an order there is exercising discretion in favour of breaching statute law. A court should not do that.
4. Given that Moore-Bick LJ spoke only of where a partial obstruction "may arise", which it did not on the facts and points of law in this case, his comments here are *obiter*. The Herrick exposition on 'significantly interferes' is what drives the exercise of discretion, rather than the physical extent of an obstruction that amounts to 'significant interference'.
5. Cranston J in Herrick also notes at [42–44] that s.130A is similar to, and in place of, judicial review. In short, if an obstruction is unlawful, the usual course should be to order its removal, even if it can be "surmounted with some effort".
6. Rights of Way Circular (1/09) Guidance for Local Authorities Version 2 October 2009:

   > [6.16] "The public are entitled to expect that all rights of way will be kept open and available for use. It is important that authorities act quickly to investigate any complaint made to them. Authorities should ensure that any obstructions they discover or have reported to them are removed as soon as is reasonably practicable. Section 143 of the 1980 Act enables authorities to

[21] Also Kind v. Northumberland County Council [2012] EWHC 603 (Admin) Case No: CO/554/2011.

secure the removal of structures on the highway by serving notice on the person responsible and by removing the obstruction themselves at the person's expense should that person fail to comply with the notice. Section 149 of the 1980 Act also enables an authority to have any 'thing' deposited on a highway so as to constitute a nuisance or danger to users removed forthwith."

The court's discretion whether to make an order

1. In Herrick v. Kidner [2010] EWHC 269[22] (Admin), Cranston J.

   [63] "There is a discretion in the court to make no order, even if the preconditions are satisfied: the introductory words of section 130B(4)."

2. In Ernstbrunner v. Manchester City Council and Males, Manchester Crown Court. 20 February 2007. Mr Recorder Pratt QC & Mrs McGinn JP.[23]

   [16] "If we came to the conclusion that this was not only an obstruction, but also a significant obstruction, then even if we found we were not precluded from making an order under section 130B(5) nevertheless we have an unfettered discretion as to whether to make an order or not. (This is made plain by the use of the word 'may' in section 130B(4)) The Act is silent on any factors which we should or should not, have regard to in the exercise of this discretion. That said, it seems to us that the discretion has to be exercised in the context of the duties imposed upon the highway authority by virtue of sections 130(1) and (3) of the Act which is 'Protection of Public Rights'."

3. Herrick v. Kidner and Somerset County Council 9 February 2009, HH Judge Longman (on appeal by Mr & Mrs Herrick from the decision of the magistrates):

   [53] "Under s130B(4) we have a discretion whether to make an order, and what order to make. In exercising that discretion, we bear in mind that SCC still has the power under s143 to remove any remaining obstruction. While it is right that we should formulate our order being mindful of that power, we do not consider that the existence of the power should determine what order we should make, i.e. we do not feel bound to order the removal of all parts of the structure which constitute an actual obstruction.
   [54] "That is not the order which we are now invited to make by Mr Kidner, the original applicant. Mr Laurence on his behalf invites us to conclude that it is sufficient to order the removal of the central pillar and gates, allowing the outermost pillars to remain.

   [55] "We do emphasise, however, that we decline to make an order requiring the removal of all parts of the structure which lie on the footpath because of the particular facts and history of this case. We anticipate and venture to suggest that the circumstances in which a court dealing with such an application as this finds it just and proper to allow any part of a structure which significantly interferes with the exercise of public rights of way to remain on a footpath will be rare indeed."

4. Similarly, in an application for an order to put a highway in repair,[24] where the court has a 'may' discretion, in Paul Sorensen v. Cheshire County Council 9

---

[22] Herrick v. Kidner was an appeal by way of case stated.
[23] Also Ernstbrunner v. Manchester City Council [2009] EWHC 3293 (Admin)
[24] S.59 Highways Act 1959, forerunner to s.56 Highways Act 1980.

November 1979 Knutsford Crown Court, Judge David QC, sitting with two Justices: “It is manifestly out of repair and this Court has no alternative but to order that the road be put in repair … We have no option but to order that that road be put into repair,”.

5. In Kind v. Northumberland County Council [2012] EWHC 603 (Admin), [2013] 1 WLR,[25] Moore-Bick LJ.

   This case concerned a cattle grid across the full width of a bridleway, where the public were forced to use a bypass gate off the highway. There was no dispute that the cattle grid ‘significantly interfered’ with the right of way.

   Headnote, “Per curiam. Where an obstruction has the effect of stopping up the highway very powerful considerations indeed are required to justify a court’s refusal to make an order, under section 130(B) of the Highways Act 1980, that the highway authority take steps to secure its removal.”

   [21] “It follows that the court has a discretion whether to make the order sought by the applicant. In my view that discretion is one to be exercised by the Crown Court itself and accordingly the matter will have to be remitted to that court to enable it to make its own decision. For that reason I decline to answer the question posed in para 33.2.2 of the case stated. However, since the court has made it clear how it would have exercised its discretion and has asked this court to say whether such a decision would have been lawful, I think we should grapple with the question and express our own conclusion on the point.

   [22] “A number of factors have a particular bearing on the exercise of the discretion in this case, some of which are of general application and some of which are peculiar to the arrangements affecting this particular bridleway. The starting point is the duty imposed on the local authority as the highway authority by section 130 of the 1980 Act to assert and protect the rights of the public to the use and enjoyment of the bridleway and to prevent, as far as possible, its stopping up or obstruction. The section as a whole is drafted in a way which reflects the fundamental importance of the right to use and enjoy the highway, an importance which is emphasised by subsection (2). Which empowers any council to assert and protect those rights in relation to any highway within its area … If the obstruction in question is partial, questions of convenience in the use and enjoyment of the highway may arise, but where, as here, the obstruction is to the whole width of the highway its effect is to stop up the highway at that point. Clearly that is far more serious than a partial obstruction, or an obstruction such as a stile that can be surmounted, albeit with some effort. In my view where the obstruction has the effect of stopping up the highway very powerful considerations

[25] Kind v. Northumberland County Council was appeal by way of case stated.

indeed are required to justify the refusal of an order to take steps to secure its removal.

[24] [The Court next considers the powers available to a highway authority to stop-up or divert an obstructed highway so as to address an unlawful obstruction] “In my view the existence of those provisions is an important factor to take into consideration, since, if the court were to exercise its discretion against granting the order which the applicant seeks, it would effectively allow the highway authority the achieve a similar outcome [by forcing the public off the highway, around the obstruction] without complying with the statutory procedures and without obtaining for the public the rights that they would normally enjoy over that section of the bridleway.

[25] “As I have already indicated, it is for the Crown Court to weigh up the competing considerations and to decide how it should exercise its discretion, but for my own part I do not think that the balance can lie in favour of declining to make the order. The right of the public to use and enjoy the highway and the informal nature of the diversion seem to me to make that an impossible conclusion to sustain.”

6. Is Moore-Bick LJ intimating to the inferior courts that they should exercise discretion not to make an order in respect of a partially obstructed way? His Lordship speaks of “a stile that can be surmounted, albeit with some effort”. Does he mean an unauthorised stile, or an authorised stile? If this stile is authorised (probably by s.147), or is a limitation on the dedication of the way, then it is anyway not susceptible to an application or order under s.130A. If it is an unauthorised stile then it is necessary to “surmount” it only if the rest of the way is obstructed enough to prevent the passage of the public.
7. If His Lordship is saying that an unlawful obstruction, where the only public passage is by way of an unauthorised stile, is a case fit for exercise of discretion not to make an order, then this goes against the intention of parliament in s.147: either the stile can be authorised (with safeguards and standards), or it should be removed. A court exercising discretion not to make an order there is exercising discretion in favour of breaching statute law. A court should not lightly do that.
8. Further, if a court could, and courts did, exercise discretion not to make an order against such an unauthorised structure, then if a highway authority, seeking to use s.143 Power to remove unauthorised structures from highways, could be told by the alleged offender, “you cannot make me do this because courts do not always make orders for removal of unauthorised structures, and I expect consistency and even-handedness in your dealings with me.” If a s.130A notice against a partial obstruction is a discretion-lottery as to outcome, then s.143 largely becomes a dead letter. And plainly the Secretary of State in

providing the s.130A process intended[26] that s.143 is, and would remain, fully available to highway authorities whether or not s.130A is engaged.

9. This brings the matter back full circle to HH Recorder Pratt QC in Ernstbrunner, "The Act is silent on any factors which we should or should not, have regard to in the exercise of this discretion. That said, it seems to us that the discretion has to be exercised in the context of the duties imposed upon the highway authority by virtue of sections 130(1) and (3) of the Act which is 'Protection of Public Rights'."

10. Similarly, HH Judge Longman in Herrick, "We anticipate and venture to suggest that the circumstances in which a court dealing with such an application as this finds it just and proper to allow any part of a structure which significantly interferes with the exercise of public rights of way to remain on a footpath will be rare indeed".

11. Equality law needs to be factored in here: for example how people with a mobility disability can cope with getting along the highway.

12. Users of 'mobility scooters' have a right to use footpaths, bridleways and restricted byways. In a letter of 10 March 2021 to the author's MP, Lord Kimble, DEFRA Under-Secretary, says, "I am replying as the Minister responsible for this policy area. The guidance here explains that all footpaths, bridleways and byways are open to mobility scooter users"

13. Given that Moore-Bick LJ spoke only of where a partial obstruction "may arise", which it did not on the facts and points of law in this case, his comments here are *obiter*.[27] The Herrick exposition on 'significantly interferes' is what drives the exercise of discretion, rather than the physical extent of an obstruction that amounts to 'significant interference'.

14. Cranston J in Herrick also notes at [42–44] that s.130A is similar to, and in place of, judicial review. In short, if an obstruction is unlawful, the usual course should be to order its removal, even if it can be "surmounted with some effort".

---

[26] Rights of Way Circular (1/09) Guidance for Local Authorities Version 2 October 2009, [6.16], see above.

[27] Kind as an authority is at the same level as Herrick.

Costs claims and awards. The statutory context

1. The Magistrates' Courts Act 1980 provides,

   64 Power to award costs and enforcement of costs.

   (1) On the hearing of a complaint, a magistrates' court shall have power in its discretion to make such order as to costs—

   (a) on making the order for which the complaint is made, to be paid by the defendant to the complainant;

   (b) on dismissing the complaint, to be paid by the complainant to the defendant, as it thinks just and reasonable.

2. The award of costs is an arcane and quite difficult matter. Where an applicant for an order is represented then that professional will deal with costs applications (in either direction). Where a member of the public in person, unrepresented, pursues a s.130A notice to the magistrates' court, it might be thought that costs would 'follow the event', but in the civil jurisdiction of the magistrates it is not that simple.

3. A litigant in person in the magistrates' court can be awarded costs (see below) for the time they have expended in preparation and travel, but the bigger issue to an individual is likely to be recovery of the fees payable to lodge the application, and then to have a hearing before the justices. This is a lot of money for ordinary people.[28]

[28] At the time of writing, the fee to file an application is £205 and for a hearing a further £515.

Particular matters in s.130A costs awards

1. S.130D s.130B: costs, provides,

   Where an application under section 130B above is dismissed by virtue of paragraph (a), (b) or (c) of subsection (5) of that section, the court, in determining whether and if so how to exercise its power under section 64(1) of the Magistrates' Courts Act 1980 (costs), shall have particular regard to any failure by the highway authority to give the applicant appropriate notice of, and information about, the grounds relied on by the authority under that paragraph.

   - (5) (a) is 'seriously disputed'.
   - (5) (b) is 'no duty under s.130A(2)'.
   - (5) (c) is 'going to be removed anyway having regard to number and seriousness of obstructions'.

Alleged obstructors' costs

1. S.130C provides,

   (6) On the hearing of the application any person who is, within the meaning of section 130A above, a person for the time being responsible for the obstruction to which the application relates has a right to be heard as respects the matters mentioned in section 130B(4) above.

2. In Wheeler v. Norfolk Co Co [2014] EWHC 2232 (Admin), an application under s.130A for a notice had failed in the magistrates' court. The magistrates made an order for costs against the applicant, in favour of the defendant council; and also an order against the applicant in favour of the person named by the applicant as (in his view) responsible for the obstruction. That 'interested party' (as the judge called him) appeared in the hearing as he was entitled to under s.130C(6). Held that the magistrates had no power to make this 'interested party' award, they were constrained to the scope of s.64 of the Magistrates' Courts Act 1980.

The magistrates' discretion in costs. The view of the courts

1. In Riggall v. Hereford County Council [1971] Ch 301, at 305, Mr Riggall used the predecessor of the Highways Act 1980 s.56 notice process to oblige the council to repair a road 2 miles long, of which 600 yards formed the only access to Mr Riggall's premises.
2. Lord Widgery CJ cited a dictum in Cooper v. Whittingham [1880] ChD 501:

   > [504] "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part – no omission or neglect which would induce the Court to deprive him of his costs – the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs; but where there is nothing of the kind the rule is plain and well settled, and is as I have stated it."

3. Lord Widgery said, "For my part I think that that ought to be a general guiding line in regard to costs in the civil jurisdiction of quarter sessions." His Lordship then qualified that by saying he "recognised the argument" put forward that the complainant (in Riggall) was "acting merely as a member of the public", and "that the public themselves have not benefitted adequately out of the bringing of proceedings". But that was left "for another day", and the general rule applied. Mr Riggall got his costs.
4. The clear difference between Mr Riggall and an applicant for an order under s.130(A) is that the applicant is seeking to open a public right of way on which he or she has no greater interest than as a member of the public wishing to use that way. There is no 'private gain'. And, further, parliament has expressly provided the s.130 process to be used by individual members of the public to oblige a highway authority to do what it should be doing anyway. It is far-fetched to say that parliament intended that a member of the public successfully engaging this process, and acting properly, should be left with a bill of many hundreds of pounds.
5. In Bradford City Metropolitan District Council v. Booth, The Times, 31 May 2000, this concerned the issue of taxi licences, a matter where the local authority had the power to make a quasi-judicial decision. In such a circumstance, where the council had exercised its discretion reasonably, but that decision had been overturned on the facts on appeal, then Lord Bingham LCJ indicated that two tests should be applied by the Magistrates in exercising their discretion under s.64 of the Magistrates' Court Act to award costs.

   > (i) "the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and

(ii) “the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.”

6. It would be hard to say that a council reasonably brought before a court with a s.130A notice had “exercised its discretion reasonably”. The council has no discretion not to comply with s.130(1) and (4) of the Highways Act 1980. That is the whole point of the s.130A process.
7. In Kind v. North Yorkshire County Council (2000) (Pockstones Moor), the magistrates’ reasons for awarding Mr Kind his costs included, “Applying the second test [as above] the Appellant County Council had refused to carry out its statutory duty to repair the highway in question. This was an unreasonable decision and an abuse of its responsibilities, which had forced the Respondent to commence proceedings”.
8. Lord Bingham’s second test here might be adapted to the circumstances of a council that has failed to clear, or promise to clear, a qualifying unlawful obstruction: ‘the need to encourage public authorities to carry out their statutory duty to clear unlawful obstructions in the public interest.’
9. If a s.130A complainant, with a valid case, cannot go to the magistrates for fear of not getting the court fees back, even when successful, then this will simply stop ordinary people from going down this path, frustrating the will of parliament.
10. If the s.130A complainant cannot be reasonably sure of getting their costs then this will very quickly teach highway authorities that the s.130A notice process is a toothless dog, which can simply be ignored, frustrating the will of parliament.

Costs for litigants in person

1. Until 2001 litigants in person could not claim their costs when successful in the magistrates' court, but could be ordered to pay costs if unsuccessful.
2. The Litigants in Person (Costs and Expenses) Order 2001 No. 3438 (L.30).This amending order was made directly consequent upon an appeal by way of case stated against the decision of Harrogate Justices to award costs to a successful litigant in person after their making an order (s.56 of the Highways Act 1980, to put a road into repair).The Administrative Court held that the scope of the Litigants in Person (Costs and Expenses) Act 1975 did not, at that time, extend to litigants in person in the magistrates' courts. Parliament immediately corrected this anomaly by way of this statutory instrument.
3. The costs that a litigant in person can claim for, and how this will be calculated, are set out in the Civil Procedure Rules, section 46.5, Litigants in person. This is contained in PART 46 – COSTS – SPECIAL CASES, on the justice.gov.uk website.