Maintenance and Repair of Minor Highways

British Horse Society Guidance

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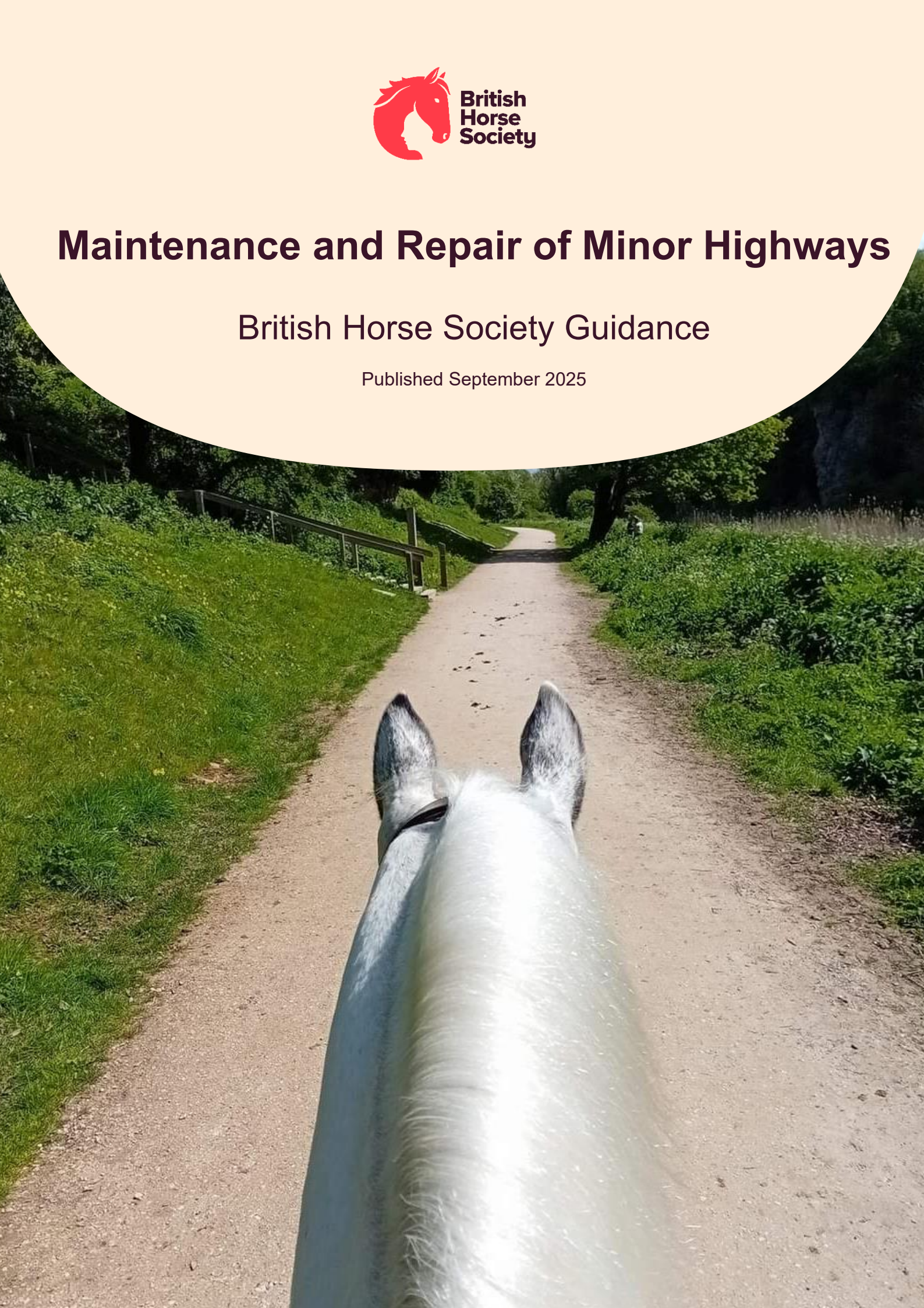

Maintenance and Repair of Minor Highways

Caution. This guidance is based on first-hand experience of the s.56 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 or Crown Court engages statutory forms and procedures that demand understanding and care.

BHS volunteers and members must not initiate a s.56 notice with a highway authority, or take the matter to court, in the name of the BHS, without written consent from BHS HQ. Please contact access@bhs.org.uk in the first instance to discuss.

Government Guidance

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

> [6.5] "Maintenance should be such that ways are capable of meeting the use that is made of them by ordinary traffic at all times of the year. Under appropriate circumstances this might require the importation and application of suitable hard materials. Maintenance need not conform to an arbitrary standard of construction or appearance, but it should harmonise with the general appearance and character of the surroundings. Guidance[1] has been issued on best practice in the maintenance of byways."

In a letter[2] DEFRA gives a view regarding surface standards for cycles on rights of way, the informal view cites Circular 2/1993,

> "The main consideration in determining the degree of maintenance for individual paths or ways is that they should serve the purpose for which they are primarily used and not that they should conform to an arbitrary standard of construction or maintenance. Generally speaking, they should be capable of meeting the use that is normally made of them throughout the year."[3]

[1] *Making the best of byways. A practical guide for local authorities managing and maintaining byways which carry motor vehicles* (DEFRA December 2005).

[2] 21/12/98 from DEFRA to Alan Kind.

[3] The same advice remains current in Wales, where Circular 5/93 remains in force.

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Introduction

1. The history of the highway is very much the history of the condition of highways. The public wanted, and want, highways to be in good enough condition for safe use, but – certainly two hundred or more years ago – nobody wanted to provide the labour, or pay the rates, to have the work done. Whereas two hundred years ago the state of an unsealed bridle road mattered for commerce and the necessities of life, now that bridle road matters for recreation and quality of life. Yet, essentially, the law remains the same.[4]
2. This paper focuses on maintenance and repair of minor highways as used for recreation. The phrase 'bridleways and byways' is used, where 'byway' means a byway open to all traffic (BOAT), a restricted byway or an unsealed unclassified road not on the definitive map and statement.[5]
3. Since the introduction of the definitive map and statement by the National Parks and Access to the Countryside Act 1949, with its process of a national survey of public rights of way, the following 75 years have seen the emphasis in rights of way management being on 'does a route exist and who has a right to use it?' Before the era of recreational paths and minor roads the emphasis was squarely on 'who is obliged to repair this?' The evolution of workaday highways (even if no more than a local bridleway) into recreational facilities for the wider public has carried with it the general statutory duty to keep these ways in repair. From the 1980s and into the new Millennium, a considerable amount of national and local government money went into raising the standard of public rights of way, hauling up with it the baseline of expectation as to how good these paths should be. Now (2025), as local government funding dries up, highway authorities are cutting back hard on their rights of way and highways functions, and tasks such as trimming undergrowth are further down the list of priorities.
4. Just what is 'repair and maintenance', and how good does a bridleway or byway have to be? These notes look at the application of the law, in everyday practice, on the repair and maintenance of public rights of way and minor roads. There is a good body of case law on highway repair, but actual cases involving rights of way and minor roads tend to be disposed of by magistrates and Crown Court judges, albeit generally in light of the general principles. The decisions of these inferior courts may not be legal precedent, but they do give an indication of how

[4] This is English law, which historically also embraces Wales. Recent statute law is just starting to split the Welsh code away from the English, but so far not as regards repair and maintenance.

[5] 'Unsealed unclassified road' is a term widely understood in the rights of way world, but which carries issues with it. Essentially this is a highway on a highway authority's 'list of streets' made for s.36(6) of the Highways Act 1980, but which does not also appear on the definitive map and statement as a BOAT, restricted byway, bridleway or footpath. The actual traffic status of any s.36(6) highway is always, in the end, a matter of evidence.

the tribunals tasked with resolving disputes are likely to respond; there is no better current indicator of what amounts to 'in sufficient repair', and what does not.[6]

5. There is some crossover between the way any particular way was repaired, or considered for repair, and the historical status of that way. Thus 'repair records' can be, and sometimes are, used in recording historical highways on the definitive map and statement. That aspect is considered elsewhere along with other historical evidence issues.

[6] Crown Courts are viewed as inferior – that is, not setting a precedent – in these highway matters, although the reasoning of a judge may be taken as persuasive and helpful elsewhere.

Maintenance and repair: definitions & duties

1. S.329(1) of the Highways Act 1980 provides:

   "'maintenance' includes repair, and 'maintain' and 'maintainable' are to be construed accordingly;"

   Looking at dictionary definitions:

   Maintain (v): "To keep up, preserve, cause to continue in being (a state of things, a condition, an activity, etc.); to keep vigorous, effective, or unimpaired; to guard from loss or deterioration" (OED).

   Repair (v): "To restore (a damaged, worn, or faulty object or structure) to good or proper condition by replacing or fixing parts; to mend, fix; to bring or restore (an immaterial thing) to normal or proper condition, compensating for some form of deterioration or downturn" (OED).

2. People tend to use the terms synonymously, but the distinction is important, and reflects society's shift in attitude towards public roads, starting around the time of the General Highway Act 1835,[7] and continuing with the advent of the pedal cycle and, particularly, the spread of commercial and private motor vehicles in the first half of the twentieth century. Simply, when the burden for highway repair fell on the inhabitants of the parish (where the road lay), the best work done by statute labour was grudging repair of defects, and not much of that.[8] From soon after the Great War, until the mid-1960s, roads that were in use by the public with motors were progressively 'improved' with a sealed surface – usually a 'blacktop' – and highway authorities shifted from retroactive repair to a proactive maintenance regime for less-important roads. The Highways Act 1959 (the first major Highways Act update since 1835) contained the recognition of the synonymous relationship between maintenance and repair that is continued in the Highways Act 1980.

3. Crudely put, maintenance stops problems arising, and repair fixes problems when they do arise. Highway authorities can plan maintenance, but the need for repair can be and often is unexpected: floods and hard winters are the usual culprits. Failure to maintain almost inevitably increases the need for later repair. This can be an important factor when it comes to highway authority and court attitudes to dealing with problems.

4. A highway that is in good enough condition for the 'ordinary traffic' that uses it is said to be 'in repair'. Sometimes it is said to be in 'good repair', but good enough condition is more a threshold than a sliding scale. A highway is either 'in repair', or it is not; if it is then the statutory duty is discharged. A member of the public might prefer that the highway should be even better, but if the highway is in repair, then 'even better' is a matter of improvement, and not of maintenance or

[7] An Act to consolidate and amend the Laws relating to Highways in that Part of Great Britain called England.

[8] Where at least some of the inhabitants had to provide manual labour, tools, and transport for a number of days each year.

repair. Improvement is discretionary, a power of the highway authority.[9] 'In good repair is laudable, but 'in sufficient repair' is generally good enough. But what amounts to 'in sufficient repair'?

5. In Burnside v. Emerson [1968] 1 WLR 1490. Lord Diplock:

> "The duty of maintenance of a highway … is a duty not merely to keep a highway in such state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing-up of Blackburn J., in 1859 in R v. Inhabitants of High Holborn, 'non-repair' has the converse meaning."

6. In Haydon v. Kent County Council [1975] 1 QB 343. Lord Denning:

> "'Repair' means making good defects in the surface of the highway itself so as to make it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition… [10] Thus deep ruts in cart roads, potholes in carriage roads, broken bridges on footpaths or bushes rooted in the surface make all the highways 'out of repair'."

7. Both views were considered and approved by the Lord Chancellor in the Court of Appeal in Department for Transport, Environment & the Regions v. Mott Mac-Donald & Others [2006] EWCA Civ 1089.

[9] Highways Act 1980, s.62(2) "Without prejudice to the powers of improvement specifically conferred on highway authorities by the following provisions of this Part of this Act, any such authority may, subject to subsection (3) below, carry out, in relation to a highway maintainable at the public expense by them, any work (including the provision of equipment) for the improvement of the highway."

[10] That is the combined effect of the statements of Blackburn J. in R v. Inhabitants of High Halden (1859) 1 F&F 678; of Diplock L.J. in Burnside v. Emerson [1968] 1 W.L.R. 1490, 1497 and Cairns L.J. in Worcestershire County Council v. Newman [1975] 1 W.L.R. 901, 911.

Highway terminology

1. These Notes are primarily about public rights of way and minor public vehicular roads. In order to try to define a baseline of 'in sufficient repair' it is necessary to define (statutorily, or as a matter of practice) the various types of public rights of way and public roads. There are three classes of highway at common law: foot road (footpath), bridle road (bridleway) and cart road (carriageway). Carriageway has a number of species within the class. Defining the highway describes the public traffic that has a right of way. Describing the traffic of a highway indicates the necessary baseline standard of repair.
2. S.329(1) Highways Act 1980:

   "'Bridleway' means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway."[11]

   "'Carriageway' means a way constituting or comprised in a highway, being a way (other than a cycle track) over which the public have a right of way for the passage of vehicles."
3. S.66(1) Wildlife and Countryside Act 1981:

   "'Byway open to all traffic' (BOAT) means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."
4. S.48(4) Countryside and Rights of Way Act 2000:

   "'Restricted byway rights' means –
   (a) a right of way on foot,
   (b) a right of way on horseback or leading a horse, and
   (c) a right of way for vehicles other than mechanically propelled vehicles; and
   'Restricted byway' means a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way."
5. 'Unclassified road' is not a type of highway statutorily defined, but for the purposes of these Notes means a minor sealed public vehicular road recorded on the highway authority's 'list of streets' as kept under the provisions of s.36(6) of the Highways Act 1980.
6. 'Unsealed unclassified road' is not a type of highway statutorily defined, but for the purposes of these Notes means a minor unsealed public vehicular road recorded on the highway authority's 'list of streets' as kept under the provisions of s.36(6) of the Highways Act 1980, and which also falls within the definition in

[11] This definition is modified by S.30 of the Countryside Act 1968 which provides (30(1)) that pedal bicyclists have a right of way, and (30(3)) that there is no obligation on the highway authority to repair, or do anything to facilitate the use of the bridleway, for cyclists.

s.22BB(1)(ii) of the Road Traffic Regulation Act 1984: “a carriageway whose surface, or most of whose surface, does not consist of concrete, tarmacadam, coated roadstone or other prescribed material”.[12]

7. ‘Metalling’ a highway does not mean giving it a sealed surface. ‘Metal’ comes from *metallum*, Latin for mine or quarry, and a road surfaced with stone is metalled.

[12] As amended by s.72 of the Natural Environment and Rural Communities Act 2006.

Vehicle terminology and use

1. Cart: A strong open vehicle with two or four wheels, typically used for carrying loads and pulled by a horse.
2. Wagon: A four-wheeled, usually horse-drawn vehicle with a large rectangular body, used for transporting loads.
3. Wain: a usually large and heavy vehicle for farm use (a hay wain).
4. ‘Wagon’ and ‘wain’ come from the same linguistic root. Both were heavy road vehicles, and required a strong team of horses or oxen to pull them. Wains, in the sense of ‘the common carrier’, used carriage roads, and made a thorough mess of them.
5. Carts as a class of traffic encompassed small horse-drawn, two-wheel vehicles. One-horse carts were common, as were light traps and gigs. The difference is that carts were mainly load carriers, and traps and gigs were people (and luggage) carriers. Carts would generally be led by the carter on anything other than a smooth, flat road. Why waste valuable load capacity when the cart moved only at walking pace? Small carts, as farm and local business traffic, were ubiquitous – the Celtic tribes in pre-Roman Britain had spoked-wheel technology and used small carts in everyday life. One horse can pull far more weight in a cart than it can carry on its back, but it cannot handle steep hills as well, nor very rough or boggy ground. Carts were primarily local. Sufficiently fast long-distance road traffic for goods (e.g. fresh fish, salt) remained with the packhorse man, other than on the turnpikes, almost up to the motor age in places (the railways diverted a lot of goods traffic, of course).
6. The best analogy for the practicalities of a small cart or trap might be a low-powered motor van. Such a motor can carry its designated load adequately, but it just does not have the power or torque to deal with significant additional load, steep hills, rough ground, deep snow or headwinds. Similarly, the one-horse light cart or trap can ‘cruise’ along very well, even on relatively rough tracks, but cannot cope with extremes of gradient or surface condition.
7. Carts are little used today outside of agricultural vehicle enthusiast meetings. Small ‘traps’ are still used for recreational driving. Some are traditional, but more are modern takes on the old style. The very great majority are one-horse (more often a pony) and are often used on bridleways where, although there is no right of way, few people seem to object.

Assessing the current and necessary state of repair of a highway

1. This section looks at how the courts consider the three key elements in any action seeking to oblige a highway authority to repair a highway. These are:
    - 'the ordinary traffic of the neighbourhood',
    - the character of the highway,
    - and the level of repair necessary to keep the way open for this 'ordinary traffic'.
2. These tests for the court were set out when, in 2021, Mr Robert Kilner made an application to the magistrates for an order under s.56 of the Highways Act 1980 obliging Cumbria County Council (as it then was) to put a substantial part of the UCR5015 into "proper repair … within a reasonable period of time".[13] In the end Mr Kilner withdrew his application, but in the initial proceedings HH District Judge Temperley issued his 'Ruling on Preliminary Legal Issues' (21 April 2022) in which he deals with the core issues (addressed in turn below).
3. This case was in the magistrates' court, and so makes no binding precedent, but Judge Temperley carried out an assessment of the judgments of the superior courts and distilled the law in context. The Judge posed this question:
4. "Whether the correct legal test to be applied is whether the route subject to the Complaint is reasonably passable without danger caused by its physical condition for the ordinary traffic of the neighbourhood which passes or may be expected to pass along it;" Judge Temperley then answered the question by reference to the case law before him, and found [key points]:
5. "… it is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change. No person really contests that principle.
6. "If that test is met, then the authority will not be excused from putting the road into repair simply because it was little used or when from want of repair it had become impassable.
7. "The needs of ordinary traffic are not only to be judged by the level of public clamour. They should be judged according to the physical circumstances and a rational assessment of human conduct.
8. "The duty of this court in this case is to do the best it can to decide what ordinary traffic would use this stretch of the public highway at all seasons of the year if it were in a passable state judged by the standards of the year 2[xxx].[14]
9. "The historical use of the route may be of some assistance but the meaning of the 'ordinary traffic of the neighbourhood' must involve an assessment of

[13] South Cumbria Magistrates' Court Case No. 032100042838.

[14] Citing Colin Seymour v. East Riding of Yorkshire Council (2000) case number A200004.

the current use of the route and the anticipated use of the route if it were made passable, taking into account the characteristics of the route outlined above.

10. “Most importantly, any assessment of the type of traffic which passes or may be expected to pass along this particular route must be evidence based …

11. “… the fact that the route is also a BOAT may offer some assistance in assessing both the current and the likely future traffic along the route.”

Cart roads and carriage roads

1. The distinction between cart roads and carriage roads matters when considering what is the ordinary traffic of a particular highway, and what is its historical character. It is important to understand how the legal terminology has changed, even where a particular highway has not.
2. Highways historians[15] say that carriages in the sense of 'coaches' – horse-drawn vehicles by which people made journeys – hardly existed in the time of Queen Elizabeth I, and that public 'stage' coaches only became practicable in the early eighteenth century, as the turnpiking movement gained a hold. In the 'General Highway Act' of 1767, in s.7, reference is made to 'Waggon, Cart, or Carriage ...' and in s.11 only to 'Cartway', rather than 'carriageway'.
3. In the General Highway Act 1835, 'Highway' is defined (in s.5) to encompass "… Carriageways, Cartways, Horseways, Bridleways, Footways, Causeways …" In ss. 64 & 65 (and in other sections), the reference is to 'Carriageway or Cartway', suggesting a distinction between the two, although this is not defined.
4. The use of the term 'public carriage road' is ubiquitous in parliamentary inclosure awards. Some awards set out 'public highways', and all or most of the roads thus set out are named, e.g., 'Elsdon Public Carriage Road'. Other awards describe the group of 'roads' set out under the heading 'public carriage roads'. An inclosure awarded public carriage road will typically be '… for the public to pass and repass with carts and all manner of carriages, horses, cattle, on foot …'
5. The setting out of a public carriage road in an inclosure award does not, of itself, indicate that the road is to be surfaced to a 'carriage-worthy' standard, although many were so made and surfaced. Some awarded public carriage roads are named, e.g., 'The Drift Road' (Northumberland) and 'Bolter's Drove' (Dorset) and were not required by the inclosure process to be made up (metalled), reflecting their utility as droving routes. Such routes would have been generally passable with pony traps and carts, but it is unlikely that they would have been in general use by a 'gentleman's carriage', or a stage coach.
6. The term 'cart road' is not much in general use after the late eighteenth century and before the twentieth century, other than occasionally as a descriptive and somewhat derogatory term for a very minor and neglected public road.
7. 'Cart road' seems to have come back into use more widely when roads were being metalled and tarred for motor use in the period after the Great War. A cart road was a road that had been left behind by progress – left for farm carts – by people in cars and trucks, to whom the longer distance around, by the sealed road, was of little consequence. When roads were increasingly being sealed, even a good, metalled carriage road of the pre-motor era could have looked crude in comparison.
8. This descriptive usage for 'cart road' became reflected in statutory practice by the National Parks and Access to the Countryside Act of 1949, and the guidance

[15] E.g. Beatrice and Stanley Webb in *The Story of the King's Highway*.

regarding the (non-statutory) description of roads used as public paths (RUPPs) as “cart road footpaths” and “cart road bridleways”. As a term, ‘cart road’ needs little if any further description.

9. Lord Denning in Haydon v. Kent County Council [1975] 1 QB 343 grasps the distinction in form and function between a cart road and a carriage road, and again in R v. Secretary of State for the Environment ex p. Hood [1975] 1 QB 891 (at 896-C) also noting the use of the term ‘cartway’ in R v. Saintiff (1705) 6 Mod. Rep. 255.

Cart roads: 'in sufficient repair'

1. Cart roads, in both the old and modern sense, are not invariably unsurfaced. Many are stone surfaced, either with rough stone to fill holes, or originally well made, and repaired afterwards by the highway authority. Once their utility for farm and local motor traffic diminished, the level of repair diminished, or it stopped altogether.
2. If you take a stone-surfaced road, in reasonable condition, which means sufficient drainage and no big potholes or washouts, then a 1960s car such as a Ford Anglia will get along it slowly but safely, and a mountain bicycle rider will have little problem. If the stone is 'blinded' with smaller stones –' fines' – then a pony and trap will get along safely, and so can a saddle horse. Most stone roads have grassy margins and a saddle horse can generally pick a way along these, although drainage ditches are a very real danger here.
3. If you take a 'grass drove' – a cart road that has never had any stone surface – then so long as it is sufficiently well drained, not affected by recent extreme weather and not chewed up (e.g. by heavy vehicles or machinery) then a car with suitable tyres (tall, narrow, decent tread) and good ground clearance will get along slowly, as will mountain bikes and horse traps; but residual wetness is more of a problem: that is why some roads were stoned, and later sealed.
4. If a cart road, whether stoned or grass, is free from deep ruts (per Lord Denning) and big potholes, is properly drained (which is the key to road maintenance, whether sealed-surface, or not) and has the inevitable sloughs filled with Mr Justice Wills' "occasional spadeful of gravel", then the road is generally passable, with necessary skill and care on the part of the driver, by appropriate vehicles.[16]
5. What is an appropriate vehicle for use on a cart road in 2024? What sort of vehicle would be 'ordinary traffic'? A cart, obviously; and single-horse traps and gigs, which are the people-carrier equivalents of carts. A pedal cycle designed and equipped for that sort of surface. A motor car or motorcycle of the type that can reasonably get along when the road is in sufficient repair for a pony and trap, or a pedal cycle.

[16] Eyre v. New Forest Highway Board (1892) JP 517, 13 August 1892

BOATs: 'in sufficient repair'

1. Byways open to all traffic (BOAT) are a particular type of minor vehicular public highway (mainly 'cart roads' in origin) and which have statutory characteristics which might (but not necessarily do) influence the baseline condition of sufficient repair.
2. S.66(1) of the Wildlife and Countryside Act 1981 defines a BOAT:

   "'Byway open to all traffic' (BOAT) means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used."
3. S.54(7) of the Wildlife and Countryside Act 1981 provides that nothing in s.54, or s.53, obliges a highway authority to provide on a BOAT a metalled carriageway or a carriageway which is by any other means provided with a surface suitable for the passage of vehicles.[17] Neither s.53 nor s.54 in themselves operate against the liability of a highway authority to keep a BOAT in sufficient repair.[18]
4. What of the 'mainly used …' clause in the definition of BOAT? Why is that present? It is to limit the types of public vehicular roads that can be recorded in the definitive map and statement to those with a similar 'use character' to footpaths and bridleways. A BOAT is 'conclusively vehicular' by its statutory definition. The level of maintenance that a BOAT needs depends upon its physical character, weighed together with the ordinary traffic of the neighbourhood which uses the BOAT. There has to be a baseline below which even BOATs with little public vehicular use are out of repair. Since the origin of most BOATs (but not all: some originate from modern-era motor traffic user) is as horse-era cart or carriage roads, that is a reasonable baseline: passable with care for a horse and cart, or the motor-era equivalents: motors with some off-blacktop ability.

[17] That is 'vehicles', and not only motor vehicles.

[18] All of s.54 has been repealed by the Natural Environment and Rural Communities Act ss. 47(1), 102, 103(3) and sch. 16 Pt II, as commenced by SI 2006/1172 (England) and SI 2006/1279 (Wales).

Restricted byways: 'in sufficient repair'

1. A restricted byway is much the same as a BOAT, but with the rights for private motor traffic stripped out. There is no burden on the highway authority to provide a metalled surface, although metalling may prove to be the only way to put, and keep, the way in sufficient repair.
2. Given that parliament has in recent times twice legislated for the traffic definition, and recording, of restricted byways, it is difficult to see how the 'ordinary traffic' on historical restricted byways does not include pony traps (if not 'carriages').[19] [20]

[19] Restricted byways feature in the Countryside and Rights of Way Act 2000, and the Natural Environment and Rural Communities Act 2006.

[20] 'Historical' restricted byways, almost by definition, originated from and for horse traffic. It is possible to have a restricted byway dedicated on the basis of recent user evidence, and while such embraces horse-drawn vehicles, the way may simply be too narrow to take them.

Bridleways: 'in sufficient repair'

1. In the age when what are today's recreational routes were everyday utilitarian highways, then (the occasional footpath case aside) it was the state of a road for the passage of horses that defined and described its condition. Cart roads were generally in poor condition. On more important routes, either for the passage of riders on horseback, or of pack horses, 'horse causeys' (causeways) were sometimes made within (generally to one side of) the bounds of a cart road. The General Highway Acts of 1767 and 1835 provided that horse causeys could be protected by the erection of posts and stones to stop carters getting their vehicles on to, and potentially damaging, the causey, and also from obstructing the faster horse traffic.
2. In the pre-motor era, a term frequently used to describe a highway alleged to be out of repair was 'foundrous' (or 'founderous'). Essentially, to founder is to fall down, or collapse, and the fact of horses foundering under load was a regular danger and evil of travel and transport.[21]
3. For riders and horses to be able to use a bridleway safely there must be freedom from hidden holes and ditches, and from deep and sharp-edged visible holes and ditches. While the surface need not be in sufficient repair for the full width of the whole length, it must be good enough that riders can easily find a way along, with sufficient clear and sound width to meet and pass other traffic along the way. Riders cannot reasonably expect the level of sufficient repair to provide a surface suitable for cantering or galloping.
4. Pedal bicyclists using a bridleway by virtue of s.30 of the Countryside Act 1968 cannot oblige the highway authority to keep the route in repair for bicycles.
5. It is sometimes forgotten that bridleways are as much a right of way for walkers as for equestrians. While walkers can 'path pick' more readily than horse riders, horses can walk through deeper mud and surface water (over a firm base) than can walkers.[22]

[21] In a pleading for an out-of-repair indictment or presentment in *Archbold's Criminal Pleading, Evidence and Practice* (1862) a highway was described as "… was and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same".

[22] In a decision letter, 9 August 2011, FPS/R2900/6/9R, Smoutel Ford, Northumberland, Inspector Roger Pritchard says, "However, a public bridleway carries an equal right of passage for walkers. As ... emphasised to me, the new bridleway crossing ought, by law, to be as safe and convenient for walkers as for riders".

Jurisdiction of the magistrates' court

1. Where a person believes that a publicly maintainable highway is out of repair, he or she may seek an order of the magistrates' court that the highway should be put into repair.

   Highways Act 1980, s.56 Proceedings for an order to repair highway:

   "(1) A person ('the complainant') who alleges that a way or bridge –

   "(a) is a highway maintainable at the public expense or a highway which a person is liable to maintain under a special enactment or by reason of tenure, enclosure or prescription, and

   "(b) is out of repair,

   "may serve a notice on the highway authority or other person alleged to be liable to maintain the way or bridge ('the respondent') requiring the respondent to state whether he admits that the way or bridge is a highway and that he is liable to maintain it.

   "(4) If, within 1 month from the date of service on him of a notice under subsection (1) above, the respondent serves on the complainant a notice admitting both that the way or bridge in question is a highway and that the respondent is liable to maintain it, the complainant may, within 6 months from the date of service on him of that notice, apply to a magistrates' court for an order requiring the respondent, if the court finds that the highway is out of repair, to put it in proper repair within such reasonable period as may be specified in the order."

2. The period of six months from the highway authority's notice of admission, in which an application may be made to the court, gives the potential complainant time to discuss remedial measures with the highway authority. A court will generally give a highway authority adequate time to schedule and carry out works: months, rather than years. If a highway authority gives assurances which are not met (without good reason) then the notice server can serve a further notice and move quickly to an application to the court. The court would expect the party serving a notice to try for an agreed resolution and seek an order only if this fails.

3. If the highway authority fails to reply within one month, or replies and denies that the way or bridge is a highway for which they are the highway authority, then the matter passes into the jurisdiction of the Crown Court.

4. The law involved in an application under s.56(4) is straightforward, but the procedure of making an application, and presenting a case to the justices, requires knowledge and confidence. It is not something to be lightly undertaken.

Jurisdiction of the Crown Court

1. If a notice served under s.56(1) does not fall within the jurisdiction of the magistrates' court (as above) then it falls into the remit of the Crown Court.

   Highways Act 1980, s.56 (2) Proceedings for an order to repair highway:

   > "If, within 1 month from the date of service on him of a notice under subsection (1) above, the respondent does not serve on the complainant a notice admitting both that the way or bridge in question is a highway and that the respondent is liable to maintain it, the complainant may apply to the Crown Court for an order requiring the respondent, if the court finds that the way or bridge is a highway which the respondent is liable to maintain and is out of repair, to put it in proper repair within such reasonable period as may be specified in the order."

   Thus, if the council on which the notice was served fails to respond within one month of receipt, or responds, denying that the route is a publicly maintainable highway, the complainant may lay a complaint and bring the matter before the Crown Court. This will generally be a bench of a Crown Court judge, and two justices. There is no 'six-month cut-off' for making an application to the Crown Court, potentially offering a longer 'discuss and fix' window to get the highway repaired.

2. The Crown Court is competent to hear evidence as to whether or not the route is a publicly maintainable highway, and make a determination of status. There is case law and a government minister's view on this. [23]

3. In an application where the Crown Court finds for the applicant, either on appeal from the magistrates, or because the highway authority disowned responsibility for the way, then the finding of status must be properly recorded. The Highways Act 1980 s.138 Effect of decision of court upon an appeal provides:

   > "Where on an appeal under this Act a court varies or reverses a decision of a highway authority or of a council it shall be the duty of the authority or the council to give effect to the order of the court and, in particular, to grant or issue any necessary consent, certificate or other document, and to make any necessary entry in any register."

[23] Williams v. Adams (1862) JP 22 March 1962; Riggall v. Hereford CoCo [1971] Ch 301, [1972] 1 All ER 301; Lord McIntosh of Haringey (Government Minister responsible) in a debate of the Countryside and Rights of Way Bill, *Hansard* for 9 October 2000, column 71 & 72.

Public roads repairable *ratione tenurae*

1. *Ratione tenurae*: 'by reason of tenure'. At common law all highways are repairable by the public (formerly the inhabitants of the parish where the highway is situated; and later the inhabitants at large) unless 'the public' can show that some other person or corporation bears the liability to repair a particular highway. There is an arcane distinction, now largely irrelevant, as to whether a public road repairable *ratione tenurae* is a public highway, in that 'public highway', centuries past, largely meant 'publicly repairable highway'. Whatever, a public road repairable *ratione tenurae* is a public right of way regardless of where the burden of repair lies.
2. This burden to repair a public road *ratione tenurae* arises from an ancient obligation attached to the land over which the road ran, or to lands given to some person in return for their repairing some highway, but not necessarily one across those lands. The legal authorities suggest that all such obligations arose before the date of legal memory (1189) and that no such obligations can, or do, arise since that date. Whatever, the burden of repairing any road *ratione tenurae* is very old, and where such still exists, the knowledge of the burden has been passed down through the generations of highway authorities to the present day.
3. The arcane distinctions between 'public highways' and roads repairable *ratione tenurae* gave rise to a number of court cases to try to enforce the repair of roads. In 1692, in R v. Inhabitants of Hornsey (Sir John Holt's Reports at 338), on a presentment by a justice of the peace that a way was out of repair, the jury found that it was out of repair, but was not a 'common highway'. Counsel for the parish said it was proved to be 'no highway' but it was admitted to be a public way repairable *ratione tenurae*. [The jurisdiction of the justices for a presentment ran only to 'public highways'; for other public roads repairable by the parish, or by another *ratione tenurae*, the action lay in indictment.]
4. This was plainly an unsatisfactory situation, and in the first 'modern' Highway Act, in 1835, s.62 provided that a public highway repairable *ratione tenurae* could become repairable by the inhabitants under a form of 'adoption by the parish and certification by the justices.' This provision continued in force until superseded by s.40 of the Highways Act 1959, which introduced 'adoption by agreement', and that provision still exists today in s.38 of the Highways Act 1980.
5. A notice (and potentially an application to the courts) under s.56(1) of the Highways Act 1980 may be made against the person or body liable to repair a highway *ratione tenurae*.

Turnpike roads: 'private' or publicly repairable?

1. Turnpike roads were not 'private roads to which the public were admitted on payment of a toll'.[24] They were public highways where the public using them was obliged to pay a toll. The toll money went to two purposes: repayment of capital and interest incurred by the turnpike trustees in making/improving the turnpike; and for the upkeep (including administration) and repair.
2. If a turnpike fell into disrepair, the parish or highway district in which the bad section lay could be indicted. The parish or district could, in turn, indict the turnpike trustees, but if these were not actionable for some reason they had to bear the cost themselves.
3. This principle is set out in Glen's *The Law of Highways* (1865) at pp.160–61. R v. Netherthong (1818) 2 B & Ald 179; and R v. Cumberworth, 4 AD & E, 731, particularly refer.

[24] Such private roads available to the public did exist, but they were not turnpike roads.

Fords

1. Where a highway crosses a watercourse by a ford or stepping stones, it does not cease to be a highway.[25] If the highway as a whole is publicly maintainable, then the ford is too.
2. Tidal fords are somewhat different. In R v. The Inhabitants of Landulph 1 M & Rob 393, where a road crossed "a small inlet of" the River Tamar close to the mouth, the water was described as washing over it at every high tide (which would suggest this was part of the road normally out of the water), leaving a deposit of mud. Held "… it would be absurd to require the parish to do repairs which from the nature of things must always be ineffectual."

[25] Attorney-General Ex Relatio Yorkshire Derwent Trust Ltd and Another v. Brotherton and Others [1991] 3 WLR 1126 (House of Lords).

Disturbance of the surface of certain highways

1. S.131A of the Highways Act 1980 (inserted by s.1(2) of the Rights of Way Act 1990) provides:

   "(1) A person who, without lawful authority or excuse, so disturbs the surface of—

   "(a) a footpath,

   "(b) a bridleway, or

   "(c) any other highway which consists of or comprises a carriageway other than a made-up carriageway,

   "as to render it inconvenient for the exercise of the public right of way is guilty of an offence and liable to a fine not exceeding level 3 on the standard scale.

   "(2) Proceedings for an offence under this section shall be brought only by the highway authority or the council of the non-metropolitan district, parish or community in which the offence is committed; and, without prejudice to section 130 (protection of public rights) above, it is the duty of the highway authority to ensure that where desirable in the public interest such proceedings are brought."

2. So what does 'inconvenient' mean here? In 2011 DEFRA was asked. In 2012 their reply was "The short answer is that we do not know."[26]

[26] Letter to DEFRA 9 May 2011, reply dated 9 January 2012.

Cases involving unsealed roads & bridleways, leading to court orders

1. Barnes v. Metropolitan Borough of Bury (1991) A90 24375 (Bolton Crown Court). Litigant in person case regarding access to properties along an unmade road.

   "We do not consider that the situation and nature of Hawkshaw lane require it to be maintained to the same standard as an urban street. That would be inappropriate and incongruous. We consider and order that it be, i) adequately drained, and, ii) surfaced – not necessarily with a tarmacadam surface but with something that is reasonably suitable for a country lane serving the number of properties it now does. It is not possible for this Court to be more precise than that."[27]

2. Colin Seymour v. North Lincolnshire Council (1997) (court order) 'Twigmoor Side Road' HH Judge Robert Smith QC:

   "Repair the surface of the road ... to a standard suitable to accommodate the normal and expected traffic which needs, or may need, to use the way i.e. as a 'green lane'."

3. Kind v. Cumbria County Council (1998) (court order). Carlisle Crown Court, 'Blagill Bridge'. Stone road badly washed out due to a blocked culvert underneath. CCC at first denied that this was and is a publicly repairable vehicular highway. In 1998 it was not on the list of streets. A local resident told the complainant that the piped bridge at the lowest point in the road has a date scratched into the mortar around the concrete pipe section. Investigations found '1957' scratched in with a trowel. CCC Highways Committee minutes for 1957 record the authorisation of expenditure for piping Blagill Bridge, which was then regarded as being a 'county bridge'. Faced with this record (and the implication of the road having been quietly 'lost' from the records) CCC agreed to a consent order, repaired the road (not a big job at all), allocated a fresh 'U road' number and put the road back on the list of streets where it belongs. The council also consented regarding two other short roads in Blagill, and repaired and re-recorded these in the same way.

4. Kind v. Cumbria County Council (1998) (court order). Carlisle Crown Court, 'Hartside Pass'. Stone road with at least three feet of muck and reed on the surface due to blocked drainage. This road is the first turnpike road over Hartside (bypassed in 1823) and it probably stopped being maintained much, if at all, at that time. By the late 1970s the section below the 'brow' behind Hartside Cafe was so deep in wet muck and reed that it was impossible to walk along without sinking over the knees at least. Further along towards Twotop Hill the surface was still hard under many inches of detritus, and there were surviving drainage ditches to both sides, albeit almost filled-in. The road was not at that time on CCC's list of streets and the council denied responsibility. The complainant took the council to a hearing at Carlisle Crown Court and an order was made to put the road back into repair. CCC tasked the East Cumbria Countryside Project,

[27] Note: Drainage is considered prerequisite to successful repair.

which carefully screefed the muck away and found an intact, carefully made, stone carriageway with, along one stretch, an earlier three-foot-wide horse causey amalgamated into it. The ECCP team found blocked ditches alongside the road on both sides (the road runs across a slope) and a number of culverts linking the ditches, underneath the road, choked with muck.

With the drainage system working again the road has remained in good condition since, and it is interesting to note that after 25 years nature has once again laid-down a couple of inches of soil and grass on to the stone surface, even with continuing motor and cycle traffic. This road was also added to the list of streets as a consequence of the s.56 action. Sue Hogg of the South Pennines Packhorse Trails Trust once laid down the three most important things for keeping unsealed roads in usable condition: 'drainage, drainage, drainage'.

5. Colin Seymour v. East Riding of Yorkshire Council (2000) case number A200004. In the Crown Court, before HH Judge Morrell. This is about surfacing an urban street, but is worth reading for the outlook on ordinary traffic and appropriate surface expectations and standards.
6. Kind v. Gateshead MBC (2000) (court order). Order of the Justices for repair of a public bridleway. This is a stretch of former mineral railway, not far from the *Angel of the North*. GMBC did not argue that the bridleway was not publicly maintainable, which it would not have been had it been added to the definitive map and statement on the basis of long user evidence, and not subsequently adopted. It is probable that the bridleway was recorded by the short-lived Tyne & Wear County Council (1974–84) on the basis of a degree of wishful thinking: other post TWCC metropolitans are still sorting out the legacy of a 'creative' inherited definitive map. This section is quite steep by railway standards (it was a rope-hauled coal truck system) and the damage has been done by water sawing a slot through the deep strata of the track bed.
7. Kind v. North Yorkshire County Council (2000), Harrogate Magistrates' Court. Across 'Pockstones Moor', a stone road over peat with two huge 'bomb holes' caused by blocked drainage. The eroded sections were bad as far back as the mid-1970s, and motorcyclists were blamed, which was simply not the case. As with the early turnpike over Hartside (1998, above) The Forest Road (as this was called in the Forest of Knaresborough Inclosure Award) ran here sideways across a slope, in an area with impervious bedrock and quite high rainfall. There were anciently ditches parallel to the road, and culverts underneath to discharge the surface water down the slope below. These had become totally choked through neglect, but unlike at Hartside this road was not robust enough to stand the water, and was 'blown out'.

   North Yorkshire County Council doggedly opposed the complaint. They said that the road is not publicly maintainable, and that because it was long out of repair, the 'ordinary traffic of the neighbourhood' did not (could not) use it, and therefore motors and cycles were not the ordinary traffic of the neighbourhood. None of this impressed the magistrates much, and an order for repair was made.

8. Edwards v. Stockport MBC (2007) (court order). The 'Roman Bridge' case. District Judge Baker.

   "The council argue now the [TRO] is in force preventing the use of the bridleway by horse riders, it is not out of repair for the current class of traffic legally entitled to use it. They base their argument on the premise set out in the Alan Kind case that 'A court is entitled to look at the present day character of a road and the nature of the traffic that used it when determining its current state of repair.' There is no doubt that horse riders are not using it – but why not? By the very fact that the council itself has prevented this use by the initial imposition of bollards and then the [TRO]. I have no reason not to accept Mr Edwards' evidence that if the bollards had been removed after the public enquiry, as he expected, that horses would be using it now.

   "In my mind it would therefore be wrong of me to consider an imposed or restricted character of this bridleway. My belief is also reinforced on the grounds of equity … I therefore find that when considering the character of this highway for the purposes of the ordinary traffic of the neighbourhood, I should consider equestrian traffic within that."

9. Himsworth v. Derbyshire County Council (2008). District Judge M J Friel. Birley Road: private carriage road, public bridleway. Highway authority cites c.f. Galloway v. Richmond upon Thames LBC [2003] All ER (D) 283: "In the same way that I could not let the higher standard [bridleway] at Wigley affect me, I cannot let the lower standards of other bridleways cloud my judgment whether this one is out of repair."