

What makes an effective strategic case or test case?

This document is intended to provide useful pointers. Needless to say, it cannot provide a definitive guide to strategic litigation. Litigation is far from being a precise science.

Litigation is a last resort. It is not an end in itself. Court cases are costly, stressful, time consuming and – crucially – uncertain as to their outcome. It may be much more effective to resolve a legal issue by another route. However it may be that time constraints or circumstances mean that litigation is the only avenue – or at least a necessary part of a wider campaign strategy.

It is worth pausing to consider what is meant by '**effective**' litigation. This in turn will depend on **what the litigation objective is**. A case may achieve victory for the individual litigant; however the government can subsequently amend legislation so as to negate any wider effect. This danger highlights the value of incorporating other elements such as lobbying and well-timed, positive media coverage. These measures will at least serve an effective purpose in drawing attention to the issue, generating public debate and putting political pressure on the government.

A few rather obvious but necessary preliminary points:

- (1) The **litigation objective should be identified and critiqued from the outset**. This practice should assist in focusing the mind as to whether litigation really is the appropriate route.
- (2) It is **important to identify the correct defendant**, e.g. the public body who had the power in law to act in the way one is alleging it should have.
- (3) **Statutory time limits** should be borne in mind from the outset.

An effective strategic/test case will be based on strong facts which are not exceptional so as to be easily distinguishable. The importance of this is that whilst an exceptional case might achieve individual success, if easily distinguishable on its facts, it may not serve any wider purpose.

As in any litigation, the client should be apprised of the **risks of litigation**: costs, losing the case, stress and negative media coverage. It is particularly important in strategic litigation to communicate clearly with a client from the outset to ensure that the client understands that their particular case is being used for a wider purpose. It goes without saying that notwithstanding the litigation's strategic aims, the client's instructions remain paramount. The possibility that the client may agree to settle must be taken into account.

Case law generally develops incrementally. It may be prudent to develop a certain point of law gradually, rather than inviting the court to draw what appears to be a radical conclusion on one set of facts. This is of course much easier said than done.

[The Public Law Project](#) considers that **the most effective strategy is to identify an area where public law has potential but is underused, draw together the main players and identify points which require resolution.**

Practical points to consider

❖ Co-ordination

Effective communication and coordination between NGOs can potentially lead to identifying and working collaboratively on effective strategic cases.

It may be that a pattern of poor decision-making by a particular public body affects a certain group. Where different NGOs have different examples of such inadequate decision-making, it may be appropriate to formulate a coordinated strategy whereby the 'strongest' set of facts is elected as a lead case. There may be one more established NGO with a greater pool of expertise to draw on to assist. A co-ordinated strategy may also be appropriate where an issue cross-cuts different areas of substantive law (e.g. welfare and housing) and NGOs can pool respective areas of expertise.

❖ Media

The media can be friend or foe. Where possible, media coverage should be well managed to draw positive public attention to the issue being litigated. The potential for any negative coverage should have been factored in.

❖ Third Parties

Thought should be given as to whether it would assist if an *amicus curiae* intervened or whether expert evidence might assist. Where a party is seeking a declaration of incompatibility under the European Convention on Human Rights (ECHR) Act 2003, they are statutorily obliged to notify the Irish Human Rights Commission (IHREC) who may exercise their power to intervene as *amicus curiae* or friend of the court. IHREC has intervened in a number of public interest cases. In addition, IHREC has a statutory power to instigate proceedings however has not exercised this power to date.

❖ Law

Strategic or test litigation protecting human rights will often rely on constitutional law and domestic or international human rights law. The ECHR Act 2003 should provide new scope for argument. This is not advocated for its own sake but rather in acknowledgment of the statutory duty incumbent on 'organs of the State' to act in compliance with Convention provisions. Where domestic legislation does not permit such public bodies to act in a Convention-compliant manner, it may be appropriate to seek a Declaration of Incompatibility. Both public bodies and practitioners should appreciate the potential import of Strasbourg jurisprudence when considering public bodies' duties and exercise of their powers.

❖ Post-litigation implementation

Even where litigation is successful, that is not the end of the story. The government may need to pass amending legislation and if so, it is important to scrutinise such amending legislation in order to ensure that it gives meaningful effect to the judgment. Alternatively, the government may need to deal with a stack of cases awaiting decisions on the same point as the test case and it will be necessary to ensure that the relevant public body applies the law properly in respect of those cases. Civil society has a role to play when it comes to monitoring the implementation of court decisions, which may mean long-term commitment to the issue. Communication with the relevant government department may be necessary, since political will is an important element in the successful implementation of a judgment. The raising of public awareness of the judgment and its implications may also be key.

A checklist for strategic or test litigation

- ☑ Pre-litigation avenues have been considered – and where relevant, exhausted.
- ☑ A clear litigation objective has been identified.
- ☑ The merits of the case indicate reasonable prospect of success.
- ☑ The case potentially impacts on a wider class of person.
- ☑ The facts are not exceptional or easily distinguishable.
- ☑ The risk of the government legislating to reverse the victory has been weighed up.
- ☑ The risk of an unfavourable judgment worsening the position has been weighed up.
- ☑ The litigant has been made aware of the risks of litigation and is willing to proceed.

PILA (Public Interest Law Alliance)

PILA is a public interest law network that seeks to engage the legal community and civil society in using the law to advance social change.

PILA was established in 2009 as a project of FLAC (Free Legal Advice Centres), an independent human rights organisation that promotes equal access to justice for all.

PILA aims to:

1. Driving and growing a diverse alliance of people and organisations who are committed to the development of public interest law in Ireland.
2. Promoting and facilitating pro bono in order to build the capacity of organisations to engage in public interest law work.
3. Mobilising emerging lawyers through clinical legal education programmes with a focus on public interest law.
4. Conducting research on barriers to public interest litigation in Ireland, raising awareness and working to remove these barriers.

What is public interest law?

Public interest law is the law that goes to the very core of our society – affecting the rights, well-being, health, or finances of our people as a whole – but, most commonly, the law that advocates for those who are disadvantaged or marginalised.

It involves using law reform, litigation and legal education as tools of change. We approach public interest law work in its broadest sense; not specifically having to involve the courts, but also assisting vulnerable groups to participate in processes that affect them.

PILA Pro Bono Referral Scheme

Central to PILA's work is the Pro Bono Referral Scheme, which supports social justice non-governmental organisations (NGOs), independent law centres and community organisations in obtaining legal assistance where they do not have the resources or in-house expertise.

PILA receives and assesses requests for assistance from over 110 NGOs, filtering matters that meet our criteria and referring them on to a pro bono barrister, solicitor or law firm with suitable skills.

The Pro Bono Referral Scheme gives NGOs access to:

- Legal advice – on organisational issues or in line with policy and campaign work;
- Law reform working groups – where lawyers and NGOs come together to work to implement social change;
- Litigation support – including pre-litigation advices and casework; and
- Legal education sessions – to better equip NGO staff in navigating the law.