

Lessons Learned

ABOUT STRATEGIC ENVIRONMENTAL LIABILITY LITIGATION

This is a Living Document and is continuously updated in consultation with our network partners and advisors as cases develop and new lessons are learned.

Last Updated: 28/10/24 (LH).

CONTENTS

1. Introduction	1
2. Lessons Learned	2
1. Preparing Investigations and Evidence	2
2. Selecting and Managing Witnesses and Scientific Experts	4
3. Science Communication	6
4. Managing plaintiffs	8
5. Anticipating Procedural Challenges	9
3. Acknowledgements	11

1. INTRODUCTION

In addition to selecting the “right” cases for litigation (see [Case Selection Framework](#)) and doing this safely (see [Risk Identification and Mitigation Framework](#)), the experiences of the Conservation-Litigation.org network are delivering a wide range of lessons – insights, tips, caveats and advice from these cases around the world. This document compiles those lessons learned into a living document that is evolving and integrating with each new case. The resource aims to help future plaintiffs navigate the complexities of biodiversity-focused environmental liability cases, which remain comparatively rare in most jurisdictions, anticipating the various obstacles and pitfalls that, if unforeseen, may jeopardise the success of the case.

The lessons learned have been divided into five different categories identified to date:

- **Preparing investigations and evidence**
- **Communicating science effectively**
- **Selecting and managing witnesses and scientific experts**
- **Managing plaintiffs**
- **Anticipating procedural challenges**

For each of these, we identify lessons compiled from practitioners across the network.

Although each case and jurisdiction presents different challenges, we are identifying a number of commonalities across contexts. By compiling these lessons, we hope to provide a continuously evolving and up-to-date resource, to be used in conjunction with the [Case Selection Framework](#) and [Risk Identification and Mitigation Framework](#), to support plaintiffs and their lawyers throughout the litigation process.

2. LESSONS LEARNED

1. Preparing Investigations and Evidence

The success of a case relies not only on the quality of evidence, but also the admissibility and presentation of that evidence in court. Ensuring that the evidence is appropriate and sufficiently strong, collected and processed correctly, admissible in court, and presented effectively and correctly, is essential to improving the likelihood that it will be accepted by the judge and therefore benefit the outcome of the case.

Ensure that the quality of the available evidence is adequate

- **Check legal requirements:** Plaintiffs may believe they have the evidence required for a case, but in many cases do not fully understand the legal requirements needed to present this in court. Some jurisdictions may have very **specific eligibility requirements** for evidence to be admissible in court. For example, a claim may not be properly documented (e.g., original receipts are missing, documents are missing dates/timestamps, etc), or a type of evidence may not be admissible in the court (e.g., expert testimony, estimates of future costs of restoration).
- **Confirm strength of the evidence:** It is important to assess how strong the available evidence is; while it may meet the legal requirements of admissibility, it may not be sufficiently clear or compelling to convince a judge or jury of the merits of the case.
- **Make contingency plans for evidence:** It is possible that during the case procedure, it becomes apparent that the evidence is not available, not eligible, or not sufficiently strong. It is important to plan for this eventuality in advance in order to make a prompt assessment as to whether other evidence may be available, or whether the case is worth pursuing further.
- **Plan for evidence upfront:** It may be hard to anticipate what evidence will be required or accepted by the court during the investigation phase. Consequently, it may be necessary to collect more evidence in the initial stages of the case. This can be costly and time-consuming.

Ensure that evidence is handled correctly

- **Protect the evidence chain of custody:** Evidence (e.g., physical evidence, equipment, digital evidence) is often handled by multiple people and agencies. There may be specific chain of custody requirements that must be respected for evidence to be admissible in court. Ensure document submissions are tracked with proof of receipt, and understand the evidence process for the relative jurisdiction ahead of time.
- **Check deadlines and timelines:** The court may have specific deadlines or timelines for the collection and submission of evidence (e.g., evidence may have to be gathered and documented before the case filing/court hearing). It is important to anticipate such

timelines in advance to avoid missed deadlines and, in a worse-case scenario, losing a case on bureaucratic grounds.

- **Make copies:** It is good practice to make certified copies of all documentary evidence to avoid losing it (or theft of evidence), and to have time-stamped proof of evidence (for example, digital time-stamp/proof of delivery or receipt) that can be produced at a later date if needed.

Anticipate other types of investigation that may be needed to support the case

- **Investigate defendant's assets:** Because liability cases often rely on a defendant's ability to pay (e.g., for restoration), it may be prudent to investigate the defendant to identify any assets they may hold. This can be important to determining if a case is even worth pursuing, or in encouraging a government body to consider freezing a defendant's assets. Such investigations may rely on the support of a forensic accountant or field observations, but can be challenging due to lack of transparency; safety, and lack of access to financial data (although government agencies often can gain access).
- **Investigate defendant profile:** It may be worth investigating the defendant's profile to help inform the case. Information such as whether they have previous criminal convictions or if they are repeat offenders may inform the case strategy. Information on their links to political power or organised crime can also be important to informing safety and security.

Ensure there is adequate evidence to prove causation

- Cases often require adequate evidence to support arguments about causation linking the defendant's actions and purported environmental harm. While the cause-effect of the case may be clear to plaintiffs, anticipate that judges may have outdated or incomplete understandings of causal chains for environmental harm. For example, harm to wildlife may be seen only at the individual animal level, and effectively presenting evidence that shows the cascading impacts on species survival and ecosystems may be challenging. Similarly, when presenting in legal contexts, climate scientists have often struggled to prove links to wider harms. It can be helpful to develop, practise and test legal arguments about causation, and understand the evidence that will be required to support such claims. For example, it may be necessary to travel to the site of harm to collect samples or take photographs. It may also be necessary to identify a scientific expert who can explain the evidence and related concepts (e.g., ecological principles).

2. Selecting and Managing Witnesses and Scientific Experts

Cases often rely on witnesses to present evidence (e.g., what they observed) and/or scientific experts (e.g., to identify species, describe harm, interpret technical evidence). There are several factors to consider when deciding who is the “right” witness or scientific expert for each case. As well as needing to meet any eligibility criteria and possessing the necessary evidence or expertise, their demeanour, presentability, credibility, standing, preparedness, ability to articulate clearly, and resistance to pressure are all important to the evidence they present. Even very strong evidence may be undermined if presented ineffectively.

Identify the “right” expert for the specific case and jurisdiction.

- **Check experts’ technical suitability:** Experts should be a technical match to the case, with relevant and credible expertise and experience in the specific areas of science used as evidence.
- **Confirm that experts will meaningfully engage:** Ensure that experts are willing and able to meaningfully engage with, and take an interest in the case argument, rather than just present points of personal interest, or be sidetracked by scientific points that are less relevant to the case.

Ensure that experts are eligible to present in court

- **Eligibility criteria may differ** between jurisdictions and courts; check the requirements in advance to make sure that the chosen experts are acceptable to the court in question.

Ensure witnesses and/or scientific experts have the necessary personal characteristics

- **Experience:** Some witnesses or experts may be accustomed to presenting in court, while others may be inexperienced or unfamiliar with the process and pressures.
- **Comfort:** Ensure that witnesses or experts are willing and comfortable with speaking in court, and to be publicly associated with the case.
- **Effective communicators:** Prepare witnesses to communicate the ideas you want clearly and effectively in court, using appropriate legal language, and anticipate questions they may be asked in cross-examination and ensure they can respond effectively.
- **Demeanour:** Ensure witnesses and experts are likely to be respectful and hold a credible demeanour before the court.
- **Language:** Ensure witnesses and experts are able to present in a language they are comfortable, and can understand and respond to questions. If needed and possible, ensure they have access to simultaneous translation.

Check affordability of having witnesses and scientific experts attend court

- **Check fees:** Although witnesses cannot be paid for their testimony, scientific experts may charge fees for their expertise that are covered by the plaintiffs. Check on any beforehand to ensure that they are affordable within the available case resources,

considering the possibility of drawn-out processes or appeals.

- **Check travel costs:** Witnesses and experts often need to travel to the court to give their testimony, and may need to have their costs reimbursed. Make sure to consider these within legal costs.

Confirm the professional credibility of scientific experts

- **Check experts' professional profiles and reputation:** High profile experts with a strong reputation, including with the government, are likely to make the case stronger.
- **Seek testimony from government scientists:** Experts from national authorities are often better respected by the courts, including if they speak on behalf of their institution and therefore represent official data.

Conduct risk evaluations for witnesses and scientific experts

- **Conduct a risk assessment** (see [Risk Identification and Mitigation Framework](#)) to identify and evaluate risks safety and security risks for witnesses and experts.
- **Ensure that witnesses are aware of and prepared for any risks** that they may be exposed to by presenting evidence in the case.
- **Specifically, evaluate the risk of SLAPP counter-suits** and take the necessary precautions. Depending on the situation and the jurisdiction, defendants may use SLAPP suits as a device to intimidate and silence witnesses. It is important to consider these risks when selecting and preparing witnesses (see [Risk Identification and Mitigation Framework](#)), and to check anti-SLAPP legislation in the relevant jurisdictions.

Prepare witnesses / experts to testify (where this is legal)

- **Anticipate that witnesses and experts may be unprepared**, inexperienced in giving evidence, or frightened, and may struggle to express themselves.
- **Search for credible witnesses and/ or experts in good time.** In countries where it is legally permitted, it can also be helpful to prepare them to testify, including anticipating questions from cross-examination questions, and practising delivery to ensure clarity.
- **Help witnesses to prepare for risks** (see point above), specifically SLAPP risks, so they can moderate their language, especially when speaking publicly about a case.

3. Science Communication

While the causal links between the environmental harm caused, the damages presented in the damage claim, and the remedies identified to respond to the harm may seem clear from an environmental and scientific perspective, it is possible that the courts have never been presented with such links before. For example, it may not be immediately clear or accepted that the removal of one elephant has a much broader impact on the environment than the loss of that one individual. Equally, there is often uncertainty around “intangible” values and whether or how these can be recognised in claims and verdicts. Moreover, judges and lawyers often have a narrow view of remedies, focusing on monetary compensation (fines) based on an arbitrary price-tag system that does not recognise the true extent of the harm, rather than on-the-ground remedies. Indeed, the concept of non-compensatory remedies may be entirely alien to the court. Communicating the concepts of harm, remedies and causation effectively, in a way that the court will accept, is key to a successful case.

As such, there is a need to be cautious – possibly incrementalist – in presenting these types of claims, to ensure that they are likely to be accepted by the judges. Presenting positive verdicts from other jurisdictions may also help inform verdicts.

Prepare to communicate scientific evidence into legal evidence that can be understood by courts

- **Draw on robust science:** Cases about environmental harm and remedies must be premised on science that is robust, and values different types of knowledge. This is key not only to the integrity of the case, but to its potential to establish precedents and educate the public. Upholding this principle is important especially due to the cross-disciplinary nature of this work.
- **Present basic scientific concepts needed to understand the evidence:** It is important that the scientific evidence be effectively presented in court, supported by presentation of the basic scientific concepts needed to interpret that evidence. Identify experts that are able to explain the basic concepts, and prepare them to present it using terminology and approaches that can be readily understood by the court (see “3. Witnesses and Scientific Experts”).
- **Anticipate the judge or jury’s needs:** Do not assume that the judges or juries hearing the case will have any prior experience with similar cases or evidence. Ensure that all of the relevant science is explained so that the scientific basis of the case could be reasonably understood by a non-expert.
- **Avoid “overloading” the judge or jury:** It is possible that the judge simply will not care about the science and will want an easy causal link to follow. If this is the case, ensure that only science that is key to the case is used, and consider simplifying or cherry-picking which information to present.
- **Consider how uncertainty is presented:** Although most scientists are familiar and comfortable with the concept of uncertainty, it carries a very different meaning in a legal

context. This means that evidence or expert testimony may reference scientific uncertainty, which the judge or jury may misunderstand as meaning that causation does not exist. Such misunderstandings can also be exploited by defendants.

- **Be prepared to change strategy:** In some cases, it may be necessary to change course and use a less complex or detailed argument in order to win the case. This may mean that the ultimate goal of securing meaningful remedies is not met on paper, but may nevertheless secure a positive verdict, which is likely better than a loss.
- **Consider using “official” data sources:** Data and figures collected and/or used by government agencies may make the scientific argument more credible to the court, even if these are less accurate or credible than other available data.
- **Seek support from government officials:** If it is possible to obtain a letter of support from a government official agreeing with your science, this may make the argument much stronger and acceptable to the court. For example, it may be possible to secure a letter from a government agency validating that certain harm occurred, or that a causal relationship exists.
- **Use credible experts:** Expert witnesses from a government institution are likely to have greater credibility in court (see “2. Selecting and Managing Witnesses and Scientific Experts”).

4. Managing plaintiffs

Case development and litigation often involves a team, including not only the plaintiff making the claim, but support from civil society groups, scientists and environmental lawyers. In the context of strategic litigation, the strategic concept behind a case is sometimes initiated by a third party (e.g., someone in the Conservation-Litigation.org community) that then identifies an appropriate case and plaintiff to bring that case. Identifying and managing plaintiffs and their partners can present challenges... It is important to work closely as a team, from case selection through to the court proceedings and public communications, to ensure shared goals, and anticipate any areas of conflict, risk or misalignment. Moreover, issues of legal standing may mean that only specific individuals or groups, who may not otherwise be the “perfect” partner, are still the best plaintiff from a legal perspective, so it is important to build strong relationships that can withstand disagreements and challenges.

Confirm eligibility to take legal action

- **Check legal standing.** Plaintiffs seeking remedies must meet specific legal requirements in order to have the right to take legal action. The most enthusiastic groups are not always the plaintiffs with the strongest legal rights to take action. It is important to have an experienced lawyer who can confirm eligibility, or to conduct a legal analysis to confirm this before the case is developed.

Develop a working strategy and timeline

- **Anticipate that plaintiffs may not fully understand the legal processes,** opportunities, evidentiary requirements or deadlines associated with legal action. This makes it important to work with plaintiffs to clearly explain procedures, establish shared timelines and ways of work and communication. It is important to work closely with such parties and to manage the relationship effectively.

Manage expectation and misalignment of goals

- Parties seeking remedies may request remedies that cannot be legally granted, or are misaligned with the strategy of the case.
- In some cases, they may have emotional investment in the case, or feel proprietary towards its management and outcome. This may be burdensome to manage but maintaining strong relationships and goodwill can be important to the success of the case.

Navigate barriers to providing support

- Certain types of plaintiffs, notably government agencies bringing claims, may want or need technical support to develop their cases. However, there may be bureaucratic, hierarchical or cultural barriers to providing it that limit the success of the case.

5. Anticipating Procedural Challenges

Bringing a liability case involves numerous procedural steps. Failure to meet deadlines, submission criteria or technical requirements can result in automatic dismissals, or be exploited by defendants.

Work with experienced lawyers

- Do not assume that most practising lawyers will already know the processes and relative timelines of undertaking these cases. Make sure they have solid experience of these types of cases before, and/or that they can clearly answer questions about procedures and timelines.

Confirm the plaintiff's eligibility/standing

- In order to be a plaintiff in a case, parties must meet specific legal requirements. These vary significantly across jurisdictions and can often be highly restrictive or unobvious. Finding a party that is eligible and willing to seek remedies can be one of the hardest aspects of building a case (see **4. Parties seeking Remedies**).

Understand the procedures fully in advance

- **Create a case checklist.** Identify all of the documents, requirements and evidence that will be required to file the case. This can include names of witnesses, copies of evidence, power of attorney documents. Creating a checklist can help to ensure that all of the parties involved are clear on their roles.

Review bureaucratic procedural requirements.

- **List procedural particularities.**
- **Identify requirements for how paperwork needs to be filed,** such as how documents need to be presented or filed (e.g., can documents be submitted by mail or online, or must they be delivered in person?); fees that need to be paid.
- **Secure legal certifications.** Cases can require specific legal certifications and attestations of documents and/evidence or certified powers of attorney may be required before information can be submitted to the court. Ensure that such processes are factored into any timeframes and anticipate delays.
- **Review requirements for scientific experts.** Experts are often involved in environmental cases, but it is important to ensure they are legally eligible to give statements (e.g., meet academic requirements, see 3. Scientific Experts)
- timelines..
-

Case timelines and deadlines

- **Map out steps and timelines.** Step-by-step mapping of the case and related timelines (e.g., court dates, timelines for appeal) can help avoid mistakes, late filings and provide

clarity for the whole team. It is important to keep track of the case timeline throughout the process, factoring in any deadlines.

- **Allow buffer time.** When preparing for deadlines, ensure that there is some buffer to allow for unexpected delays.
- **Have a team that can respond quickly.** Have a team that is ready to respond to court request and deadline quickly (e.g., prepare and submit documents, evidence appeals at short notice) Rapid responses to court requests sometimes require that plaintiffs give their lawyer or third party Power of Attorney, so that they can act quickly in their best interest and meet deadlines.

Costs

- **Check the amounts and deadlines** for paying court or other fees, and ensure that the case resources are sufficient to meet them throughout the process, including in the case of appeals.

Confirm that the legal forum is appropriate

- **The proposed case must be submitted to the right court.** For example, in some countries, wildlife cases cannot be heard by general environmental courts. In many contexts, the competent court is often the court nearest to where the offence was committed.. Some types of remedies can only be sought from certain types of courts.

Consider an plan for logistical challenges

- **Take into account any physical and logistical challenges.** For example, the court may be located a long distance from the lawyer's office, which can complicate procedures (e.g., document submissions, attending). This may also increase financial costs due to travel time, and may be exploited by the defendant.

3. ACKNOWLEDGEMENTS



Conservation-Litigation.org is an international network of lawyers, scientists and conservationists. We support strategic liability litigation as a creative legal response to the biodiversity crisis. We do this by providing novel legal analyses to reduce the technical barriers for action, by supporting novel litigation cases around the world, and by empowering others to litigate for biodiversity.

Authors:

Dr. Jacob Phelps is Senior Lecturer at the Lancaster Environment Center at Lancaster University, and co-founder of Conservation-Litigation.org.

jacob.phelps@gmail.com

Maribel Rodriguez is founder and legal director of Law and Wildlife, a consultancy that assists conservation organisations with their legal needs and is co-founder of Conservation-Litigation.org.

mrodriguez@lawandwildlife.org

Lynne Hempton is a translator, copywriter, and communications consultant for Conservation-Litigation.org.

lynnehempton@outlook.com

Acknowledgements: This work was generously funded by the UK Government through the Illegal Wildlife Trade Challenge Fund. Thank you to Conservation-Litigation.org colleagues Rika Fajrini and Naila Bhatri, and to all members of the Conservation-Litigation.org network for their input and contributions.

Comments are welcome and can be sent to jacob.phelps@gmail.com

© Conservation-Litigation.org, October 2024.

