



### **Exemplar Litigation Portfolio – Criminal Proceedings**

Applicants compiling a portfolio of 3 or 5 cases in which they have been involved which demonstrate their experience in litigation in respect of Civil, Criminal or Family Proceedings, may use this template for each case.

**This exemplar has been produced to demonstrate the breadth and depth of information the External Advisers expect to see when they assess applicant's portfolios.**

## Litigation Portfolio Template

Provide a concise description of the case	Date instructed:	<a href="#">Click here to enter text.</a>
<p>The client was charged with an offence of Common Assault.</p> <p>He was of good character.</p> <p>He was retired from full time teaching however he was working part time at a local school which educates children who are not in mainstream education due to their behavioural and educational needs.</p> <p>The complainant in the case was a pupil at the school, and he alleged that the client had deliberately punched him to the left cheek, causing reddening and bruising.</p> <p>The complainant's account of the incident was that the client had prevented him from leaving the classroom, as he had been asked to do, and he (the pupil) then pushed past the client to get out. The pupil alleged that the client then grabbed his arm in response to which the pupil motioned to head butt him. It is said to be at this point that the client threw the punch.</p> <p>Our client's version of events was that he had asked the pupil to leave the classroom due to his disruptive behaviour and upon doing so the pupil intentionally barged into him. He denied that he had prevented the pupil from leaving the room. Our client's response to the contact was to say, "don't you dare push me" and with that pupil then head butted him and made contact with his left eye. Our client's reaction was to put his arm out in a defensive strike. He was unsure if any contact was made with the pupil but if it was then it wasn't deliberate and done in self-defence.</p> <p>The issue in the case was limited to whether the strike by our client was a deliberate assault or a defensive act.</p> <p>There were two witnesses to the incident, both of whom were teaching assistants in the room at the time. They supported the Crown's case that the contact made by the client was a deliberate assault.</p> <p>Our client was interviewed as a volunteer at the local police station a month after the incident. He gave the account as stated above, both verbally and by producing a copy of a written report he had prepared the same day for the school's internal inquiry.</p> <p>The matter proceeded to a two-day trial before a District Judge at the local Magistrates Court.</p> <p>Our client was represented by counsel at the hearing.</p> <p>He was acquitted by the District Judge, and her finding was that our client had been assaulted by the pupil on two occasions, during the incident in question and had acted entirely reasonably in self-defence of himself.</p> <p>A cost order was awarded to our client who was a private paying client as he was not eligible for legal aid.</p>		

**Provide a description of law arising in the case and its application to the facts**

The law is unclear on whether common assault and battery are statutory or common law offences. The Divisional court in DPP v Taylor and DPP v Little held that they are statutory offences whereas in Haystead v DPP, an obiter opinion was expressed by the Divisional Court that Common assault and battery remained common law offences.

In practice the offence is generally charged as being contrary to statute, and the wording of the offence is generally '....assaulted by beating...'.

Common assault is a summary offence which carries the Magistrates maximum power of 6 months imprisonment or a fine.

The term assault is often used to include both an assault and battery and it is defined as an act by which a person intentionally or recklessly causes a person to apprehend immediate unlawful violence or to suffer violence.

In this particular trial the Crown's case was put on the basis that our client intentionally made unlawful physical contact with the victim, in that he deliberately assaulted him. Our client's defence was one of self-defence.

Self-defence is provided for by both Common Law and Statute Law, namely section 3 of the Criminal Law Act 1967.

At common law the principle is that 'a person is entitled to use reasonable force as is necessary to protect himself....'

At statute it states that 'a person may use such force as is reasonable in the circumstances in the prevention of a crime....'

The Criminal Justice and Immigration Act 2008 clarified the principles of reasonableness and confirmed that the question of whether the force used by someone was reasonable in the circumstance is to be considered with regard to the circumstances as that person believed them to be, and whether that belief of the circumstances was a genuinely held belief. Section 76 of the Criminal Justice and Immigration Act 2008 doesn't operate to change the older law it is simply a tool to clarify it.

In the circumstances of this case, our client's use of force was to try and prevent a head butt from the complainant. His case was that by putting out his arm to try and block the complainant's forehead making contact with him was a reasonable response to the attack he faced. His genuinely held belief was that the head butt would make contact if not prevented and thereby cause him injury. In addition, although the complainant was only young, he was only slightly smaller than our client but of similar build. Based on those circumstances our client sought to rely on his actions as a complete defence to the offence of assault.

**Describe the procedural and process issues, including the Court and, where relevant, the track to which the case was allocated**

The case was tried summarily by a District Judge sitting at Reading Magistrates' court.

Our client received the requisition in the post. The requisition is the document setting out the charge for which he is due to appear and the date which he is to attend the Magistrates

court. This particular method of bringing a case to court is legislated for by Section 29 of the Criminal Justice Act 2003. It was dated within the six-month time limit, which is applied to summary only offences.

Common assault is generally an offence tried only by Magistrates but in certain circumstances can be tried on indictment, for example if the common assault is founded upon the same facts alleging an indictable offence, these circumstances are provided for under section 40 of the Criminal Justice Act 1988. Such circumstances were absent from this case, so the trial was held in the lower court.

Our client appeared unrepresented at the first hearing when he entered a not guilty plea, and the case was set down for trial. He sought legal representation two days before the listed pre-trial review.

Our client's instructions were obtained during an appointment at our firm's office. It was decided, on the basis of those instructions, that we would not be ready for trial as a number of enquiries had been identified which had to be pursued in readiness for the trial, an application to vacate the trial was therefore made at the pre-trial review hearing.

The court agreed to move the trial to a new date and various case management orders were made with regards the service of the complainant's transcript of evidence, editing of such transcript, the bad character applications and responses and any hearsay notices.

A further hearing was set to enable the court to ensure that all matters were in hand and that the trial date was still achievable.

At the pre-trial review hearing some three weeks later the District Judge assigned herself to the case and took over the management of it for trial. By the time of this hearing the Crown had served some information on the defence dealing with the victim's previous bad behaviour. The issue of the bad character application was raised and the Crown agreed to the admission of the information they had supplied. Any further documents/evidence would be considered when received but as a general principle the prosecutor helpfully indicated in open court that they would not seek to oppose our application providing some documentary evidence of some sort was available to support the behaviour complained of.

Matters such as witness requirements and special measures were also agreed between the parties.

The case was then further listed for a mention hearing to ensure that any outstanding disclosure issues had been dealt with.

During the interim the Local Education Authority notified us that they were seeking Public Interest Immunity (PII) in their file. This indication required us to make an application to the court for disclosure.

It involved an application for a witness summons under the Criminal Procedure Rules, rule 28.4. This was a written application setting out who the summons was required for, and their full name and address etc, what documents we believed they held and the reasons why the documents/evidence were material to the issues in the case. In the application we set out the nature of the evidence we sought and how it was important to our client's case. This was necessary because the court will not order disclosure on the basis of a defence

‘fishing expedition’ in the hope some useful material may arise, it had to be evidence that it is relevant and admissible; R v Reading Justices, ex parte Berkshire County Court (1996).

The court issued a summons for the production of local authority files, under section 97 of the Magistrates Court Act 1980.

A hearing was then held to deal specifically with this issue. The legal representative from the local authority had highlighted in her file of papers the documents which she felt fell into the relevant category and it was the job of the District Judge to go through all the material and make a ruling on what she felt ought to be disclosed, if anything.

The defence also made oral submissions to the Judge at the hearing identifying what material we sought in order to achieve our aim with regards the bad character application.

The hearing was successful for the defence, and several reports were disclosed which evidenced other incidents involving aggressive behaviour displayed by the complainant. The details of such incidents were subsequently adduced at trial and the complainant cross examined upon them.

The PII hearing was the last hearing in this case before the trial.

Two weeks before trial we completed a certificate of readiness which is required by the court to confirm that the case was now ready for trial.

The trial lasted two days and was heard by the District Judge.

A final process issue that arose in this case was in relation to the defence witness. The witness was another teacher who had witnessed a previous assault upon my client by the complainant in question.

Her contact details were provided by the client, and contact was made with her. Due to the teacher’s work commitments, she agreed to send, via email, her account of the earlier incident so that we would then be aware of what she had to say and if necessary, arrangements could be made to take a section 9 witness statement from her. She agreed also to attend the trial and give evidence. Her email however never came and two days before the trial, after numerous unsuccessful attempts to make contact with her again, she emailed to say that she wouldn’t be attending and what she had to say wouldn’t help my client’s case.

This email came after a letter had been sent to her advising her, we would be seeking a witness summons to compel her attendance if we didn’t hear from her.

In order to avoid any issues at trial a witness summons was again sought under the Magistrates Court Act 1980. The application was again a written application on the same form as the summons for the PII. A witness summons was granted but subsequently not served (see discussion below – decisions).

### **Explain the evidential issues arising in the case and how they were dealt with**

The question of a non-defendant’s bad character evidence arose in this case. Our client instructed us that this was not the first time he had been assaulted by this pupil nor was it the first time the pupil had actually assaulted a teacher. We were told that this could be

evidenced by way of school records which log such incidents and from another teacher who was witness to the previous assault. This was clearly going to be important evidence and accordingly a bad character application was made in accordance with section 100 of the Criminal Justice Act 2003.

The grounds for our application were that the type of behaviour we were seeking to adduce comes within the definition of bad character as defined by section 98 of the Criminal Justice Act 2003. That definition being '....evidence of or a disposition towards, misconduct on his part...'

Misconduct is defined within section 112 of the Criminal Justice Act 2003 as the commission of an offence or reprehensible behaviour. Reprehensible behaviour is defined in the Oxford English Dictionary as '....At fault, in the wrong...'

The defence therefore proposed to argue that the evidence of the previous behaviour, as produced by the school records and by witness statement from the other teacher, amounted to bad character.

The ground for admissibility under the 2003 Act were section 100 (1) (a) (b) (i) and (ii).

Section 100(1) relates to the evidence of bad character of a non-defendant, which in this case was the complainant, and subsections (a) and (b) relate to whether the evidence in this case is of explanatory importance and has substantial probative value to the case.

In order to meet these requirements, the defence argued it was important for the court to be aware of the evidence in order for them to assess whether the actions of our client were reasonable given the knowledge he (our client) had about how the situation could develop given the previous incidents. In assessing the probative value of the evidence the defence maintained that the nature of this evidence goes to show the behaviour displayed on other occasions by the pupil and how the pupil reacts to requests he does not like, given the defence case was he was the aggressor throughout, that the court could not properly consider this evidence without knowing his previous pattern of behaviour.

The Crown served upon the defence a notice of intention to adduce hearsay evidence. Their application was seeking to put into evidence the account of the incident as told by the pupil to the head teacher immediately after the event.

The admissibility of hearsay evidence in criminal proceedings is governed by section 114 of the Criminal Justice Act 2003. The Crown's application was on the basis that Section 118 of the Criminal Justice Act 2003 preserved certain common law grounds of admissibility, in particular for this case, section 1 (4) (a), Res Gestae.

Res Gestae relates to a 'statement made by a person who was so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded'. The Crown's submission was that the head teacher's account of what the pupil told her would reveal consistency in what the victim told her on the day of the incident, and what he later told the police when video interviewed. In addition to this they also sought admission under section 114 (1) (d) of the 2003 Act which allows for admission if the court is satisfied that it is in the interests of justice to do so. Again, their submission related to the importance of showing consistency in the pupil's account.

Section 114 (2) of the 2003 Act details several factors which the court must have regard to when admitting the hearsay evidence.

In this particular case however, the defence agreed to the evidence being admitted and therefore the court allowed the evidence under section 114 (1) (c) as all parties were in agreement that it be properly obtained.

In relation to the defence bad character application, in order to progress it, it was necessary for us to obtain the relevant information to support it. This was done by dual means.

The first route we took to seek disclosure of any information pertaining to the victim's previous behaviour was to draft and serve a defence case statement. The statement was served in accordance with the Criminal Procedure and Investigations Act 1996, section 6. Service of a defence statement is obligatory in Crown Court cases but in the Magistrates it is discretionary.

The defence case statement must deal with the following points;

- The nature of the accused's defence
- The evidence with which he takes issue
- The reasons for taking such issue
- Particularise the matters of fact on which he intends to rely.

The latter issue only became required under the Criminal Justice and Immigration Act 2008.

Once a statement is served the duty is then on the prosecution to consider the contents of that statement and examine whether any further unused prosecution material ought to be disclosed. An application can be made to the court for disclosure if there is any dispute with material to be disclosed.

The second means of securing disclosure of relevant documents was to make an application to the local education authority for disclosure from their files of any materials which would support our contention concerning the pupil's previous misbehaviour. In the event such material is held on file it is then considered by the court as to its relevance and whether it ought to be disclosed. (See procedure section for discussion)

Finally, an application was made on behalf of the complainant for him to have special measures for when he gives evidence.

The giving of evidence in criminal proceedings for young, vulnerable or intimidated witnesses is governed by the Youth Justice and Criminal Evidence Act 1999. Section 16 was applicable in this case due to the age of the witness (victim). Section 16 provides assistance by way of live link to give evidence at the trial for anyone under the age of 17 years, it is an automatic right and on this basis the defence did not seek to oppose it, and in fact had no grounds on which to oppose it.

At the end of the trial, counsel for the defence in her closing speech reminded the District Judge of the defendant's evidence of his previous good character. A defendant of previous good character is entitled to rely on that good character and although it is not a defence it does go to the question of his credibility and propensity. For that reason, the court is

entitled to take it into account when considering the case (known as a 'Vye good character direction').

**Provide an overview of any ethical or conduct issues that arose in the case and how they were dealt with**

The main conduct issue in this case arose in relation to the defence witness.

The witness was a teacher at the school also and initially agreed that she could help by giving evidence of a previous assault by the pupil in question. She agreed to come to court and give such evidence.

The nearer the trial got however, the less inclined this witness appeared to be to testify on behalf of the defence. Very shortly before the trial she was not returning calls nor was she responding to letters or emails.

Unfortunately, at this stage we hadn't got a formal s.9 witness statement from her as she had agreed to forward by email her account of the incident. We hadn't been able to meet up due to her work commitments so at the time this was the only way of obtaining her account, although the account never subsequently came from her.

This posed a question for our client as to whether we summons her to court or whether we proceed without her. The latter option was chosen by our client (see decisions section for discussion) although a witness summons had been applied for.

One potential ethical issue that arose in this case was in relation to payment of our client's legal fees.

Our client didn't qualify for legal aid, so he was funding the case privately. He advised us that the school had agreed to pay part of his legal fees and initially we were concerned as to whether that was appropriate given three teachers from that school were due to give evidence at the trial on behalf of the prosecution and contrary to our client's account and in favour of the pupil. After discussion with our firm's head of department it was concluded that it wasn't an issue as the complainant was the pupil and not the school, and although these three teachers were potential witnesses, the school as an entity was not a party to the case.

As it turned out in any event, the client was going to put the money up front and the school would later reimburse him so the money we received on account from the client was directly from him.

**Provide details of any funding issues arising in the case and how they were dealt with**

During our initial meeting with the client, it was quickly established that due to his income he would not qualify for Legal Aid.

In this particular case our client would fail to meet the means test as his income was more than the specified limit of £22,325.

The interests of justice test considers matters such as whether an applicant is at risk of losing their liberty, whether questions of law are involved that would require the skill of a legally qualified advocate and whether it's in the interests of the complainant or other



prosecution witnesses that the applicant is not representing themselves in person.

The client was provided with a quotation of our costs for preparing his case for trial and representing him in the proceedings.

My firm initially asked for a proportion of the costs to commence the work that had been identified and then requested the remaining monies be paid and cleared into our account one week before the trial. This was duly done by our client.

The client informed us that his employer, the school, had agreed to share his legal costs with him. He was to sort out obtaining the costs from them directly.

At the end of the trial, because our client was acquitted it allowed counsel on our behalf to make an application for a defendant's costs order.

The Magistrates can order a defendant's costs order when a '...magistrates court dealing summarily with an offence dismisses the information...' This is provided for by section 16 of the Prosecution of Offences Act 1985. The court did not award a fixed sum it allowed for our bill to be taxed by the National Taxing Team.

Our bill was subsequently prepared and sent for taxing and payment made thereafter. Of course, the funds paid to us by our client were refunded to him.

#### **Provide details of any research undertaken in the case, relating to law or procedure**

Most of the research conducted in this case related to the procedure before the Magistrates Court. The advocacy of course was conducted by my head of department, and then by counsel, but day to day preparation on the file was conducted by myself under the appropriate supervision of my head of department. The majority of my experience was dealing with Crown Court cases and therefore I was anxious to ensure that I was fully aware of the procedure and case management issues that would arise before the magistrates. I attended all hearings with my head of department, so I was fully aware of what happened, what ancillary trial orders were made, and of course to show continuity to the client. This enabled me to make sure that the case was always fully prepared for each particular hearing, and all orders were complied with.

I spoke with the legal adviser at the local Magistrates Court on a few occasions too when dealing with applications for summons for the PII and the defence witness and again this was simply to ensure that I was following the correct protocol for their court.

With regards to the law, despite the fact that I had had experience in responding to bad character applications served on behalf of the prosecution in relation to the defendant's bad character, I hadn't had much experience in applying for a non-defendant's bad character. Part of the reason for this being that counsel generally deal with such applications in the Crown Court and so the opportunity to prepare applications myself was not as frequent. In order to prepare the application, I did reconsider and research the provisions of the Criminal Justice Act 2003, in particular Section 100 and the grounds applicable thereafter.

**Provide an outline of the decision making in the case and any advice taken on strategic issues in the case**

The service of a defence case statement is discretionary in the Magistrates Court.

The disadvantages in doing so are that you are giving the prosecution early notice of your client's case and secondly you are relying on your client having told you everything he/she is likely to cover during the course of his/her evidence, because of course anything that is missing out of the statement could subsequently form part of your client's cross examination if he departs or adds to the account he has given in the statement. It therefore has to be considered very carefully whether to submit a statement in circumstances which doesn't actually require you to.

The advantage however is it may render further material to be disclosed to us that's helpful to our client's case.

Service of a statement was a decision that we had to take in this case.

The matter was discussed fully with our client and the above pros and cons aired. It was decided that we would serve a statement.

This decision was reached on the basis that our client's account had not changed in any respect despite the fact that on three occasions he had been asked to give it. The first occasion was when he made a written account of the incident for the school internal enquiry. Secondly, he provided the same account during the police interview and thirdly, in his instructions to us. This gave us confidence that he would not materially depart from a defence statement and then open himself up to cross-examination.

Another decision that had to be taken as part of the case was in relation to pursuing the defence witness.

At the start of the case when we had initially spoken to her, she was a willing witness and appeared to be supportive of our client's case, albeit a full account was not taken from her at that stage for reasons referred to above. She was happy for us to make contact and agreed to send us her account via email for us to consider the relevance and usefulness of what she had to say. However, just shortly before the trial the contact stopped, and we were unable to get hold of her. She was not responding to calls nor answering letters. A decision had to be taken as to whether we summons her or not pursue her further. Our client felt that her sudden lack of willingness may be due to pressure she was having at school, as she still worked there and still taught the pupil in question. Our client felt she was maybe not strong enough to stand by him at trial then go back to her job. Nonetheless, we had our client's best interests to protect, and we discussed carefully what we ought to do. Our initial decision was to summons her, this had with it, its own problems given that we didn't actually have a formal s.9 witness statement from her and appreciated that the court may be more cautious about granting a summons for someone we just believed could help. Moreover, summoning a witness can sometimes turn a witness hostile and we didn't want this to have a negative effect. We had decided to summons her for the first day of the trial to try and obtain a statement from her, and counsel would then have the chance to assess her attitude to the case and whether in fact she would help.

The main disadvantage to not calling her as a witness was that we had no other independent, first-hand evidence of an earlier incident where our client had been assaulted by the complainant and it was important in the sense that we were relying upon it in support of our bad character application. On the other hand, however, we had secured by way of PII disclosure, school reports of other incidents of violent and aggressive behaviour by the pupil. Another consideration had to be whether it was wise to summons a witness who is likely to then turn hostile in the witness box (as per the indication in her last email). If she turned hostile, we had no ammunition, like a signed statement from her, to then apply to the court to treat her as such. The pros and cons were discussed at length with our client, and he made the final decision, which was to leave her out and not pursue the summons.

For both of these decisions, I discussed the matters fully with my head of department who agreed with my reasoning and analysis of the situations.

#### **Detail any advice given in the case and how it was recorded**

We were not instructed to represent the client until after proceedings had commenced and he had already entered a not guilty plea.

All advice was therefore based around trial preparation, representation at his trial in the magistrates' court and post-trial work.

This advice was provided orally and in writing. When it was done orally, a written record was also made of the advice and placed on the client's file as well as confirming the advice to the client in writing, usually by way of email.

The key areas of advice included advising on the relevant law, procedure, evidence, PII, ethical / professional conduct issues and witness requirements.

#### **Provide information on any training or development needs identified arising from the case**

Given this was one of the first cases I had been involved with before the Magistrates Court it was immediately apparent that I had to familiarise myself with the case management procedure before the lower court in the event it was different to protocol followed in the Crown Court, where the bulk of my experience has been. I therefore took the opportunity to attend at the Magistrates Court with my head of department when possible, and certainly at every hearing of this case so I could expand my knowledge and become familiar with how things are done.

Similarly, with the process for applying for witness summons for both the PII proceedings and the defence witness, this was something that albeit I didn't think would be any different as both courts use the same forms, I wanted to ensure they were done correctly so as to avoid any procedural error which may affect the outcome of the case.

Perhaps the most obvious training need highlighted in this case was in relation to the situation with the unhelpful defence witness. With hindsight we should have obtained a written account from her at the first opportunity rather than agree to hear from her via email. If faced with a similar situation again a more proactive approach will be taken.

**Please identify and provide the knowledge and understanding of the learning outcomes you have met through this portfolio**

Although the offence was a summary only offence, it involved an allegation of violence on a vulnerable person by someone in a fiduciary relationship with the complainant. The consequences of a conviction for this particular client, who was someone of good character, would therefore have been very significant.

The case also gave rise to a number of interesting and sometimes challenging evidential and procedural issues.

It was therefore possible to identify and illustrate how all of the above learning outcomes were relevant in this case.

In particular, appreciating that even a relatively straightforward allegation may still give rise to a large number of procedural, evidential and ethical issues.

I confirm that the information contained on this form is accurate to the best of my knowledge and belief.

**Signed:**

**Date:**