

February 2016
MPT-2 Point Sheet:
Miller v. Trapp

Miller v. Trapp**DRAFTERS' POINT SHEET**

In this performance test, the examinee is employed by the law firm of Stuart, Parks & Howard. Katie Miller has retained the firm to pursue claims for civil assault and battery against musician Steve Trapp in connection with an incident that occurred after a concert by Trapp's band, the Revengers. Examinees have two tasks to complete: (1) draft a demand letter on behalf of Miller in anticipation of a lawsuit for assault and battery against Trapp, and (2) draft a brief memo to the assigning partner setting forth an analysis and recommendation of the compensatory and punitive damages that Miller can reasonably and realistically expect to recover from Trapp at trial. Based on the analysis in the examinee's memo, the partner will determine the appropriate amounts of damages to seek in the demand letter.

The File contains an instructional memo from the assigning partner Timothy Howard, the law firm's guidelines for drafting demand letters, an excerpt from Katie Miller's blog RockNation, an article from *Reeling Rock* magazine about the incident, a file memorandum summarizing a phone conversation between Timothy Howard and Trapp's attorney Saul Leffler, and summaries of Franklin jury verdicts in civil cases. The Library contains three Franklin cases: *Horton v. Suzuki*, *Polk v. Eugene*, and *Brown v. Orr*.

The following discussion covers all the points the drafters intended to raise in the problem.

I. FORMAT AND OVERVIEW

The assigning partner requests that the examinee (1) write a demand letter to Steve Trapp's attorney, Saul Leffler, on behalf of the client, Katie Miller, setting forth the basis for Miller's assault and battery claims and the basis for compensatory and punitive damages; and (2) write a brief memo to the assigning partner setting forth the examinee's analysis and recommendation of the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial.

A. Demand Letter

The examinee's first task is to write a demand letter to Saul Leffler. The demand letter should persuasively set forth the strength of Miller's assault and battery claims and her eligibility for compensatory and punitive damages. The guidelines for drafting demand letters indicate that demand letters should state the client's legal claim, demand that the other party pay damages and/or take or cease taking a certain action, and advocate a position and persuade the recipient.

The firm's guidelines state that a demand letter typically includes

- (1) a brief statement indicating that the lawyer represents the client in the present matter;
- (2) a brief statement of the purpose of the letter;
- (3) a succinct but persuasive statement of facts;
- (4) a thorough analysis of the bases for the client's claims;

- (5) a blank space for a specific settlement demand or amount, to be filled in by the supervising partner;
- (6) a deadline by which the other party must comply (usually one or two weeks); and
- (7) the consequences for failing to comply by the deadline, including the risks of litigation for the opposing party.

Examinees must follow the guidelines and draft a demand letter to Saul Leffler that includes each of the seven listed components. In the discussion of the bases for the client's claims (item (4) above), the examinee should thoroughly analyze and integrate both the facts and the applicable law. The examinee should also respond to arguments made against the claim and set forth the strongest credible claim on behalf of the client so that there is room for negotiation. In line with the instructions from Timothy Howard, the examinee should not refer to the Franklin jury verdict summaries in the demand letter.

B. Memo Regarding Damages

The examinee's second task is to draft a brief memo to the assigning partner about Miller's damages arising from the assault and battery claim. Examinees are told to analyze and recommend the amounts for each category of damages that Miller can reasonably and realistically expect to recover at trial, using the cases and the Franklin jury verdict summaries for guidance. The partner will then use this memo in determining the amounts of requested damages to be inserted into the demand letter.

Specific amounts for the damages award to be expected from a trial should be identified. This includes an amount for total compensatory damages with specific amounts for medical expenses, pain and suffering, and lost wages, and an amount for punitive damages. The examinee should explain the analysis resulting in these amounts.

II. FACTS

- Katie Miller is a reporter for her college newspaper and has a blog called RockNation that provides commentary about rock and roll. Miller was very excited to obtain a press pass to go backstage at the Revengers rock concert held at the Franklin City Arena. She hoped to interview the Revengers' famous lead singer and guitarist Steve Trapp after the concert for the newspaper and then post the details of the interview on her blog. Miller has "followed every piece of news" about Trapp's music and personal life; he has been her idol since he joined the Revengers.
- Miller watched the concert offstage with other photographers and journalists. She had her smartphone in her hand, set to record. After the final encore, Trapp walked offstage. Nina Pender, a photographer from *Celebrity* magazine, was in front of the crowd and leaned in to take a picture of Trapp. Trapp asked Pender to stop shooting. He then walked over to Pender, punched her in the nose, and smashed her camera on the ground. Other photographers at the scene and an amateur YouTube video captured the incident. Pender was hospitalized with serious injuries. A police investigation is ongoing, and Pender intends to sue Trapp for \$5 million in damages.

- After hitting Pender, Trapp stormed through the crowd of paparazzi and journalists, yelling obscenities and pushing individuals out of his way.
- Trapp yelled at Miller, “Get out of my way, you little punk, or I’ll beat the hell out of you.” He raised his arm as if he was going to hit her. Miller was “freaking out.” Then Trapp grabbed Miller’s phone out of her hand and smashed it to the ground. She was holding the phone tightly, and Trapp dislocated her shoulder when he grabbed the phone. She went to the hospital and was in “unbelievable” pain for almost four hours until the doctor popped her shoulder back into place.
- Miller has been “a wreck” since the incident and has found it “devastating.”
- Miller has \$5,000 in medical bills; her arm was in a sling for three days; she missed a week of part-time work in the school cafeteria, losing \$100; and she had to pay \$500 to replace her phone.
- Trapp owns a 15-bedroom vacation home in Xanadu, the exclusive Franklin beach resort. The Revengers’ most recent album, *Jab*, has received universal acclaim and awards, including 2015 Album of the Year at the Franklin City Music Awards.
- Trapp has had previous run-ins with the law. In 2009, he was charged with possession of illegal drugs; the charges were later dropped. In 2012, he pleaded guilty to misdemeanor assault and battery after attacking his then bodyguard Alex Peel.
- Timothy Howard recently spoke to Trapp’s attorney, Saul Leffler, and memorialized the conversation in a memorandum to file. Leffler asserted that Miller does not have meritorious claims for assault and battery and is not entitled to punitive damages. Trapp states that he does not remember touching Miller and that if he did touch her it was accidental. Howard pointed out that Trapp does not need any more bad publicity.

III. LEGAL ISSUES

A. Assault

- An actor is subject to liability for assault if he acts intending to cause a battery or imminent apprehension of a battery and the plaintiff is put in well-founded apprehension of an imminent battery. *Brown v. Orr*.
- Words standing alone cannot constitute an assault. However, they may give meaning to an act, and together, they may create a well-founded fear of a battery in the mind of the person at whom they are directed, thereby constituting an assault. *Holmes v. Nash* (cited in *Brown*).
- In the demand letter, examinees must argue that Trapp’s conduct constitutes assault. They should address two issues: (1) that Trapp intended to cause imminent apprehension of a battery, and (2) that Miller was put in well-founded apprehension of an imminent battery.
- The relevant facts indicate that Trapp intended to cause imminent apprehension of an imminent battery in Miller. He said he would “beat the hell” out of her if she did not get out of his way and then raised his arm as if to hit her.

- The facts also demonstrate that Trapp's acts created a well-founded fear of a battery in Miller's mind. Miller had just watched Trapp punch Nina Pender in the face and break her camera. Trapp was pushing journalists and photographers out of his way. Miller observed this conduct and could have formed a well-founded fear that Trapp was about to commit a battery upon her. Trapp specifically threatened to "beat the hell" out of her and then raised his arm as if to hit her. Moreover, Trapp's criminal record includes an assault and battery of his former bodyguard Peel, indicating his willingness to engage in violence. Miller likely knows of this criminal history because she has "followed every piece of news about Steve's music and personal life." While Trapp's drug history is not especially relevant, his attacks of Pender and Peel would contribute to Miller's well-founded fear of a battery.
- Examinees should argue that while "words standing alone cannot constitute an assault," Trapp's verbal threats combined with his physical acts could have created a well-founded fear of a battery in Miller's mind. Examinees can analogize to *Brown v. Orr* in which the court held that an assault may have occurred when the defendant shook his finger in the plaintiff's face and stated that he would "take [her] down anytime, anywhere." Examinees can also rely on *Holmes*, in which the court held that the defendant's acts may have constituted assault when the defendant came to the plaintiff's home, beat on the door, and attempted to pry it open, all while threatening to kill her.

B. Battery

- An actor is subject to liability to another for battery if he or she acts intending to cause a harmful or offensive contact, or an imminent apprehension of such a contact, and a harmful or offensive contact results. *Horton v. Suzuki*. It is sufficient that the defendant intended to cause a contact that turned out to be harmful or offensive; the defendant does not have to have intended that the contact result in harm or offense. *Id.*
- Unpermitted and intentional contact with anything so connected with the body as to be customarily regarded as part of another's person is actionable as an offensive contact with his person. *Polk v. Eugene*. To constitute a battery, it is not necessary to touch the plaintiff's body or even his clothing. Knocking or snatching anything from [a] plaintiff's hand or touching anything connected with his person, when done in an offensive manner, is sufficient to constitute an offensive touching. *Riley v. Adams* (cited in *Polk*).
- The plaintiff must show that the plaintiff did not consent to (or give apparent consent to) the defendant's contact. Consent and apparent consent are relevant to whether there was in fact a harmful or offensive contact. *Horton*.
- In the demand letter, examinees must argue that Trapp's actions constituted a battery. Examinees should address the two components of battery: (1) that Trapp intended to make contact with Miller and a harmful and offensive contact with Miller resulted; and (2) that Miller did not consent to the contact.
- Trapp intended to make contact with Miller when he grabbed her phone on purpose and with such force that he dislocated her shoulder. The resulting contact was both offensive

and harmful. (It is sufficient that Trapp intended the contact with Miller, regardless of whether he meant the contact to be harmful or offensive.)

- It was offensive because Trapp made unpermitted and intentional contact with her phone, which was so connected to her body (in her hand) as to be regarded as part of Miller's person.
- The resulting contact was harmful because Trapp dislocated Miller's shoulder and caused pain and suffering.
- Examinees should also address consent. Miller did not consent to having her phone grabbed by Trapp. Nothing about her seeking an impromptu backstage interview with Trapp would signal consent to having her phone forcefully grabbed from her hand. That she was upset as a result of the contact also indicates lack of consent.

C. Compensatory Damages

- A plaintiff in an intentional tort suit like assault or battery can seek compensatory damages for medical expenses, lost wages, and pain and suffering. *Horton*.
- Compensatory damages are mandatory once liability is found. The jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss. *Polk*.
- If Trapp is found liable for assault and/or battery, the jury must award Miller compensatory damages to compensate her for her losses.
 - In the demand letter, examinees should address Miller's eligibility to receive compensatory damages for medical expenses, lost wages, pain and suffering, and her broken phone. The specific amounts requested in the demand letter should be left blank.
 - In the memo to the partner, examinees should list specific amounts as to each type of compensatory damages (medical expenses, lost wages, pain and suffering, and broken phone) that Miller could reasonably and realistically expect to receive at trial and explain their reasoning in arriving at those amounts.
- Certain compensatory damages are straightforward. Miller should be awarded
 - \$5,000 in medical expenses to cover her \$5,000 in medical bills;
 - \$100 for lost wages to compensate her for the \$100 in lost wages from missing a week at her part-time job in the school cafeteria; and
 - \$500 for the broken phone Miller had to replace.
- Pain and suffering (another category of compensatory damages) includes physical pain as well as mental suffering such as insult and indignity, hurt feelings, and fright. Mental suffering may be inferred from proof of fright caused by a sudden, unprovoked, unjustifiable battery. There is no mathematical formula for assessing the value of pain and suffering; that determination is left to the sound discretion of the trier of fact. *Horton*.
- Miller should be awarded damages for physical pain. She endured "unbelievable" pain for almost four hours until the doctor popped her shoulder back in place. If Miller experienced

pain when Trapp dislocated her shoulder, when the doctor popped her shoulder back in place, or during or after the time she had her arm in a sling, she can seek compensation for that, too.

- Miller may be able to recover for mental suffering, including insult and indignity, hurt feelings, and fright caused by Trapp's conduct. She suffered insult and indignity when Trapp yelled at her, threatened to "beat the hell out of [her]," and grabbed and smashed her phone in front of the other journalists and photographers. Examinees could also argue that Miller should recover for hurt feelings. Trapp was Miller's idol, and she feels devastated by the incident. Miller suffered fright, as she was "freaking out" when Trapp raised his arm as if to hit her, threatened to beat her, and grabbed the cell phone from her hand. Miller has been "a wreck" since the incident.
- In the damages memo, examinees must provide a specific amount that Miller could expect to recover at trial for pain and suffering. To determine a specific amount, examinees should refer to the cases in the Library and the Franklin jury verdict summaries.
- In *Polk*, the jury awarded the plaintiff \$1,000 for pain and suffering. The jury found that the defendant subjected Polk to compensable humiliation and indignity when he "forcibly dispossessed plaintiff of his dinner plate" and "shouted in a loud and offensive manner" that the plaintiff could not be served in a private club. In *Horton*, the plaintiff was awarded \$6,000 for pain and suffering for being struck on the cheek by his karate instructor.
- The jury verdict summaries provide additional guidance. In *Little v. Franklin Chargers Inc.*, the plaintiff was awarded \$40,000 in pain and suffering for the pain of having his shoulder dislocated and the suffering of being humiliated in front of his fiancée and a stadium full of fans. In *Cook v. Matthews Garage*, the plaintiff was awarded \$50,000 for pain and suffering when an automobile repair shop employee screamed and cursed at him and broke his arm by pushing him to the floor. In *Alma v. Burgess*, the plaintiff was awarded \$400,000 in damages for pain and suffering after she was stabbed and hospitalized for her injuries.
- Examinees should compare the facts of Miller's case to those in the Library and the Franklin jury verdict summaries to arrive at a specific amount for pain and suffering. Miller's pain and suffering damages should be more than the \$1,000 in *Polk* where the defendant took the plaintiff's plate and shouted in a loud and offensive manner. They should be less than the \$400,000 in *Alma*, as that plaintiff experienced significantly more pain and suffering from being stabbed and was hospitalized. Examinees could suggest an amount similar to the \$40,000 awarded in *Little* or the \$50,000 awarded in *Cook*. As in *Little*, where the plaintiff's shoulder was dislocated and he was humiliated in front of his fiancée and a stadium full of fans, Miller too had her shoulder dislocated and was humiliated in front of a crowd of journalists and photographers.
- A perceptive examinee will notice that the pain and suffering awards in this problem are about three to five times the amount of the medical expenses. In *Horton*, the medical expenses were \$1,500, and the pain and suffering damages were \$6,000. In *Cook*, the

medical expenses were \$10,000, and the pain and suffering damages were \$50,000. In *Alma*, the medical expenses were \$100,000, and the pain and suffering damages were \$400,000. In *Little*, the medical expenses were \$12,000, and the pain and suffering damages were \$40,000.

- Miller's medical expenses are \$5,000. Using the ratio of one to between three and five, a plausible amount for her pain and suffering damages would be between \$15,000 and \$25,000.

An excellent examinee will analyze pain and suffering damages both by comparing the facts of Miller's case to those of the other cases and by recognizing and applying the multiplier of between three and five between her medical expenses and pain and suffering damages.

D. Punitive Damages

- A plaintiff may seek punitive damages for assault and battery claims. *Horton*.
- Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. *Polk*.
- Punitive damages are awarded in the jury's discretion to punish the defendant for his outrageous conduct and to deter him and others like him from similar conduct in the future. The focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards. *Id.*
- In assessing punitive damages, the trier of fact can consider (a) the character of the defendant's act (whether it is of the sort that calls for deterrence and punishment); (b) the nature and extent of the harm that the defendant caused or intended to cause; and (c) the wealth of the defendant. *Id.*
- Punitive damages should not be so unrelated to the injury and compensatory damages proven as to plainly manifest passion and prejudice rather than reason and justice. *Id.* Few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. *State Farm v. Campbell*, 538 U.S. 408 (2003) (cited in *Polk*).
- In the demand letter, examinees are expected to make the case that Miller is entitled to punitive damages. Examinees should argue that Trapp's conduct toward Miller was outrageous because of his evil motive or reckless indifference to the rights of others. The facts do not entirely support this proposition, but a credible argument can be made that Trapp's conduct constituting both the assault and the battery could lead a court to award punitive damages.
 - The conduct underlying the assault—Trapp threatening to “beat the hell” out of Miller and acting as if he was about to hit her—shows evil motive.
 - His conduct constituting the battery—forcefully grabbing Miller's phone from her hand and breaking it and dislocating her shoulder—shows evil motive and reckless indifference to the rights of others. Examinees can argue that Trapp was acting with evil motive and reckless indifference to the rights of others as he rampaged through the crowd of journalists and photographers, injuring Miller and pushing others. Grabbing

someone's phone contravenes that person's right to be free from offensive or harmful contacts.

- Examinees should address the negative character underlying Trapp's acts: his yelling at Miller, threatening to beat her, acting like he was going to hit her, and grabbing and smashing her phone. Hostile, threatening, and (somewhat) violent behavior should be deterred and punished.
- Examinees will have a harder time claiming that the nature and extent of the harm to Miller warrants elevated punitive damages. She sustained some harm—a shoulder injury, \$5,000 in medical bills, pain and suffering, \$100 in lost wages, and a broken phone. While the harm is not especially serious, examinees should argue that it bolsters her eligibility for punitive damages.
- Examinees should claim that punitive damages should be substantial because of Trapp's wealth. While the extent of his financial resources is unknown, Trapp's band the Revengers has had great success. Their most recent album received universal acclaim and was named 2015 Album of the Year. Trapp presumably had substantial financial rewards from this success. His wealth is also reflected by his large vacation home in Xanadu, the exclusive Franklin beach resort.
- In the memo to the assigning partner, examinees must specify an amount Miller is likely to receive for punitive damages if the case goes to trial and their reasoning in choosing that amount. Examinees should use the above factors for assessing punitive damages in their reasoning as to the amount they choose. They should also rely on the Franklin jury verdict summaries, the cases in the Library, and the single-digit ratio rule from *Campbell* in determining and explaining the appropriate amount of punitive damages.
- In *Little*, the plaintiff requested but was not awarded punitive damages after a team mascot tried to pull the plaintiff onto the floor during halftime of a professional basketball game. In *Cook*, the plaintiff was awarded \$300,000 after being screamed and cursed at and pushed to the floor, resulting in a broken arm. In *Alma*, the plaintiff was awarded \$1,000,000 in punitive damages after being stabbed by the defendant.
- Examinees should request less than the \$1,000,000 of punitive damages awarded in *Alma*. In *Alma*, the character of the defendant's act and the nature and extent of the harm to the plaintiff were more severe than the character of Trapp's acts and the harm suffered by Miller. Trapp may be wealthier than the defendant in *Alma*, however. An examinee might request an amount similar to the \$300,000 awarded in *Cook*. The character of Trapp's acts is similar to those in that case. The defendant in *Cook* screamed and cursed at the plaintiff, and Trapp yelled at and threatened Miller. The defendant in *Cook* used minor violence (pushing the plaintiff), and Trapp too used minor violence by grabbing and smashing Miller's phone. Again, Trapp's wealth is likely greater than that of the defendant in *Cook*, thus perhaps justifying a higher award.
- In *Little* and *Horton* the plaintiffs were not awarded punitive damages. Examinees may choose to distinguish the facts of Miller's case from the facts of these cases.

- Under the single-digit ratio rule from *Campbell*, the punitive damages amount must be only up to nine times the total compensatory damages award. Here, Miller's compensatory damages will be \$5,600 (\$5,000 in medical expenses + \$100 in lost wages + \$500 for the broken phone) plus the amount the examinee has chosen for pain and suffering. For instance, if the examinee concludes that \$20,000 is the amount of pain and suffering damages likely to be awarded, the total compensatory damages will be \$25,600 (\$20,000 + \$5,600). Then, under the *Campbell* rule, the punitive damages should not exceed \$230,400 (9 x \$25,600).
- Excellent examinees will use the factors for assessing punitive damages, the jury verdict summaries, the cases in the Library, and the *Campbell* single-digit ratio in reaching and explaining the amount of punitive damages.

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