

CANADA / JUDGMENT

Bagri v. Heran

2020 BCSC 2002

COURT

Supreme Court of British Columbia

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2020 BCSC 2002 Bagri v. Heran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bagri v. Heran,

2020 BCSC 2002

Date: 20201216

Docket: M210949

Registry: New Westminster

Between:

Amanda Bagri

Plaintiff

And

Manraj Heran

Defendant

- and -

Docket: M210950

Registry: New Westminster

Between:

Amanda Bagri

Plaintiff

And

Michael Hoenisch and Ryan Gauthier

Defendants

- and -

Docket: M210951

Registry: New Westminsters

Between:

Amanda Bagri

Plaintiff

And

Guang Cheng Liu and Ya Na Liu

Defendants

Before: The Honourable Mr. Justice Gomery

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

November 16-20, 23 and 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 16, 2020

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Introduction

- [1] Amanda Bagri claims damages for soft tissue injuries suffered in three motor vehicle accidents. Each accident involved a collision between Ms. Bagri's vehicle and a vehicle driven by one of the defendants. Ms. Bagri maintains that the accidents were caused by the negligence of the other drivers. She says that the first accident was the most serious of the three and her injuries were exacerbated by the two subsequent collisions.
- [2] The defendants are represented by common counsel. Each accident is the subject of a separate action and the three actions were tried together.
- [3] The defendants admit liability for the first accident and deny liability for the second and third. If there is liability for the second and third accidents, they submit that Ms. Bagri was contributorily negligent. The defendants maintain that Ms. Bagri's injuries caused by the collisions are relatively minor. They say that she is only entitled to modest non-pecuniary damages for her injuries suffered in the first accident, and special damages.

- [4] These reasons come in three parts. In Part 1, I outline the background and address Ms. Bagri's credibility. In Part 2, I address the liability issues. In Part 3, I turn to the assessment of damages.

Part 1: Background and Credibility

Background

- [5] Ms. Bagri was born in the spring of 1991. She is 29 years old. She was born in Vancouver and was living alone in Vancouver at the time of the accidents.
- [6] Ms. Bagri is a professional hairstylist who graduated from high school in 2009, and completed a vocational program in hair design in June 2010. She has worked as a hairstylist ever since, although she was also employed providing personal care to her grandfather in 2013 and 2014.
- [7] From June 2016 to the time of trial, Ms. Bagri worked as a hairstylist at Pure Beauty Bar, a salon on Cambie Street at the corner of Marine Drive in South Vancouver. She rented a chair in the salon, collected her own revenues, and paid her own expenses. The salon received customers between 7 a.m. and 8:30 p.m. Ms. Bagri fixed her own working days and hours, which varied according to the needs of her customers and her own availability.
- [8] Ms. Bagri lived on Jervis Street in the West End of Vancouver. She owned a car and drove it to and from work. In 2017 and 2018 until the second accident, her car was a 2002 Honda Civic. At the time of the third accident in late 2018, she was driving a 2017 Mazda.
- [9] The first collision occurred on March 23, 2017, the second on August 30, 2018, and the third on December 6, 2018.

Credibility and reliability

- [10] The defendants maintain that Ms. Bagri is neither a credible nor a reliable witness.
- [11] Ms. Bagri's counsel concede that she is financially unsophisticated and a poor historian. Accepting that her evidence concerning her hours worked before and since the accidents is impressionistic and unreliable, they submit that her account of her injuries and their effect on her life is consistent and generally credible. They submit that the financial impact of her injuries can be inferred from an examination of contemporaneous records.
- [12] I agree that Ms. Bagri's evidence concerning her hours worked and her financial affairs generally is impressionistic and unreliable. The difficult question concerns her credibility, that is, her propensity to tell the truth. In approaching this question, I have had regard to the well-known list of considerations canvassed by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.

- [13] In giving evidence, Ms. Bagri was cooperative, responsive, and made appropriate concessions. She has a sympathetic personality. Unfortunately, in the course of this proceeding, she repeatedly provided precise, sometimes elaborate information and explanations that were untrue.
- [14] On April 18, 2017, Ms. Bagri completed a CL22 Insurance Claim Application in which she indicated that, at the time of the first accident, she was earning \$7,000 per month. She accepts that this was untrue. She testified in chief that she thought it was true when she filled out the form. At an examination for discovery conducted two years after she filled out the form, on August 13, 2019, she confirmed the \$7,000 amount under oath.
- [15] Ms. Bagri's tax return for 2016 records her net income for the year as \$16,557. However, her tax returns are unreliable because Ms. Bagri does not record cash receipts and does not know how much cash she was receiving, except that it was sufficient to cover the chair rental at the Pure salon of \$900 to \$1,200 per month.
- [16] In completing the CL22 application and giving evidence on discovery, Ms. Bagri did not know how much she was making. The amount of \$7,000 per month (\$84,000 annually) was a figure plucked from the air. It is probably more than twice her actual income.
- [17] In January 2018, Ms. Bagri filled a prescription for Tylenol 3. At her examination for discovery in 2019, she testified that this painkiller was prescribed for her by a physician, Dr. Henry Wong, who was treating her for accident-related injuries. She testified that she took the Tylenol once or twice a week for approximately three weeks, but did not finish the prescription. At a subsequent examination on November 4, 2020, shortly before trial, she testified that she did not take any of the Tylenol. Under cross-examination at trial, she testified that the prescription was not prescribed by Dr. Wong. It was prescribed by a cosmetic surgeon, Dr. Lennox, in connection with a private surgical procedure, and had nothing to do with accident-related injuries.
- [18] The evidence Ms. Bagri gave on her first examination for discovery was false in more than one way. She named the wrong doctor as the prescriber. She wrongly stated that the prescription was to treat her for injuries suffered in the accident. It is unclear whether she ever took any of the medicine.
- [19] Ms. Bagri was assessed by an independent physician, Dr. Trent Faraday, and a kinesiologist, Mr. Chris Nguyen, who conducted a functional capacity evaluation. She gave both of them similar, detailed accounts of the effects of the collisions on her ability to work. She told them that, before the first collision, she worked ten hours per day, five to six days a week. After the first and second accidents, she said she was off work for two weeks; after the third accident, she was off work for one week. She said that, upon her return to work after the first, second, and third accidents, she was only able to work shortened hours, on alternate days.

- [20] Ms. Bagri's evidence-in-chief at trial was somewhat less precise. She confirmed that she was working full-time before the first accident. She said that she was obliged to take two weeks off following the first accident, and one week off following the second and third accidents. She said that she was only able to work part-time in the period after each accident, though each time her condition improved over time.
- [21] The Pure salon maintains an electronic calendar in which appointments are recorded. Under cross-examination, Ms. Bagri was questioned about the appointments recorded in the calendar. There are many appointments recorded in the periods when she says that she was off work. She explained that she cancelled these appointments in direct communication with her clients without deleting them from the calendar.
- [22] Ms. Lenard has been going to Ms. Bagri to have her hair done weekly for the past seven or eight years. I am led by her evidence not to accept Ms. Bagri's evidence that she did not work in the periods after the accidents. Ms. Lenard cannot recall that any appointments were ever cancelled. Her practice is to conclude each appointment by scheduling the next, although occasionally she makes new appointments by text. According to the calendar, Ms. Lenard had appointments with Ms. Bagri on March 25, 2017 (two days after the first accident), August 31, 2018 (the day after the second accident), September 8, 2018 (the following week), and December 7, 2018 (the day after the third accident). According to Ms. Bagri's evidence, all these appointments were cancelled. I do not accept that Ms. Lenard overlooked the cancellation of four appointments in giving evidence.
- [23] What is much more likely is that Ms. Lenard attended all these appointments as set out in the calendar. On August 31, 2018, she scheduled the September 8 appointment, and on September 8, she scheduled an appointment that took place, according to the calendar, on September 15. On December 7, 2018, she scheduled an appointment that took place, according to the calendar, on December 14. I conclude that Ms. Bagri's account of having cancelled appointments informally, without removing them from the calendar, is untrue. She offered it in an attempt to reconcile the calendar with what she had told Dr. Faraday and Mr. Nguyen.
- [24] There are further important discrepancies between the calendar and Ms. Bagri's account of her work history. The calendar does not support Ms. Bagri's contention that she was working in excess of 40 hours per week before the first accident. It does not support her contention that she settled into a pattern of working alternate days afterwards. I will address these matters later in these reasons, in assessing Ms. Bagri's wage loss claims.
- [25] I am driven somewhat reluctantly to the conclusion that Ms. Bagri's credibility is suspect. I approach all of her evidence with caution for this reason and because, as her counsel concede, she is a poor historian, especially where financial matters are concerned.

Part 2: Liability issues

- [26] The first collision occurred at about 7 p.m. on March 23, 2017 at the intersection of Citadel Parade and Dunsmuir Street in Vancouver (The notice of civil claim states that the collision occurred one block to the north, at the corner of Citadel Parade and West Georgia Street. Nothing turns on the discrepancy.)
- [27] Ms. Bagri was stopped at a stop sign on Citadel Parade, waiting for a chance to turn left onto Dunsmuir Street. A larger car owned and driven by the defendant, Manraj Heran, rear-ended her. Mr. Heran admits liability for the first collision and does not suggest that Ms. Bagri was contributorily negligent.

The second collision

- [28] The second collision occurred on August 30, 2018 in an alley just east of Main Street in Vancouver, where the alley meets East 57th Avenue. Ms. Bagri was driving her car south in the alley towards East 57th Avenue. The defendant, Ryan Gauthier, was driving a large panel van owned by the defendant, Michael Hoenisch, west along East 57th Avenue. Mr. Gauthier turned right into the alley, heading north, as Ms. Bagri was approaching from the north. The two vehicles collided at a low speed.
- [29] The only witnesses to the second collision are Ms. Bagri and Mr. Gauthier. They disagree as to exactly where and how the collision occurred.
- [30] The accident took place in the morning, probably between 8:30 a.m. and 9:20 a.m. It was a bright day, with good visibility. The pavement was dry.
- [31] Ms. Bagri was alone in her car. She was on her way from her mother's house to a bakery, taking a familiar route. She intended to turn right from the alley, westbound onto East 57th Avenue.
- [32] Mr. Gauthier was accompanied by his two-year old son in a car seat beside him. He was on his way to drop his son off for child care at a house just off the alley, after which he would head off to work. This was a familiar routine for him.
- [33] A tall fence runs along the east side of the alley as it approaches 57th Avenue from the south. The fence blocks the line of sight between the alley and traffic (such as Mr. Gauthier) approaching from the east until a vehicle in the alley is close to or at the south end of the fence line. The south end of the fence is 220" (just over 18') from the north curb of 57th Avenue.
- [34] A sidewalk runs along the north side of 57th Avenue. East of the alley, it is separated from the street by a grassy verge. There is an unmarked crosswalk where the sidewalk crosses the alley.

- [35] Ms. Bagri says she proceeded cautiously up the alley and stopped well short of the sidewalk, where some pedestrians had just passed. She wanted to make sure no more pedestrians were coming. She says she heard a screeching sound and saw Mr. Gauthier's van turning into her path. Her foot was on the brake and there was no time to honk. She says that the collision occurred while her vehicle was at rest, well within the alley. According to her account, by the time Mr. Gauthier's van struck her vehicle, it had completed its turn and had fully entered the alley.
- [36] Mr. Gauthier says that he had started his turn into the alley when Ms. Bagri's vehicle suddenly came into view. Both of them hit their brakes and the collision occurred in the area of the unmarked crosswalk. While he recalls that he made a wide turn, Mr. Gauthier's van was angled at the moment of collision and the rear end was still on 57th Avenue, blocking traffic.
- [37] Neither vehicle's airbags deployed. While both drivers agree that it was a low speed collision, there was sufficient damage to Ms. Bagri's car that it was eventually written off.
- [38] Mr. Gauthier and Ms. Bagri concur that, the first thing they did, following the collision, was agree that Ms. Bagri should back up her car so that Mr. Gauthier might move forward. Ms. Bagri says that this was necessary to make space in the alley so that other cars could get by. Mr. Gauthier says that it was necessary so that he could stop blocking traffic on 57th Avenue. Mr. Gauthier's recollection is firm and I accept his evidence on this point.
- [39] The physical evidence is more consistent with Mr. Gauthier's account than Ms. Bagri's. Mr. Gauthier's van struck Ms. Bagri's vehicle on the driver's side front corner, more on the side than on the front. He had not completed his turn.
- [40] Having found that (1) Mr. Gauthier's van was angled at the moment of impact, and (2) it came to rest with its rear end still on 57th Avenue, it follows that the collision took place while the van was in the unmarked crosswalk where the sidewalk crosses the alley. The van is 16' long. The north edge of the sidewalk is 153.5" (approximately 13') from the north end of the road. The point of impact was either in the unmarked crosswalk or just to the north.
- [41] Contrary to Ms. Bagri's evidence, I think it is most likely that the collision occurred while both vehicles were in motion. The drivers saw one another and were braking, but were unable to stop in time to avoid a collision.
- [42] The alley is more than 20' wide. Mr. Gauthier's van was 6.5' wide. Ms. Bagri's Honda Civic would not have been any wider. There should have been enough room for the two vehicles to pass. While it is probable that Ms. Bagri's vehicle was not all the way over to the right hand side, neither was Mr. Gauthier's vehicle. Mr. Gauthier did not testify that Ms. Bagri left him with no room to get by on the right.
- [43] In my view, both drivers failed to exercise reasonable care and were at fault in the collision.

- [44] Each driver owed the other a duty to take reasonable care for their safety. A driver's duty of care is informed but not exhausted by legislated rules of the road; *Cook v. Teh* (1990), 45 B.C.L.R. (2d) 194 (C.A.) at paras. 17-19; *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 18-21.
- [45] On his own account, Mr. Gauthier began his turn into the alley before he was able to see down it to spot Ms. Bagri approaching from the north. Had he taken a wider turn and spotted her earlier, he could have stopped in time or steered past Ms. Bagri to the right.
- [46] The intersection where the alley met 57th Avenue was uncontrolled. Entering the intersection, Mr. Gauthier's duty was to yield the right of way to a vehicle such as Ms. Bagri's that was approaching from the right; Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA], s. 173(1). Once in the alley--in law, it was a highway without marked lanes--he was obliged to keep to the right-hand half of the roadway, where practicable; MVA, ss. 150, 151. The collision resulted from Mr. Gauthier's failure to follow these rules, which I find was negligent in the circumstances.
- [47] As the driver of a vehicle emerging from the alley, s. 176(1) of the MVA required Ms. Bagri to stop immediately before driving across the unmarked crosswalk. I find that the collision resulted from her failure to do so. Her failure to keep to the right-hand half of the roadway also contributed to the collision. As with Mr. Gauthier, I find that Ms. Bagri's failure to follow the rules was negligent in the circumstances.
- [48] Section 1(1) of the Negligence Act, R.S.B.C. 1996, c. 333 requires me to apportion the liability to make good the damage or loss suffered by Ms. Bagri "in proportion to the degree to which each person was at fault". By s. 1(2), if it is not possible to establish different degrees of fault, the liability must be apportioned equally. In this context, "fault" means blameworthiness, and the court must evaluate the extent to which each party's conduct departed from the standard of reasonable care; *Alberta Wheat Pool v. Northwest Pile*, 2000 BCCA 505 at para. 46; *Randhawa v. Evans*, 2020 BCCA 292 at paras. 22-23.
- [49] I find that Mr. Gauthier and Ms. Bagri were equally at fault. Their responsibility for the damage or loss suffered by Ms. Bagri as a result of the second collision must be apportioned equally.

The third collision

- [50] The third collision occurred after dark in the evening on December 6, 2018, on Pacific Avenue just east of Howe Street in Vancouver. It was raining. Ms. Bagri's car was driving west, as was a late model Mercedes Benz owned by the defendant, Ya Na Liu and driven by her husband, Guang Liu. The Liu vehicle's left front bumper made contact with the right side of Ms. Bagri's car, behind the rear door. It was a glancing blow.
- [51] The only witnesses to the third collision are Ms. Bagri, Mr. Liu, and Ms. Liu. They disagree as to how the collision occurred.

- [52] Where the collision occurred to the east of Howe Street, Pacific Avenue has three lanes for westbound traffic, plus a left-turn lane for traffic turning south onto Howe Street. The right-most curb lane exits onto an on-ramp that circles around to the right, leading south-bound traffic onto the Granville Bridge. The two centre lanes are for through traffic. Two blocks further west, traffic still in the left-centre lane must turn left onto the Burrard Bridge. Only the right-centre lane leads onto Pacific Avenue west of Burrard Avenue, which was Ms. Bagri's destination.
- [53] Ms. Bagri says that she was in the right-centre lane when the collision occurred. I accept her evidence on this point. She was driving a familiar route to her home just a short distance away. There was no reason for her to move into the curb lane, which would take her onto the Granville Bridge and away from her destination. Ms. Bagri did not see the Liu's vehicle before it struck her from behind.
- [54] Mr. and Ms. Liu were not familiar with the area. They were trying to get home to Richmond following a shopping trip to the Home Depot store on Cambie Street on the south side of False Creek. Leaving the Home Depot, Mr. Liu took a wrong turn and ended up crossing False Creek by the Cambie Bridge into the downtown core. They drove around for some time--Ms. Liu says it was 10 to 20 minutes--before Mr. Liu pulled over and entered their home address into his vehicle's GPS navigation system. Mr. and Ms. Liu do not speak or read English. The system displayed a map and gave oral instructions in Mandarin, which Mr. Liu was trying to follow when the collision occurred.
- [55] Mr. and Ms. Liu agree that, at the time of the collision, their vehicle was in the curb lane, preparatory to turning right onto the Granville Bridge, with a view to going south and home to Richmond.
- [56] The collision occurred in one of three ways: Mr. Liu veered to the left out of his lane into Ms. Bagri's lane, striking Ms. Bagri; Ms. Bagri veered to the right out of her lane into Mr. Liu's lane, so that the Liu vehicle struck her vehicle; or, conceivably, both vehicles veered towards one another. The third possibility is the least likely of the three.
- [57] Mr. and Ms. Liu admitted on cross-examination that they did not see Ms. Bagri's vehicle before the collision. Both testified in chief, in identical terms, that they sensed "a dark shadow" that approached from the left and cut in front immediately before the collision. Noting that Mr. Liu did not report the collision to ICBC until two months later on February 9, 2019, I find that this was an unreliable attempt to reconstruct what occurred.
- [58] Mr. Liu was uncertain and distracted. He was in unfamiliar surroundings. He had been driving aimlessly for some time and was trying to get home. He was contending with darkness, rain, traffic, oral instructions from the GPS navigation system, and street signage he could not read easily or at all. In contrast, Ms. Bagri was following a familiar path on her way home. I think it is much more likely that Mr. Liu unintentionally veered to the left, out of his lane, than that Ms. Bagri unintentionally veered to the right, out of her lane.

[59] Accordingly, on a balance of probabilities, I find that the collision resulted from Mr. Liu's error in leaving the curb lane and striking Ms. Bagri's vehicle in the centre-right lane. It was entirely the result of Mr. Liu's negligence. Ms. Bagri was not contributorily negligent.

Part 3: Assessment of damages

[60] Ms. Bagri claims damages of \$284,067.02 under the following heads:

- a) Non-pecuniary damages of \$80,000;
- b) Past loss of earning capacity of \$27,438.49;
- c) Future loss of earning capacity of \$170,000;
- d) Costs of future care of \$4,304.78; and
- e) Special damages of \$2,323.75.

[61] The special damages are agreed.

[62] In addition to assessing damages, I must address the effect of Ms. Bagri's contributory negligence and the allocation of responsibility for the damages among the defendants.

Non-pecuniary damages

[63] Ms. Bagri seeks an award of \$80,000. The defendants submit that an award of \$35,000 to \$40,000 is appropriate. Both sides agree that Ms. Bagri's non-pecuniary injuries are indivisible as among the three collisions.

Legal framework

[64] Non-pecuniary damages are awarded as compensation for past and future pain, suffering, disability, and loss of enjoyment of life. The Court must take into account both the seriousness of the injury and the ability of the award to ameliorate the condition or offer solace to the victim: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45, leave to appeal ref'd, [2006] S.C.C.A. No. 100 [Stapley]. In *Stapley*, at para. 46, the Court of Appeal noted a non-exhaustive list of factors to be considered: age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism as a factor that should not, generally speaking, penalize the plaintiff.

[65] An award must be fair and reasonable, and fairness is measured against the awards made in comparable cases, recognizing that other cases provide only a rough guide. Each case must be decided on its own facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189.

Ms. Bagri's injuries and the evolution of her condition

- [66] Ms. Bagri tendered expert reports from Dr. Wong, Dr. Faraday, and Mr. Nguyen. The reports are helpful, but must be read with some care, because they are based in part on reports of symptoms that are not established in evidence. For example, Dr. Faraday, who examined Ms. Bagri in 2019, relied on a complaint that she was experiencing ongoing headaches attributable to the collisions. At trial, Ms. Bagri testified that she no longer experiences headaches, and she did not say that she was experiencing headaches in 2019.
- [67] Prior to the first accident on March 23, 2017, Ms. Bagri had no prior experience of soft tissue injuries.
- [68] When Mr. Heran's vehicle struck her vehicle from behind, Ms. Bagri was looking straight ahead with her hands on the steering wheel. Her body was jolted forward by the collision, and then brought back as she was restrained by her seat belt. Her head hit the headrest.
- [69] Ms. Bagri's car was not badly damaged. After exchanging information with Mr. Heran, she drove home. She soon began to experience pain in her neck, back, and left wrist.
- [70] Ms. Bagri was unable to get in to see her family doctor, Dr. Wong immediately, so she went to a walk-in clinic and saw Dr. Lam on the second day after the accident, March 25.
- [71] Ms. Bagri's complaints of neck and back pain persisted and she saw Dr. Wong on March 31, 2017. She reported pain in the neck, thoracic, and lumbar spine. Ms. Bagri saw Dr. Wong five more times for accident-related complaints from May 2017 through July 2018. On examination, each time he observed cervical, thoracic, and lumbar spasm, and a decreased range of motion.
- [72] Dr. Wong recommended that Ms. Bagri take analgesics to manage her pain and pursue a program of active rehabilitation with a physiotherapist. She followed these recommendations and did stretches, exercises, and yoga at home. By the summer of 2018, Dr. Wong's observations of spasm in Ms. Bagri's neck and back had improved from "moderate" to "mild".
- [73] Ms. Bagri says that in this period she was also experiencing almost every day a pulsing, aching pain in her left shoulder, when she lifted her arm. I accept this evidence. While Dr. Wong did not note complaints of shoulder pain, he considers that shoulder complaints are often attributable to neck pain and would not necessarily document them separately.
- [74] Ms. Bagri says that her left wrist remained sore for some time after the accident and eventually resolved. I think that the wrist pain probably resolved quickly, because Dr. Wong did not note a complaint of wrist pain after he saw her on March 31, 2017.
- [75] For a few months following the accident, Ms. Bagri suffered cervicogenic headaches attributable to the accident.

- [76] Ms. Bagri says that the pain she was experiencing woke her up two or three times a night following the first accident and that, by the time just prior to the second collision in August 2018, her condition had improved to the point that she was getting up only once a night. She felt that she was getting better and on the road to recovery, though still not 100%.
- [77] Ms. Bagri testifies that the second collision on August 30, 2018, reset her back to the condition she had been in after the first accident so far as her neck, shoulder, mid-back, and lower back were concerned. Once again, the pain was waking her up two or three times a night. However, she was feeling a little better by the time of the third accident on December 6, 2018. With the third accident, she says, it all flared up again.
- [78] Ms. Bagri continued with physiotherapy until March 2019. At that point, she felt she had reached a plateau and was no longer receiving symptomatic relief from the physiotherapy sessions.
- [79] Ms. Bagri was seen by Dr. Faraday for an independent medical examination on June 20, 2019. He observed tenderness, stiffness, and swelling of the left lateral neck muscles and left trapezius muscles, and tenderness to palpation of the sub-occipital area, the left shoulder, the joint where the clavicle meets the scapula, and the left lumbar paraspinal muscles and left lumbosacral area.
- [80] At some point, Ms. Bagri developed a complaint of numbness and tingling in her left arm. On her evidence, it is not clear when this occurred. She mentioned it to Dr. Faraday in 2019 and to Mr. Nguyen on June 10, 2020.
- [81] Dr. Faraday testifies that, notwithstanding the apparent late onset of the complaint of numbness and tingling, it is probably due to the soft tissue injuries Ms. Bagri suffered in the collisions. He explains:

I have seen this frequently in my practice where no objective neurological findings can be found to explain intermittent sensory symptoms of numbness in the hands; however, the sensory disturbance symptoms are typically associated with increased muscle tension or spasm in the neck, trapezius, periscapular or scapular muscles.

In Ms. Bagri's situation, her current intermittent left hand numbness symptoms are likely due to the left neck and upper back musculoligamentous injury that she sustained in the March 23, 2017, August 30, 2018 and December 6, 2018 motor vehicle accidents.

- [82] During her assessment by Mr. Nguyen, Ms. Bagri filled in a pain assessment diagram with circles and slashes indicating numbness and pins and needles in her neck, left shoulder, and left arm. She rated these complaints as hurting at 0.25-4 on a scale of 1 to 10. Notably, she did not include in the diagram any of the symbols provided for complaints of burning, stabbing, aching, or "other".

- [83] Ms. Bagri told Mr. Nguyen that her pain in her mid-back and lower back had fully resolved. He understood from her that she was now asymptomatic in these areas. Ms. Bagri says that Mr. Nguyen misunderstood her, and that she still has pain in her neck, mid-back, lower back, and shoulder, not every day, but a few days a week. She is able to manage her pain with Advil and yoga stretches. The Advil does not make the pain go away completely, but it helps a great deal.
- [84] In summary, I conclude that, as a result of the first collision, Ms. Bagri suffered a strain to the soft tissues of her neck, upper and lower back, headaches, a strain to her left wrist, pain in her left shoulder, disturbed sleep, and eventually, numbness and tingling in her left arm. The wrist strain and headaches resolved within a few months.
- [85] Ms. Bagri's symptoms in her neck and back flared up as a result of the second and third collisions. These collisions did not cause her new or different symptoms.
- [86] Ms. Bagri continues to be bothered by pain in her neck and shoulder. The pain is, as she says, manageable. She no longer suffers wrist pain or headaches. If she still suffers pain in her mid-back and lower back, it is only from time-to-time and it is a small enough matter that she neglected to mention it to Mr. Nguyen in June 2020. There is no evidence that Ms. Bagri is still suffering pain that wakes her up at night.
- [87] Dr. Faraday's report states that, "Ms. Bagri's prognosis for a full recovery is guarded, given the amount of time that has elapsed since the accidents and the temporary response to therapy". By "guarded", Dr. Faraday means simply "uncertain". He does not have an opinion as to whether she will or will not improve. I conclude that it is possible that she will fully recover, and there is a risk that she will have to contend with her present discomfort indefinitely.

Other Stapley considerations

- [88] Ms. Bagri was 26 years old at the time of the first accident and 27 at the time of the second and third accidents.
- [89] Ms. Bagri's injuries have certainly caused her pain and suffering, but they have not disabled her. At no stage did they entirely stop her from working.
- [90] As it is for many people, Ms. Bagri's career is important to her. She chose to become a hairstylist because she has a passion for the beauty industry and enjoys the connection she can build with her clients. Ms. Bagri's injuries have not prevented her from maintaining this career and pursuing elaborate plans to take it to a higher level by opening her own hair salon. I address Ms. Bagri's claim that her injuries have limited her ability to earn income as a hairstylist later in these reasons.
- [91] Ms. Bagri testifies that, since the first accident, her injuries have made her somewhat less sociable, and she goes out less often with friends and family. This is corroborated to some extent by her brother-in-law, Mr. Bains, who observes that she will no longer go hiking or

bowling, as she used to. She leaves social gatherings earlier and is not as talkative. Right after the first accident, and again after the second accident, she seemed tired and uncomfortable. Ms. Lenard observes that Ms. Bagri was "a little bit more subdued" after the accidents.

- [92] The impact of the injuries was not so severe as to prompt Ms. Bagri to cancel vacations that included lengthy airplane trips. Ms. Bagri flew to Bali in late April and early May of 2017, leaving just a month after the first accident. Later she went on holidays to Las Vegas, Vietnam, and New York. She drove to Calgary for the Calgary Stampede. Ms. Bagri says that the flights were uncomfortable.
- [93] Before the accidents, Ms. Bagri went to a gym regularly and did hot yoga workouts at a studio. She continued going to the gym until the COVID-19 pandemic, and intends to return when the pandemic is over, but her workouts have changed. Now she favours a lower intensity workout. She has continued doing yoga at home, but no longer does hot yoga in studios. While Ms. Bagri is far from overweight, she has gained about 20 lbs since the accidents, which she attributes not being able to exercise as much and as intensely.
- [94] Ms. Bagri's injuries have not significantly impaired her family, intimate, and social relationships.
- [95] Ms. Bagri's injuries have not caused her significant emotional suffering. She says that she felt depressed for a time following the first accident. I do not think this was anything more than a description of her natural, and understandable, reaction to persistent neck and shoulder pain and sleep disruption. She did not seek out treatment for depression and there is no record that any physician considered she was suffering from a mood disorder.

Comparable cases

- [96] Mr. Bagri submits that the following cases are comparable to the case at bar: *Carson v. Ehman*, 2019 BCSC 2120; *Smith v. Fremlin*, 2013 BCSC 800, *aff'd* 2014 BCCA 253; and *Rabiei v. Oster*, 2019 BCSC 733. The non-pecuniary damages awarded in these cases ranged from \$70,000 in *Rabiei* to \$90,000 in *Smith*.
- [97] Of these cases, *Rabiei* is the closest to this case on its facts. At the time of the accident, the plaintiff was a 25-year-old hairstylist. Like Ms. Bagri, she suffered soft tissue injuries to her neck and back that were painful, but not disabling. There were circumstances favouring a more significant award in her case than in this case: three years after the accident, the Court accepted that Ms. *Rabiei*'s symptoms had become chronic and was unlikely to improve; and her injuries caused her to give up playing the violin, described by Justice Adair as "a major loss, as, prior to the accident, she was a dedicated and talented violin player" (at para. 142). Ms. Bagri has not suffered a comparable loss.

- [98] The defendants submit that the following cases are comparable to the case at bar: *Randhawa v. Chiang*, 2014 BCSC 631; *Hunter v. Yuan*, 2010 BCSC 1526; *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114; and *Frech v. Langley*, 2012 BCSC 1230. The non-pecuniary damages awarded in these cases ranged from \$35,000 to \$40,000 (approximately \$39,000 to \$45,500 in 2020 dollars). *Edmondson* marks the high end of this range.
- [99] These cases all involved similarly aged plaintiffs who suffered soft tissue injuries to some combination of the neck, upper back, and shoulders. The following passage from N. Smith J.'s judgment in *Edmondson* offers a fair description of Ms. Bagri's situation, except that the amount of time that has passed since the first accident is shorter in Ms. Bagri's case:
- [92] The ongoing injury of which the plaintiff complains is a relatively minor one and she has not attempted to suggest that it amounts to any significant disability. She has been able to continue working and remain physically active, with some limitations and difficulties that did not previously exist. But, five years after the accident, she still has recurrent pain and stiffness that, while not constant, is frequent and significant enough to make her life less comfortable and less enjoyable.
- [100] None of the defendants' cases involved a complaint equivalent to Ms. Bagri's complaint of numbness and tingling in the left arm.

Assessment of non-pecuniary damages

- [101] While every case has its own unique features, in my view, the defendants' cases come closer to the circumstances of this case than the cases put forward by Ms. Bagri. In view of Ms. Bagri's complaint of numbness and tingling in her left arm, I think that a modest upward adjustment is justified. Subject to considerations of apportionment, I would award Ms. Bagri non-pecuniary damages of \$50,000.

Past loss of earning capacity

- [102] Ms. Bagri seeks an award of \$27,438.49 for past loss of earning capacity. The defendants maintain that no more than a de minimis award can be justified under this head of damages.
- [103] An award for past loss of earning capacity compensates the plaintiff for the income that she should have earned up to the date of trial, by comparison to what she actually earned. What must be determined is the plaintiff's loss net of the tax she would have paid on her earnings; *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98.
- [104] The question of what should have occurred is hypothetical. The assessment of hypothetical events--whether past or future--does not take place on a balance of probabilities. Hypothetical events are taken into account as long as they are a real and substantial possibility, and not a mere speculation. The court determines the measure of damages by assessing the likelihood of the event; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

- [105] The assessment of income loss--again whether past or future--is a matter of judgment, not mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.
- [106] Ms. Bagri relies on a summary, prepared by defence counsel and marked by consent as an exhibit, of her monthly appointments and income. The monthly appointments are counted from those recorded in the Pure Beauty Bar electronic calendar. The income amounts are compiled from Ms. Bagri's records of credit and debit card receipts. Ms. Bagri acknowledges that the calendar is not perfectly reliable and the income records are incomplete, but submits that they provide evidence from which a financial injury suffered by her in consequence of the accidents can be inferred.
- [107] A notable difficulty is that the calendar and income records do not disclose a decline in either the number of Ms. Bagri's appointments or her income in the nine months following the first accident.
- [108] Ms. Bagri submits that the average number of appointments she had each month decreased year-over-year from 2016 through October 2020. She attributes the decline to time she was not working due to her injuries. Her average income per appointment increased in each year. She submits that, had she maintained the average number of appointments, she would have increased her total income, and presents a calculation of her income loss on this basis. Her calculation includes a 25% reduction for contingencies and a 10.5% reduction for taxes.
- [109] Ms. Bagri's submission is founded on a speculative premise. While it is correct that the average number of appointments recorded in calendar has declined since 2016, there are many possible explanations for the decline. Appointments range in length from 30 minutes for a blow-dry to as much as four hours for hair colouring. It may be that the average length of appointment has increased even as the average number of appointments has decreased.
- [110] The calculation of Ms. Bagri's average income per appointment only takes into account recorded income, and not her cash receipts. It is clear that her cash receipts are significant, amounting to at least \$900 per month. Ms. Bagri's recorded monthly income in 2017 was \$3,724. On the evidence, there is no way to know whether cash receipts, viewed as a percentage of total receipts, have increased, decreased, or remained stable over time.
- [111] Even if one assumes that cash receipts and recorded income have moved in parallel, there remains the fact that Ms. Bagri's recorded income increased in the nine months of 2017 following the first accident by comparison to the first three months culminating in the accident. Her average recorded monthly income in January through March 2017 was \$3,152 (an amount consistent with the average monthly income recorded over the last six and one-half months of 2016). Her average recorded monthly income in April through December 2017 was \$3,914. This was a 24% increase in her average recorded monthly income, by comparison to the last six months of 2016 and the first three months of 2017.

- [112] Ms. Bagri gave evidence that she increases her prices incrementally every year, but that could not account for this jump. It is more likely, contrary to Ms. Bagri's evidence and her theory of an income loss, that she was working more in the nine months immediately following the first accident than before.
- [113] Ms. Bagri's average recorded monthly income declined to \$3,298 in 2018, but was still higher than in the period prior to the first accident.
- [114] If Ms. Bagri did not suffer income losses due to the accidents in 2017 and 2018, it is implausible that she suffered income losses in 2019 and 2020. Except possibly for the numbness and tingling in her arm, her condition was not getting worse. She did not testify that the numbness and tingling had any effect on her ability to work as a hairstylist.
- [115] In sum, the evidence does not establish a real and substantial probability that, but for the accidents, Ms. Bagri would have earned more than she did in fact. Her theory of a past income loss is merely speculative. I dismiss her claim for an award of damages under this head.

Future loss of earning capacity

- [116] Ms. Bagri seeks an award of \$170,000 for loss of future earning capacity. The defendants maintain that, if any award could be justified under this head of damages, it could not be more than the \$15,000 awarded in Edmondson.
- [117] An award for future loss of earning capacity requires the plaintiff to prove that there is a real and substantial possibility of a future event leading to an income loss. Once that hurdle is crossed, the loss may be quantified by comparing the currently expected earnings stream to that which would have been expected, but for the accident, or on the footing of the damage to a capital asset caused by the plaintiff's injuries; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [118] Applying an earnings approach, Ms. Bagri submits that her pattern of decreasing appointments per month since 2016 justifies a conclusion that she is now suffering a net loss of 24 appointments per month, which she equates to a loss of \$18,390 per year. She submits that an award equal to the present value of ten years of lost income at this rate would be \$174,578, which she rounds to \$170,000 for argument's sake.
- [119] For the reasons given above, I view the foundation of this calculation--the premise that Ms. Bagri is suffering a net loss of 24 appointments per month--as speculative. It cannot support an award for future loss of earning capacity.

- [120] Alternatively, Ms. Bagri submits that an award of \$100,000 is justified on a capital asset approach. Ms. Bagri gets to this amount by assuming that, but for the accident, she would have seen an average of 131 clients per month in 2019 and earned a gross annual income of approximately \$53,000. The \$100,000 amount is put forward as slightly less than two year's earnings.
- [121] Again, the proposed calculation rests on a speculative foundation that cannot support an award. The premise that the number of appointments per month has declined due to Ms. Bagri's injuries is not securely founded in the evidence.
- [122] Putting these calculations to one side, I must still ask whether there is a real and substantial possibility that Ms. Bagri will suffer a future income loss resulting from her injuries suffered in the accidents.
- [123] Ms. Bagri relies on the functional capacity evaluation conducted by Mr. Nguyen. He assessed her ability to satisfy the physical demands of work as a hairstylist and concluded that she requires accommodations that affect her competitive employability.
- [124] Mr. Nguyen's opinion is premised in part on inaccurate advice provided to him by Ms. Bagri concerning "her modified work schedule". His report states:

Despite Ms. Bagri's ongoing symptomatology and functional deterioration, she has demonstrated resilience by continuing to work in her job after the indexed MVAs, albeit at a reduced and modified work schedule of six hours per day, three-four days per week (alternating one day on/one day off) to mitigate her symptomatology and the associated diminished functional capacity.

This evaluator believes that [Ms.] Bagri's ongoing symptomatology and diminished functional capacity for bodily positionings (B4) and upper limb coordination (L1) demonstrated during this FCE will prevent her from working beyond her present modified duties and most likely prevent her from achieving her pre-MVA status of full-time/full duty work without accommodation or modifications.

[Emphasis added.]

- [125] The modified work schedule described in Mr. Nguyen's report is fictitious. At no stage did Ms. Bagri settle into a routine of working alternate days. Based on the electronic calendar, she has not limited herself to working six-hour days.
- [126] Mr. Nguyen further relies on diagnoses contained in Dr. Faraday's report that I find are not made out, such as headaches and depressive symptoms.
- [127] Moreover, consideration of Ms. Bagri's "competitive employability" is not germane to this case. Ms. Bagri has been self-employed in her work as a hairstylist since June 2016. She has had her own clients and set her own conditions of work. Recently, she incorporated a company, signed a lease, and took out a bank loan with a view to establishing her own salon. At trial, she anticipated an opening date of December 1, 2020. The new premises will be a dedicated hairstyling facility with eight chairs. Ms. Bagri plans to be running a

hairstyling business, in addition to dealing with her own clients. If worst comes to worst, and the business fails, she is likely to return to self-employment as a hairstylist.

- [128] This case is different from Edmondson, another case involving a hairdresser who had not lost time from work up to the time of trial in consequence of relatively modest soft tissue injuries. At paras. 100-101, Justice N. Smith accepted a medical opinion that "it is unlikely that [the plaintiff] will be able to continue hairdressing on a full time basis over the long term because of her injury". He found that this opinion established a real and substantial possibility of future loss, which he valued at \$15,000. The evidence does not support an equivalent finding in Ms. Bagri's case.
- [129] Considering the evolution of Ms. Bagri's condition, the absence of evidence that her condition has affected her income to date, and her plans for the future, I am not persuaded that there is a real and substantial likelihood that she will suffer a future income loss resulting from her injuries. I dismiss her claim for an award under this head.

Cost of future care

- [130] Ms. Bagri seeks an award of \$4,304.78 for the cost of future care. The defendants maintain that no award is justified under this head of damages.
- [131] The purpose of an award for the cost of future care is, so far as is possible with a monetary award, to restore the plaintiff to the position she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 [Gignac] at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) and *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.
- [132] Each part of the claim must be supported by the medical evidence. If the plaintiff relies on the report of an occupational therapist or rehabilitation consultant, there must be an evidentiary link between the medical evidence and the recommendations in the report; *Gignac*, at paras. 31-32. If the plaintiff has not used or sought out a service in the past, it will usually be difficult for her to justify a claim in respect of that service; *Warick v. Diwell*, 2018 BCCA 53 at para. 55.
- [133] Ms. Bagri submits that Dr. Faraday's evidence supports an award for the cost of future care in respect of the following:
- \$500 for over the counter analgesics;
 - \$210 for an ergonomic assessment of Ms. Bagri's workspace;
 - \$900 for 12 sessions of active rehabilitation at \$75 per session; and
 - An amount sufficient to fund four physiotherapy sessions per year at \$75 per session for the balance of Ms. Bagri's working career.

- [134] There is no evidence as to how much Ms. Bagri is likely to spend on over-the-counter analgesics. The cost is not included in Ms. Bagri's special damages. While I accept that Ms. Bagri uses Ativan to manage her ongoing discomfort, and that this is medically justified, there is nothing in the evidence to quantify this element in her claim. Any award I might make would be speculative.
- [135] I do not think it is likely that Ms. Bagri will undertake an ergonomic assessment of her workspace. She testified that she hired a designer to design her new salon premises. The design work was done and, when the trial took place, the premises were almost ready for occupancy. The sensible time for an ergonomic assessment was when the design work was being undertaken. Ms. Bagri had Dr. Faraday's report. She had years of experience working as a hairstylist since the first accident. Having chosen not to pursue the recommendation of an ergonomic assessment at the most logical time, I doubt that she will alter course and obtain one now.
- [136] Concerning the recommendation for active rehabilitation, Ms. Bagri pursued a course of active rehabilitation with a physiotherapist until March 2019, when she determined that she was no longer obtaining benefit from the treatments. She is managing her condition on her own. I am not persuaded that she is likely to pursue active rehabilitation or physiotherapy for any other reason, in consequence of her injuries.
- [137] I dismiss Ms. Bagri's claim for an allowance for the cost of future care.

Allocation of responsibility among the defendants

- [138] I have concluded that Ms. Bagri has suffered injuries warranting an award of \$50,000 non-pecuniary damages. She has also suffered special damages of \$2,323.75. In my view, these injuries are indivisible, that is, they are all attributable to each of the collisions. The special damages might be divisible, if there were evidence as to when they were incurred, but I have only the parties' agreement as to the amount.
- [139] Because Ms. Bagri was contributorily negligent in relation to the injuries suffered in the second accident, I must apportion the damages among the three accidents. Even though the injuries are indivisible, the effect of the contributory negligence is that the defendants are not jointly and severally liable for all the injuries suffered by Ms. Bagri, only the injuries for which they are individually responsible; *Lakatos v. Lakatos*, 2017 BCSC 1990 at paras. 174 and 208-210.
- [140] The cases dealing with multiple accidents causing indivisible injuries where there was contributory negligence in respect of one of the accidents, but not others, are difficult to reconcile. They were most recently considered by Justice Funt in *Alragheb v. Francis*, 2020 BCSC 1712 at paras. 15-63. *Alragheb* was a case involving two accidents where the plaintiff was 50% at fault in the first accident, and not at fault in the second.

[141] At paras. 23-33, Funt J. held that fault or blameworthiness must be determined on an accident-by-accident basis. He held that a distinction must be drawn between apportionment in cases involving contributory negligence under s. 1 of the Negligence Act, and apportionment of liability among concurrent tortfeasors pursuant to s. 4 of the Negligence Act. That distinction was recognized by a five-judge division of the Court of Appeal in *Leischner v. West Kootenay Power & Lights Co. Ltd.* (1986), 24 D.L.R. (4th) 641 (B.C.C.A.) at 665-666. Justice Funt declined to follow cases in this court in which the judges have apportioned fault as among plaintiffs and multiple defendants in separate accidents on the basis that these cases had not fully considered the important distinction between apportionment under ss. 1 and 4 (at paras. 46-51), citing *Bilanik v. Ferman*, 2014 BCSC 732, *Saidy v. Louzado*, 2019 BCSC 281, *Lakatos*, and *Lane v. Wahl*, 2015 BCSC 1779, *aff'd* on other grounds *sub nom Lane v. Pierce*, 2017 BCCA 450.

[142] I consider that I am bound by Funt J.'s considered analysis. I should add that I think that an accident-by-accident allocation of fault makes the most sense in the context of this case because Mr. Heran's blameworthiness vis-à-vis Ms. Bagri on March 23, 2017 cannot have been alleviated by Ms. Bagri's contributory negligence vis-à-vis Mr. Gauthier on August 30, 2018. It makes no difference that the action arising from the first accident is being tried together with the action arising from the second.

[143] Justice Funt concluded:

[34] In my view, the rule may be stated: Where an initial accident and a successive accident result in indivisible injuries to an at-fault plaintiff, the damages or loss relating to the time after the successive accident are apportioned on the basis that each accident was a cause of the plaintiff's indivisible injuries with the relative fault determined on the basis that each accident is given equal weight.

[Emphasis added.]

[144] This approach requires me to award different sums for the three accidents, an approach adopted by Justice Fitzpatrick in *Langille v. Nguyen*, 2014 BCSC 1460, *aff'd* on other grounds, 2014 BCCA 430.

[145] The first accident was the most serious of the three and the 17 months following the first accident were the period in which Ms. Bagri experienced headaches, wrist pain, and relatively acute neck and back pain. I attribute 50% of her damages to that period, and the balance to the pain, suffering, and inconvenience she suffered after the second accident and will continue to suffer in the future.

[146] The third accident followed the second accident only three months later. As between the two, I cannot say that either one contributed more to Ms. Bagri's injuries. I attribute 25% of Ms. Bagri's damages to each of the second and third accidents.

- [147] Accordingly, Ms. Bagri's 50% contributory negligence in connection with the second accident makes her responsible for 12.5% of her total loss.
- [148] Mr. Heran is responsible for all the indivisible injuries suffered by Ms. Bagri, subject to a deduction of her contributory negligence. Accordingly, he is responsible for 87.5% of Ms. Bagri's total loss.
- [149] Mr. Gauthier and Mr. Hoenisch are responsible for the injuries suffered by Ms. Bagri in the second and third accidents, but only for 50% of the loss in light of Ms. Bagri's contributory negligence. Accordingly, they are responsible for 25% of the total loss.
- [150] Mr. and Ms. Liu are solely responsible for the loss attributable to the third accident; that is 25% of the total loss.
- [151] While Ms. Bagri is entitled to overlapping judgments against the defendants, she will only be able to recover her net loss once. To the extent that she recovers money on one judgment, she will have to give credit for the amount recovered in connection with the other judgments; *Cuttell v. Bentz* (1985), 65 B.C.L.R. 273 (C.A.) at para. 15.

Disposition

- [152] I award Ms. Bagri judgment against Mr. Heran for 87.5% of \$52,323.75, or \$45,783.28.
- [153] I award Ms. Bagri judgment against Mr. Gauthier and Mr. Hoenisch for 25% of \$52,323.75, or \$26,161.88.
- [154] I award Ms. Bagri judgment against Mr. and Ms. Liu for 25% of \$52,323.75 or \$26,161.88.
- [155] Unless there are matters that must be brought to my attention, Ms. Bagri is entitled to her costs. If costs must be spoken to, counsel may make arrangements through the registry for a hearing at 9 a.m. one day, to be preceded by an exchange of written submissions not to exceed five pages each.

"Gomery J."

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