

1995

S.H. No. 120246

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Cashen v. Donovan, 1999 NSSC 86

BETWEEN:

JUNE CASHEN

PLAINTIFF

- and -

DALE DONOVAN

DEFENDANT

DECISION

HEARD: at Halifax, Nova Scotia before The Honourable Justice Walter R.E. Goodfellow on December 7, 8, 9, 10, 11, 14, 15 and 16, 1998

DECISION: February 10, 1999

COUNSEL: Allan J. Stern, Q.C. & Tara A. Miller
Solicitors for the Plaintiff

Ross H. Haynes & Duane Rhyno
Solicitors for the Defendant

GOODFELLOW, J.

1. BACKGROUND

June Cashen, born 6th of June, 1947, was employed as a Registered Nurse at the Victoria General Hospital on the 26th of January, 1987, when she sustained a low back sprain while lifting a patient. Various investigative procedures and conservative treatment were employed and then she underwent surgery, a decompressive laminectomy, carried out at L5 and S1 on February 8th, 1988. She was unable to return to employment and Worker's Compensation funded her, along with benefits to obtain a Bachelor's Degree in Nursing from Dalhousie University, graduating in May 1991.

Mr. and Mrs. Cashen acquired a property in P.E.I. in 1986, about three months prior to her 1987 lifting accident. The property was apparently subject to some building prerequisites. Initially, they had a motor home and vacationed in P.E.I. and sold the motor home to acquire the land. Mr. Cashen had work related physical problems that resulted in him initially, being off work from the City of Dartmouth on light duties. He never did, due to his injuries, re-enter the work force. They built three cottages and a large cottage as a home for themselves and started to operate the family business. The children Thomas Cashen, born January , 1973 and Lynn Cashen, born May 25, 1976 were also active in the business and Mrs. Cashen participated, but not as much as she would like, due to her bad back. They did an expansion to their business in 1991 and it now has seven (7) cottages, plus their home. They rent the cottages out during the tourist season and in the winter, to university students. This family business was, in part, entered into with an eye to retirement and took on added significance when Mr. Cashen became substantially disabled. When Mrs. Cashen finished university in 1991, she planned to work and was hoping to get into a supervisory position but it did not work out that way, and she took employment in P.E.I., as this was the stage where they wanted to expand their P.E.I. business. Mrs. Cashen was employed at the Queen Elizabeth Hospital in Charlottetown from March 1992 to October 1992, covering a six month maternity leave position. She had an opportunity for employment prior to this in P.E.I.; however, there was a glitch with

respect to her license transfer registration, which was finally resolved.

In the Spring of 1992, Mr. Cashen was admitted to the VG Hospital for cardiac problems and their daughter Lynn became quite ill and was hospitalized, so Mrs. Cashen obtained work in the Coronary Care Unit at the Victoria General Hospital and commenced work the Monday following completion of her maternity replacement in P.E.I. She was employed on a casual full time basis.

On the 23rd of March, 1993 Mrs. Cashen, while at work, slipped on a recently mopped floor and was unable to continue her employment. Mrs. Cashen was hoping to enter a one year course towards a certificate in Health Services Administration. She was advised by the Worker's Compensation Board that it would not cover the cost of this retraining, as it felt that she had been provided ample rehabilitation assistance in the past. Worker's Compensation Board advised that her benefits would cease effective 30th of August, 1993. Mrs. Cashen applied for permanent/partial disability arising out of the 1987 accident and 1988 surgery and was awarded an 8% disability pension, which she took by way of lump sum and there remains outstanding, an appeal with respect of the 8% level assigned to her by the Worker's Compensation Board, which falls 12% below the 20% level advanced by Orthopedic Surgeon, Dr. Gerald Reardon.

Mrs. Cashen was undergoing treatment for the slip and fall accident in the VG Hospital, and she was scheduled for a CT Scan of her lumbosacral spine October 25, 1993, to determine whether or not there was any further surgical intervention as an option to management of Mrs. Cashen's back pain. She had an appointment with her Orthopedic Surgeon, Dr. William Canham for November 2nd, 1993.

Unfortunately, on the 28th of October, 1993, Mrs. Cashen while pushing a shopping cart in the parking lot of Sobeys in Dartmouth, Nova Scotia, was returning to her own parked car, when a motor vehicle owned and operated by Dale Donovan, backed up from its parking spot and the motor vehicle and shopping cart then came into contact and the

shopping cart came into contact with Mrs. Cashen, whereby she suffered personal injuries.

2. ISSUES

(1) Liability

- (a) Was the accident, which occurred on October 28, 1993 a result of negligence on the part of Dale Donovan?**

- (b) Was there any contributory negligence on the part of June Cashen?**

(2) Quantum of Damages

3. ISSUE (1)

Liability

- (a) Was the accident, which occurred on October 28, 1993 a result of negligence on the part of Dale Donovan?**

Mrs. Cashen was familiar with the traffic and general parking area in front of and adjacent to the stores in the shopping centre, as she shopped in Sobeys with some frequency, while she lived in Dartmouth.

Mrs. Cashen parked her car, went in to get her groceries, came out of the Sobeys store, pushing her grocery cart straight ahead. Her car was parked on the left and her next recollection was an impact by the car with her cart, resulting in it coming into her and she says she was thrown into the air. She saw nothing unusual about the cars and had no warning and did not see any brake lights. She states that she was walking perfectly normal and was keeping a look out and when the car hit the cart, it came into her legs and threw her into the air and onto her back. She estimates going four to six feet into the air, landing on the pavement on her lower back and she described the landing like an accordion. She had excruciating pain from her back to her feet. She was dazed, but not unconscious and

she recalls a Mr. Miller was there, plus another gentleman who was the operator of the motor vehicle and the operator said words to the affect, "I must have been in his blind spot." Mrs. Cashen said the operator said he was in a hurry, he gave information to Mr. Miller and Mr. Miller kindly called her sister-in-law and drove her to her sister-in-laws place and because she couldn't get out of his car, took her to the Dartmouth General Hospital. In cross-examination, she indicated that in photograph #6, she was more or less in the area that is depicted by a man in a brown jacket, pushing a shopping cart. Exactly where she was, is not established as a certainty, but significantly, she was not within the parking lines for motor vehicles. She was unable to say how fast the motor vehicle was going

Clarence Miller, a former member of the Canadian Armed Forces is an owner and part time operator of two taxis. He has a familiarity with the shopping mall and parking area as he shops there, as well as being there on business from time to time. He says the weather was fine, clear and he had backed into a parking spot and was doing a crossword puzzle when he heard the crash and said the car had backed into the grocery cart. He looked up and saw the lady was in the act of, or falling and he went over where the operator of the car asked the lady if she was ok. She was not and he put her in the passenger seat of his taxi and drove her to her sisters and then on to the Dartmouth General Hospital. He said the buggy was behind the car and Mrs. Cashen on the ground. He took Mr. Donovan's name and particulars and made a police report a couple of days later. When asked about contact between the car and the shopping cart, he said it was the rear left hand and while he expressed the opinion that it could not have been going very fast, it is significant that his attention was drawn by the noise of the impact and prior to that, he was preoccupied with his crossword puzzle. He says that he did not see the process of Mrs. Cashen falling and he doesn't know where she was coming from. When asked if Mr. Donovan spoke, he said not really, then said that Mr. Donovan was cooperative and concerned and very apologetic and said I am sorry, sorry, sorry. Mr. Miller is familiar with the area and the heavy traffic, particularly near the end of the day.

Mr. Donovan gave evidence and confirmed that he was the owner/operator of a

1991 Mazda 323, a two door hatchback, which while he would not necessarily call it a sub-compact (he shrugged) he conceded it was a very small car. His motor vehicle was in good condition and he had gone to Sobeys with his son to seek a pumpkin, but does not recall whether or not his visit was successful. He parked nose in and says he did so in his normal manner and when he returned to the car he and his son put on their seatbelts. He said he looked over his shoulders and checked his mirrors. He recalls a vehicle on one side and a buggy corral on the other, but he is not able to remember upon which side was the buggy corral. He said it appeared to be clear and he backed up five feet and heard the sound of the shopping cart, stopped, got out and noticed a lady on the ground. She was obviously in pain and he offered assistance. Mr. Miller came over and between the two of them, she was placed in Mr. Miller's vehicle. Mr. Donovan went home. Mr. Donovan called Mrs. Cashen's home later that evening, but was unable to speak to her because she was sedated.

Mr. Donovan identifies the area as shown on the photographs and marks where he says the point of impact took place, a tiny red mark on the rear bumper. It is to the left of the license plate and appears to be below the backup light. With respect to speed, he said it was normal. One, two, three miles an hour, I do not know, and he was asked about Mrs. Cashen's position and said she was right there, right behind my car and that the large window at the rear of his vehicle would have been clean because normally it is. Then he went on to say that the vehicle has a large blind spot and his only explanation as to why he did not see Mrs. Cashen or the cart was related to the blind spot. He said words to the effect, obviously I did not see her. It was clear, around four-thirty and in cross examination, again it was pointed out that in his direct evidence, he offered the blind spot and went on to say it is the only explanation I could come up with. He does not recall mentioning anything about the blind spot to Mrs. Cashen at the time. I find as a fact and accept June Cashen's evidence that Mr. Donovan did indeed tell her he had not seen her because of the blind spot in the left hand rear corner of his motor vehicle, which to begin with, would be sitting relatively low to the ground. He denies saying to Mrs. Cashen that he was in a hurry and says that he took every precaution.

Mr. Paul MacLean, the Manager of the Westphal Plaza, responsible for Sobeys, confirmed the photographs, particularly the first one, before they made a change to bring about an increased number of parking spaces. In addition to that primary reason for changing the layout, they wished to re-direct some of the traffic that was using the shopping area to leave Main Street and exit to Tacoma Drive. He confirmed the rush hour was between four and six p.m. and that with respect to traffic, it was a very, very busy area.

I have already found as a fact, that Mr. Donovan said to Mrs. Cashen at the scene that she must have been in his blind spot and I am satisfied on a strong balance of probabilities that any glance Mr. Donovan made towards the Sobeys store being the direction from which Mrs. Cashen and the cart were proceeding, was cursory at best. He acknowledged in cross examination, Mrs. Cashen was where one would expect pedestrians to be with a cart and that it would not be any surprise to him, the pedestrian and cart being present. Reversing from a parking space in a busy shopping area calls for a duty of care on the part of the operator of a motor vehicle embarking upon such a maneuver and particularly where the reversing of the motor vehicle is combined with the necessity of turning the motor vehicle in order to exit in the travel lanes provided. Mr. Donovan marks the point of impact on his rear bumper, which confirms that at that point, Mrs. Cashen was indeed behind his motor vehicle and it is very highly probable, that he did not see her because she was, for that brief cursory glance, in his blind spot and his failure to be more careful and take a proper lookout, represents a breach of his duty of care to Mrs. Cashen.

(b) Was there any contributory negligence on the part of June Cashen?

The defendant recites a number of cases of which are of no assistance. For example **Collett v. Mattison [1993] N.B.J. No. 216**. Mrs. Collett, a pedestrian in a shopping parking lot, was held 50% liable. The Trial Judge found that she walked or ran in front of the defendant's vehicle, which was occupied and in one of the travel lanes for vehicles, within the parking lot. This represents an entirely different situation than exists

before the court in Mrs. Cashen's case.

Mrs. Cashen owes a duty of care because a pedestrian, particularly pushing a shopping cart, must conduct herself/himself with the recognition that the parking lot itself, is a confined area where vehicles are required to back up and turn. Mrs. Cashen left Sobeys, pushing her parking cart, as she indicated somewhere generally in the area of the gentleman pushing a grocery cart in photograph #6 and not as indicated in that same photograph in the area in which the lady is walking within the defined parking area. The point of impact confirms that she was behind the motor vehicle and she was entitled to rely upon Mr. Donovan exercising caution, after having kept a reasonable lookout herself. I accept and prefer her evidence to that of Mr. Donovan and I find that no breach of the duty of care upon her and no contributory negligence and hold Mr. Donovan's negligence to be the sole cause of this accident.

4. MRS. CASHEN - WORK RECORD

Mrs. Cashen obtained a diploma in nursing in 1969 and worked at St. Elizabeth and St. Rita's in Sydney, during staff nursing, before going to the Victoria General in Halifax. She was married the 30th of June, 1972 and worked until her first child, their son Thomas was born in January 1973. She then went to the Rehab Centre as a staff nurse for a couple of years and left there and went to the Nova Scotia Hospital 1974/75 until the spring of 1976, when her second daughter Lynn was born in May. She was assistant Head Nurse at the Nova Scotia Hospital and later in the fall of 1976, she went to the emergency department of the Dartmouth General Hospital for three years, transferring to the Coronary Care Unit, where she remained until 1987. While working at the Dartmouth Coronary Unit on January 26, 1987, she lifted a patient and sustained a low back injury, which she indicates she had no injury to her back or problems with her back before this incident. She did not return to work in 1987 and underwent surgery a year later on February 8, 1988, for which she thinks she was hospitalized a period of three weeks. The evidence is clear that it was recommended she should not return to general nursing, due to the physical requirements of lifting, handling patients, etc. Through the sponsorship of the Worker's

Compensation Board, June Cashen entered Dalhousie University on September 8, 1988 for what was a four year program. She was given a credit of one year and graduated three years later with her Bachelor of Science in Nursing.

The reason she pursued the degree was that she wanted to stay in the health field and had hoped the attainment of a degree would increase her chance of getting an administrative job in the nursing field. She was enrolled in all day courses and in the summer of 1988, they lived on site and ran the family business in PEI. She did the basics in helping to run it, chores around her three bedroom home, basic running of the household, cooking, regular laundry, but was careful with things like vacuuming, etc. The Cashen's maintained their home in Dartmouth and Mrs. Cashen had further treatment to 1993. It appears that she had three epidural steroids in the hospital during the period of her surgery or related in time and she recalls one epidural while at university in January 1989, and her last being in March or April of 1993, well after her May 1991 graduation from Dalhousie University. Throughout the period at university, she indicates she was walking, carrying books without assistance, was able to carry on. She acknowledged limitations in that she was careful lifting or vacuuming or avoiding things that would aggravate her back and indicated that she really wasn't under any medication. Her evidence as to how she was able to physically conduct herself while at university, must be read in contrast to the preferable evidence of her husband, as to the assistance he and the family provided at that time.

After her graduation, the family held a council and in that spring, elected to put their home on the market and it was sold in the summer of 1991. Her husband never returned to work since the summer of 1991 and Mrs. Cashen continued to plan a return to employment.

She checked with the RN Association and understood there was no problem transferring to PEI and applied for several nursing positions in Charlottetown. One opportunity arose, but she was unable to take it because a problem developed with respect

to her transfer and it was not until March 1992 that the transfer problem was rectified. In March 1992, she took a six month term work in general nursing. The family had, by this time, seven (7) cottages plus their own home, which was winterized. It was at this time that her husband became sick and her daughter ill, and Mrs. Cashen herself saw doctors in PEI and the family elected to return to Dartmouth, rented their home on the Island and built a home in Dartmouth. Mrs. Cashen finished her term employment in PEI and obtained a nursing job at the Victoria General Hospital the following Monday, in October 1992, in the Coronary Care Unit, as she was assured they had a number of male RN's so that any lifting requirements would be reduced and this was her last employment. This job was a casual/full time and Mrs. Cashen gives evidence that she had no problems with her health and that the residue of difficulties from January 26th, 1987 injury did not keep her from fulfilling her job as a nurse and she says that she never took any time off. She acknowledged that she experienced foot drop prior to her surgery in 1988. Kind of a weakness in the right side. She continued to work until March 23, 1993 and that was her very last day of employment. This is the day of the slip and fall accident.

In 1993, while at VG, she was in contact with the head nurse at the Nova Scotia Hospital and applied for a general nursing position. She was interviewed in February 1993 and although the nursing position was not taken, she hoped to obtain the head nurse position, but initially at least, her employment would be casual in the Forensic Unit. She was in fact, offered a **casual** position in April of 1993. The letter of offer of April 28, 1993 commences:

Dear June:

This letter is confirmation of your casual employment with us, effective May 3, 1993.

As was outlined in the interview/selection process, in the nursing department at the Nova Scotia Hospital, casual status is defined as up to 74 work hours per calendar month.

Mrs. Cashen was unable to take this casual employment, due to the injuries suffered

by her in the slip and fall accident of March 23, 1993.

In the summer of 1993, her family was at PEI working on the business. Her daughter was managing, but they did hire people and had family and friends who helped out. Mrs. Cashen wasn't involved in the business that summer but previously, was in the summers of 1992 and 1991, prior to the slip and fall accident of the 23rd of March, 1993. She says the cooking and cleaning was shared and she was able to do some of it. Their family business was originally financed by personal loans. In 1991, a mortgage was taken with the Royal Bank and in 1992/93, all her husband had was Worker's Compensation Board and Canada Pension Plan disability. Mrs. Cashen had Worker's Compensation Board, but neither her nor her husband, after March 1993, had any salary income.

Just prior to the motor vehicle accident, they moved back to Dartmouth, sold their Montebello Park property and rented an apartment in Dartmouth. The father and son remained in PEI and Mrs. Cashen and her daughter Lynn, who was in grade 11, stayed in Dartmouth. When asked at the time of the accident in the VG, how long she planned to work, she said for a long time, because the income was needed and when asked if she planned to retire at any specific stage, she said in a very low voice, probably 65 or thereabouts and I interject that I am completely satisfied she had no intention whatsoever, working to age 65 and would have left employment in any event, far before attaining age 65 and quite probably, before attaining age 60, should they have a clear handle on the finances of the family business, which was to be their real vocation in life, as soon as possible. Mrs. Cashen gave evidence that when she received the casual employment offer from the NS Hospital, she intended to continue to work at the VG and handle both jobs and I have serious reservations that if this was her intention, it would probably not have endured for very long, given the residue of problems leading from her injury of January 26, 1987 and subsequent surgery, February 8, 1988. Mrs. Cashen said that she explored going back to school for the one year health certificate because she had some degree of discomfort, prior to the 28th of October, 1993 motor vehicle accident. There was walking but it was difficult at times and restricted. Says that she was able to drive, shop

and sleeping normally.

5. MRS. CASHEN'S HEALTH PRIOR TO JANUARY 26, 1987

Crohn's Disease, etc.

When asked if she had any health problems prior to 1987, she answered not that kept her from employment. She was diagnosed with the Crohn's Disease in 1969-1970 and had a flare up the time of the birth of her son, but had no flare ups again.

She was asked if prior to the accident of October 28, 1993 did she ever have cervical pain and responded, "never". She was referred to an entry in the family doctor's records of 1985, "severe neck strain" and some reference to restriction of movement in all directions. She was also referred to some doctor's accounts for the Worker's Compensation Board, which are indicated to be in 1983 and 1984, relating to a Dr. Ross, but quite frankly, these records are so illegible that they are of no value. Mrs. Cashen did acknowledge that she had an injury at one time, but does not recall much about it. What I think is significant is that there is no further reference between 1985 - 1986 to the neck strain in the family doctor's records.

There is however, reference to her neck being extremely painful and tender, with restricted range of movement of her neck in the report of Dr. Shears of November 27, 1987.

Mrs. Cashen was asked if she ever had a concussion and she says she does not recall it and again, she was referred to the family doctor's notes, which indicated in March 18, 1986, Cerebral Concussion. And then a further entry March 26, 1986, Cerebral Concussion worsening, referred to VG Hospital Neuro Surgery. There is also in evidence reference to a radiology report and Mrs. Cashen says she has no recollection going through such examination in 1986.

6. INJURY, JANUARY 26, 1987 - SURGERY, FEBRUARY 8, 1988

Mrs. Cashen, as already noted, was not employed from the date of her injury January 26, 1987 through and including her period of three years at Dalhousie University in obtaining a Bachelor of Science in Nursing, until she returned, contrary to her specialist advice to general nursing in March of 1992. She would have returned a few months earlier, had it not been for the RN transfer problem. She had limited "employment" in that she made some degree of contribution to the family business during the summers preceding her return to employment in March of 1992.

a. June Cashen

Mrs. Cashen indicated she had hoped to return to employment shortly after the 26th of January, 1987. She saw her family doctor, Dr. Pierre Ferguson and also Dr. Gibson, a Chiropractor the latter on three or four occasions, because she says her pain was quite episodic. There was a recommendation she see a neurosurgeon and she saw Dr. Langille and then a physiatrist, Dr. Arthur Shears at the Rehab Centre where she took physiotherapy and indicated it did not relieve the problem. She did not have any investigation until the fall of 1987 when in November, she had a myelogram and a Dr. Barton recommend a CAT Scan to confirm the myelogram findings.

Mrs. Cashen, in December 1987, requested to see Dr. Canham, an orthopedic surgeon and at this time, her general physician was a Dr. Ferguson. In addition to seeing Dr. Canham, she received a second opinion from another orthopedic surgeon, Dr. Gerald Reardon. She ended up as a patient in the Dartmouth General Hospital in late November 1987 until early in December and said that she had excruciating back pain, pain in the right foot and foot drop. After she saw Dr. Canham, the Worker's Compensation Board asked her to see a Dr. Rose-Marie Sampson in early 1988. She had

a second myelogram and knew that she was going to have a surgical decompression and believed she was in hospital for three weeks with respect to this surgery. Initially, she said, I felt I got a lot of relief and it was during this period that she had three epidural steroids from Dr. Marr.

I have already recited her stated wish to remain in the health field and her return to university, and in the summer of 1988, when she participated in the household duties, she was careful with things such as vacuuming. As already indicated, she had an epidural in January of 1989 and indicated her last one was in March or April of 1993. Although she was able to attend university, she was throughout this period, careful about lifting, vacuuming and avoiding things that would aggravate, particularly her back. She returned to general nursing in March of 1992. She said she did so because she was assured there were a number of male RN's on staff and that this would reduce any lifting requirements. On completion of this employment, she immediately took employment at the Victoria General Hospital where she suffered the slip and fall accident of the 23rd of March, 1993 and has not worked since.

b. Lynn Cashen - Date of Birth - May 25, 1976

Ms. Cashen is presently in her fourth year at Mount St. Vincent University. She recalls the early stages of their family cottage business in PEI, when they had three cottages and their own three bedroom home. She was asked if her parents were active in the early days and she said yes, that her father oversaw the construction, did ground work and that both her and her brother helped out. Her mother oversaw what everybody did, made reservations, did some cleaning. Ms. Cashen, the first two summers, had two jobs, then exclusively at the home in the family business in the summers thereafter.

She was asked about her mother's accident of 1987 and she said there was

a change in the summer of 1988. She didn't do as much of the cleaning, did more of the overseeing. They hired people. They had only three cottages but in 1991 they expanded. They had seven in 1991 and eight as of this summer, plus their home. The cottages were rented, generally on a weekly basis with turnover on Saturday, and in the winter months, basically to students.

She was asked what role her mother played in 1991-1992 and said that her mother would do the banking. Ms. Cashen has signing authority as well and her mother would help fold towels and sheets. Ms. Cashen was in grade 10 in 1991 and in 1992, at home sick. They moved back to Halifax to finish her school and in the home, she said her mother was very active baking and active outside and that her mother was involved in a number of groups, church, council and recreational. Her mother did some skating and drove them when the children went skiing and she used to walk a lot in the evenings after work. Her mother participated, to some extent, in the flower beds, etc. with respect to the lawn. They had a lawn tractor.

c. Donald Cashen

Mr. Cashen was born July 3, 1948 and traced his employment record, leading up to his employment as a heavy equipment operator with the City of Dartmouth and his own accident in May of 1987, when he lost the use of part of his left arm, difficulty with lower back and neck. He confirmed the purchase of the property in 1986 by the sale of their motor home and its acquisition purpose was development for retirement purposes. He has not been employed since May of 1987, except for working in the family business, and when asked how much Mrs. Cashen did prior to 1991, he said a fair amount, but not as much as she would like to because of her bad back, which meant that we would have to do a number of things. When her back was ok, sometimes she would make beds, meals. Between 1988 and 1991,

was in PEI, pretty well all the time and Mrs. Cashen was there in the summers. They had to travel in 1988 for her physio, which was five days a week and when asked how Mrs. Cashen was during her time at university, which would be (fall of 89 to spring of 92) he said he used to go to Dalhousie to pick her up, carry her books, that she had good days and bad days, was not 100%. But a lot of good times, they had some social life, dancing, parties and friends. Drove to Martock. Enjoyments that they do not have today. He said during this time frame, she tried to do as much work as she could and the family chipped in. When she finished university, he says in 1991, she was going to try for a supervisor's position in PEI, and when asked why PEI, he said it was difficult to travel and they had a house in PEI and they wanted to expand the business. In 1992, his wife was back in hospital, working. Their daughter Lynn was sick and they did not want her to lose her grade 12, and Mrs. Cashen stayed for the school year and in fact, took employment at the VG because of their daughter Lynn.

He was asked how was her health in 1992 and he said she was getting along considerably well. Had her bad days and he was asked if she ever missed work and he said, other than the flu, I cannot recall, remember her leaving work and she had a physical assessment before she returned to work at the VG. And in the summer of 1992 in PEI he said they had a normal life, with some restrictions. Inside the home, she would seldom bake but she did cooking, cleaning and they tried to keep her away from such things as vacuuming and with respect to outside work, he said things she tried, sometimes she could, sometimes she could not. She could make a cottage up, as long as her back was fine and with respect to how she was after the surgery, he said we knew her limitations and that his wife tried to do more. When they would socialize and go to Cape Breton to see her parents, they might stop once or twice, but they still enjoyed dancing and some house parties and when their daughter Lynn, in 1992 went to the Mount, that is

when they decided to build another house in Montebello and because Mrs. Cashen was working at the NS Hospital, it allowed them to apply for a mortgage.

d. Family Doctor's Notes

Notes of the various visits by Mrs. Cashen to her family doctors from 1983 to 1996 were entered in evidence by agreement and at and after the injury of January 27, 1987, there are several references, which simply say say WCB Report. There was an entry February 13, 1987, which indicates in part, continues to have tightness mid back and up into neck April 7, 1987. Seen in March by Dr. Shears who injected. She continues to have pain over L4-5 to L5-S1 and forward bending continues to be restricted. Injected right facets and a week later, no big change. Something with respect to no one position is good for long. In June, reference to low back pain. In September, reference to having been seen by Dr. Langille and being referred to Thorpe (chiropractor) for more manipulation. On November 10, 1987, headaches, tears. I believe depressed and anxious. Lets try ... 10 mgm, up to 30 mgm in evening only and then the notes seemed to indicate a recognition that surgery was going to take place, plus there was the reference to seeing Dr. Marr in January. The notes post the operation seem to reflect some indication of possible return to employment. There was references to low back pain and on December 4, 1990, the notes include a reference to chronic back pain and sciatica. She also had over time, some problems with her bronchitis, that appeared to reoccur. There does not appear to be very many, if any attendances on family doctors from approximately June 4, 1992 until after the slip and fall of March 23, 1993 and this is in part, the period where she had returned, contrary to medical advice, to general nursing duties.

e. Dr. Paul Begin

Dr. Begin first saw Mrs. Cashen in his capacity as a general practitioner, on December 20, 1989 and he received a report from Dr. W.D. Canham, probably in answer to a referral. Dr. Canham saw Mrs. Cashen May 3, 1990 and reported:

Her problem is that of back and right leg pain. She has had radicular symptoms off and on for a number of years. Her back problem had developed to the point where she had developed a bit of a foot drop and hence we operated on her some time ago. We stabilized this process and although she still has marked weakness of dorsiflexion on the right, it is certainly no worse. She has pain from time to time in that leg, but Depo-Medrol injections into the epidural space have certainly controlled it.

There is no change from the previous examinations and neurologically she is stable.

Dr. Begin also received a report from Dr. Marr 28th of January 1991, dating "she is an old patient with a long-standing mechanical back pain" and Dr. Marr was going to give her an epidural steroid injection, to try and address some of the pain. Dr. Begin acknowledged that he was unaware of the earlier Worker's Compensation reports and of the ongoing WCB dispute at first, and did not learn about it until the slip and fall injury of March 93.

It appears that Mrs. Cashen has epidural injections fairly regularly in 1991, 1992 and 1993 and Dr. Begin was confronted with Dr. Canham's report to Mrs. Cashen's WCB solicitor of Dr. Canham's findings on August 26, 1992:

"she has marked limitation in range of motion in her back, this being at best, 50% of normal, for both forward flexion and lateral bending, both to

the right and the left. She also has neurological problems from time to time, as I said in the text above, requires epidural steroids several times a year to keep functioning."

Dr. Begin agreed with these comments.

Dr. Canham also reported to Dr. Begin:

The second issue that you wish addressed is my opinion as to whether her condition is directly related to the work related injury of January, 1987.

She has a history of never previously having had back problems and as the work related injury was more or less the classic nursing injury, I think we have little choice but to attribute this problem to the January, 1987 injury.

The third question you ask concerns the restrictions this injury will place on Mrs. Cashen's work activities.

As I noted in the text above, I was not happy to hear that this lady was back in exactly the same environment that caused her problem in the first place. I would be much happier if she went into administrative work, for which she is trained with her Bachelor of Nursing degree. Unfortunately these jobs are few and she is back in the same environment where she was injured originally. This, I think, realistically has to be considered a problematic environment for her and she probably will have problems in that environment. She will be easily re-injured and will come back to the attention of the Board with subsequent claims, in my opinion.

The best thing would be to get her into a more administrative nursing position. The

would certainly be helpful.

f. Dr. Gerald P. Reardon - Orthopedic Surgeon

Dr. Reardon was asked by Mrs. Cashen's WCB solicitor to provide a report and Dr. Reardon last examined Mrs. Cashen January 11, 1993 in preparation for his report dated March 26, 1993, in which he stated:

At the time of my last examination on January 11, 1993, she was working in the Coronary Care Unit at the Victoria General Hospital. She was complaining of persistent difficulty with her back. Her activities of daily living were restricted. She was unable to bend or lift and this of course posed difficulties in an ICU milieu. Housework, particularly activities such as ironing or vacuuming were extremely difficult. She also had significant pain with driving a car. The pain is still located in the lumbar area and has radiation into both her lower limbs. She is not taking analgesics on a regular basis. She tends to use heat which is helpful in the short term. Basically she would like to obtain a job with some administrative duties which she feels would be more appropriate with her Bachelor's degree and also would be more tolerable with regards to her back.

It is quite apparent that this lady is left with significant physical impairment. She sustained a work injury in January, 1987. This subsequently required surgery a year later. She has not had a good result. She has not responded to conservative treatment. She has done well with her retraining, but is having difficulty with her present job situation.

I would assess her level of permanent physical impairment at 20%. This takes into consideration the fact that she has had a

disectomy, but has not had a good result and also the fact that she is left with a neurological deficit in the form of a partial foot drop. There is absolutely nothing to suggest any pre-existing or underlying condition. Her problems are directly as a result of her work related injury.

We know from Mrs. Cashen's evidence that the Worker's Compensation Board assessed her at 8% permanent disability and as at the time of trial, there is still outstanding, her appeal, attempting to have Dr. Reardon's view of 20% permanent disability accepted. Mrs. Cashen, instead of accepting a monthly payment, opted for a lump sum payment of her already rated 8% disability. Dr. Reardon, in his evidence, made it clear that disability is overall disability and not related to employability. He used the example that if you lose one arm, it is generally thought to result in 50% permanent disability. Obviously, if you are in a certain trade or profession, i.e. a piano player, the limitation on employability would be far higher than 50%

g. Dr. Arthur Shears

Dr. Shears reported to the Worker's Compensation Board by a letter November 27, 1987. He had seen Mrs. Cashen on a number of occasions from March 30, 1987 to the occasion prior to this report, November 20, 1987. In his report, Dr. Shears relates what Mrs. Cashen said to him:

She said that she had had an increase in pain through the left lower back, through the left hip area as well as the residual pain on the right side. She thought that even little activities around the house would trouble her and felt that she could definitely not go back to her work as a Nurse. She told me also that she would get attacks of spasm in both legs and feet to such a degree that she was unable to bear weight on her feet. She had

been getting some calcium medication for this. She told me that she had been able to get comfortable only lying on her back with her feet elevated on a pillow and her hips and knees flexed.

And also:

She says that she has pain all the time in the neck, the back, the thighs, and that she is more comfortable when lying down. It is painful even on sitting or standing. Her symptoms are aggravated even by the very lightest work.

Examination shows that her neck is extremely painful and extremely tender, as is the lower back. There is gross decrease of range of movement of her neck and her lower back.

It is born in mind that Dr. Shears' report covers a time frame prior to Mrs. Cashen's surgery for her first accident. It does however, refer to spasms in both legs and feet to such a degree that Mrs. Cashen indicated she was unable to bear weight on her feet and this is somewhat at cross purposes to her evidence with respect to left side difficulties, said to be solely arising from and attributable to the motor vehicle accident.

h. Dr. Pierre Ferguson

In a note from Dr. Ferguson to Mrs. Cashen April 5, 1988, he said "a patient eventually will need a lumbar brace.

i. Dr. William Canham

He initially saw Mrs. Cashen at the request of Dr. Langille. There was a consideration in December of 1987, whether she would benefit from spinal fusion. It was his conclusion at that time, he didn't think it would benefit her. It is a major procedure and the question was referred to Dr. Gerald Reardon

for a second opinion, and ultimately, he decided not to proceed with the spinal fusion and to follow conservative management.

The spinal decompression that was performed, is a less major surgical intervention. He received information from her that she injured her back lifting a heavy patient. She slipped and wrenched her back. There was a myelogram, which is a radiological study. You put dye in the spine and it shows up in x-ray in contrast with the tissue. He described the operation, a decompressive laminectomy. It frees up the nerves in that area of the spine. Lamina refers to the roof of the spine and you attempt to avoid scarring and use a layer of fat to put over the area. When he did the operation, he found exactly what the radiologist predicted and he was seeing her a few times after her surgery.

He acknowledges writing to her family doctor and that he was not keen on her going back to work as a bedside RN or any job involving any lifting. He indicated it was safe to say that three quarters of his female patients with these problems, would have been nurses. By May 4, 1988, he said Mrs. Cashen is anxious to get back to work. Two years later, there was a report of Dr. L. Marr, confirming he administered an epidural injection and that her problem was mechanical back pain. In a report to Mrs. Cashen's WCB solicitor, the 18th of November, 1992, he stated "her problem developed while lifting a 300lb patient in the Dartmouth General Hospital in the Intensive Care Unit. This occurred on January 26, 1987. It was more or less the classic nursing injury." He noted the methodical elimination of orderly's from the hospital environment over the past several years, leaving heavy lifting to be done by nursing staff. Dr. Canham expressed the view that he hoped she might get into administrative nursing, because bed side nursing was very demanding on the spine, when you are bent over you are vulnerable and he said, unfortunately, the Intensive Care Unit is where bedside is probably at

its most intense.

7. INJURY - MARCH 23, 1993 - SLIP AND FALL

a. June Cashen

She referred to the day of the slip and fall, in that the floor had just been scrubbed. She slipped on the wet floor and said it had nothing to do with lifting and she had no trouble with any lifting aspect on the job. The epidural injections provided some relief but were not lasting. She was unable to take the casual employment offered at the Nova Scotia Hospital, due to the slip and fall accident of March 23, 1993. Mrs. Cashen insists that she intended to continue to work in the health field and that the family needed her income. She made note that she was working in March 1993 and said she was functioning, living with her limitations. This of course is, in reference to the period prior to the slip and fall.

Mrs. Cashen wrote a letter December 27, 1994 to the Liability Adjudicator of Canada Pension Plan. She referred to the January 26, 1987 incident. It is one where she sustained a serious low back injury and outlined requirement of epidural steroid injections periodically, to remain functional. She went on to say "in July 1993 and prior to the motor vehicle accident, when it was obvious I could not return to any form of work, I contemplated the possibility of taking some courses toward a certificate in health services admin, to keep my mind occupied." It must be remembered that this letter relates to her CPP Disability Claim arising out of the January 26, 1987 injury and she refers to the doctor's understanding her frustrations and disappointments at not being able to pursue any gainful employment since "my accidents" and went on to say "due to the fact that I am unable to stand or sit for any length of time without a great deal of pain. Therefore, any sedentary type of occupation is impossible." The latter remarks would include the motor

vehicle accident; however, the former remark probably relates to the period after the slip and fall accident, when she was endeavoring to pursue a certificate in health services administration. She relates her attendance on Dr. Tweel, the doctor appointed by CPP, as a major step backward and most disturbing. She went on to say that there is ample evidence to proceed with an appeal for benefits from August to the time of the motor vehicle accident of October 28, 1993.

Dr. Finlayson gave her epidural injections from the period April to May 1993 and she says she had some relief but not lasting. Her problems she described as being right side discomfort and this is the time period when there was a further suggestion of trying a brace and she tried it. She found the brace did not give her any relief and it was almost like a corset.

Mrs. Cashen said that from her perspective in April, May and June of 1993, she was not getting any worse, not any better. It was frustrating and it was in July, August 1993 that there was a suggestion that she have a CAT scan. The back brace was in June of 1993 and it was in June 1993 that she applied for the one year Certificate of Health. There were 130 applicants and only 30, including her, were accepted. As a result of the slip and fall, she was unable to accept the employment offer from PEI. In the summer of 1993 her family was in PEI working on the family business and she was not involved in the family business herself that summer, which represents a change from the summers of 1992 and 1991. She was in PEI the summer of 1993 and says the cooking and cleaning were shared, that she was able to do some of it. She loves to cook and bake, but again, she couldn't do the heavy vacuuming. She reiterates in August 1993 that she still intended to return to work in the nursing field. By that time, they had the mortgage and certainly her salary was very much needed. I have already commented on her likelihood of working to age 65 or even to age 60. I note again that her

evidence in this regard was not said with any real conviction. Mrs. Cashen says prior to October 28, 1993, she was walking. It was difficult at times. It was restrictive at times, but in September and October 1993 in the daytime, she would go grocery shopping on her own, drive on her own and says sleeping was normal. It was in September of 1993 that Dr. Finlayson suggested another CAT scan. There was a CAT scan October 25, 1993 at the VG and was going to discuss the results in a prearranged appointment with Dr. Canham on November 2, 1993. They installed a Jacuzzi in their home in 1991 because of their physical problems. While she acknowledged using it in 1992, she says the extent used then is not as great as it is now.

Her WCB payments terminated August 1993 and it would appear that she got some type of extension to October 28, 1993. The degree of disability is as previously noted, still under appeal. Mrs. Cashen said that she did baking and cooking, but sometimes with difficulty, but that she could knit and crochet in the summer of 1993. In the summer of 1993 she was asked about outside work, and she said she would help out with the garden. She took pride in it and tried to do some work, but was paying an awful price. She said their social life was quite active. They did walks and swimming and just started back dancing in the summer of 1993 and was involved in her church with the Parish Council, etc. in 1993 and prior to the motor vehicle accident. She belonged to a women's group, The Institute in 1991 and this group made voluntary visits to elders and shut-ins and she had also joined a ladies barbershop group.

Mrs. Cashen confirmed she saw Dr. Shears in 1987 and also Dr. Thorpe. Mrs. Cashen acknowledged the outpatient clinic note from Dr. Finlayson of the 13th of September 1993, when he indicated in June of 1993, Mrs. Cashen was getting worse and her response was that she was having good days and bad days prior to the car accident of October 28, 1993. This

explanation of good days, bad days does not quite fit with the assessment of Dr. Finlayson in June 1993, where in part he states "I saw June today with a recurrence of persisting pain in her lower back, radiating to her leg and into the area of her big toe. She finds that over the last few weeks, her pain has become almost intolerable." Because of her persisting pain, and it is becoming almost intolerable, he discussed with Mrs. Cashen trying an epidural. Mrs. Cashen was still hoping in the summer of 1993, the Worker's Compensation Board would fund her further education. Pursuit of this had begun prior to the slip and fall accident and the appeal is now underway at this time. She acknowledged the reports of Dr. Reardon's and Canham in the fall of 1992 and the 11th of January, 1993 respectively, was for the purpose of pursuing medical pension. She confirmed that the WCB benefits had been cut off before the car accident and acknowledged that prior to the car accident, Dr. Begin had described her as totally disabled, for the purpose of getting benefits reinstated. Dr. Raiche-Marsden took over from Dr. Paul Begin as her family physician and wrote to the Worker's Compensation Board February 6, 1994. Dr. Raiche-Marsden also gave evidence, and it is interesting that in her report, she made no mention of the car accident, nor any mention of any neck sprain or neck difficulties. Dr. Raiche-Marsden was endeavoring to be as helpful as possible, but really, did not have a complete handle on the history.

b. Lynn Cashen

They had an apartment in Dartmouth in 1993, her mother and her and she saw her mother daily after the slip and fall in March. She said her mother was not able to do things as actively. She could not stand and bake for hours, not like she used to and would lay down more often, but was not in extensive pain.

She was asked about the summer of 1993 and said that her mother was not actively cleaning, but did some overseeing. Apparently, they hired two girls to help out and the daughter basically ran the office. Her mother would take a message or reservation. Lynn Cashen indicated that in the summer of 1993, the house was always full of company. It was a busy time and that her mother did light laundry and still did some cooking and baking, but not as much. They had a pool installed in 1991. She said her mother got relief from it and that socially, their routine in the summer of 1993 was normal. After the summer, they went back to their apartment in Dartmouth and she returned to grade 12 and her mother prepared to go back to work. She made the observation that her mother appeared to be feeling a bit better. She acknowledged that her brother had his own business since the spring of 1998. He operates transport truck and that his last summer at the cottages was 1992, other than occasionally when he was visiting home. They hired staff, but she acknowledged one of the reasons was that with her brother in his own business, they were short one person. A portion of Dr. Reardon's Report of March 26, 1993 (which will be reproduced under medical), and she was asked does that sound like your mother after the motor vehicle accident. She said yes. The March 26, 1993 report reference Dr. Reardon's opinion of Mrs. Cashen's medical situation as of January 11, 1993, which is prior to the slip and fall accident of March 26, 1993. In particular, difficulties she is having with such things as ironing and vacuuming. Ms. Cashen acknowledged that her mother had complaints after the original surgery but that they used to go away on trips, drive to Maine without discomfort. Her mother could make bread, go skating, drive the children skiing. Overall, Ms. Cashen is a young lady in whom the parents have justifiable pride. However, she is very much lacking in objectivity in her attempts to relate observations of her mother's conditions, before and after these three events. Ms. Cashen did comment in response to Dr. Begin's description of her mother being totally disabled after the March 26, 1993 slip and fall, by commenting along

the lines of what she was saying that was from her perspective day to day. Her mother had sustained a level but not saying that she was out skating and things like that. This was primarily in response to the observation of Dr. Begin prior to the motor vehicle accident, her mother's condition has deteriorated.

c. Donald Cashen

He was at home when the slip and fall accident occurred. He said that in March and April of 1993, she was very sore. She had bruises on the buttocks on the right hand side. April and May 1993 he was looking after the business. The kids chipped in and he said Mrs. Cashen was getting meals and was quite functional. There was no vacuuming or heavy work the summer of 1993. She did some of the things she could possibly do. She tried the everyday normal house requirements and would try to plant or weed the gardens and sometimes, this would result on her being a little stiff and throughout, he says she planned to return to employment and her income was needed. It was needed to permit the business to borrow. He observed her having difficulties in June, some discomfort that the problem in August and September 1993, was that she was trying to do a little too much.

d. Dr. Begin

Dr. Begin wrote the WCB the 1st of October, 1993 and stated:

**RE: June Cashen
Claim No. 1528046**

Dear Mrs. Cook:

June Cashen injured her back at work in January 1987. She sustained a disc herniation at the L5-S1 level at that time. She underwent a laminectomy and decompression of the L5-S1 nerve root in February 1988.

Following this injury, she was able to return to work. She has required periodic epidural nerve blocks for pain control but had been able to function quite well with these.

On March 26, 1993, she fell at work, re-injuring her back. She has been totally disabled since due to low back pain and sciatica. She has received several epidural steroid injections since the injury in March which have not relieved her discomfort. In the past, these have helped her back pain and sciatica.

Her condition has deteriorated. She can no longer function due to ongoing back and leg pain. She is to see Dr. Canham in the near future for further investigations. Future back surgery is a consideration pending further tests.

e. Dr. William D. Canham

Mrs. Cashen was pressing for consideration of a further surgical intervention and Dr. William D. Canham, Orthopedic Surgeon saw her at the request of her family doctor on October 8, 1993 and reported:

June continues to have problems with a great deal of right leg pain to the point that she can no longer work as a nurse. She has tried getting back to work, but this has failed, as you well know.

Examination of the knees, hips and SI joints is unremarkable while neurological exam of the lower extremities indicates that she has both an L5 and an S1 radiculopathy on the right with a milder radiculopathy on the left. Straight leg raising bilaterally is inhibited at 45 degrees. There is almost a drop foot gait on the right, which is pure L5 function, and little power of plantar flexion, with the ankle reflex on the right present but diminished compared to that on the left.

These are real neurological findings and I have little that long hours of standing as a nurse are problematic for this woman.

Dr. Canham, in an earlier report, the 21st of June 1993 stated:

She was in the process of administering some medication to a patient who she believed was about to arrest. Her concentration on the stresses of the moment, together with a trip across a wet recently mopped hospital floor resulted in a fall.

That's the last thing a patient like this needs and she has been crippled up with a significant degree of spondylosis and right radiant leg pain since.

Certainly there are neurological signs, with still a profound foot drop and radiant pain more or less into L5. Straight leg raising is inhibited at about 60 degrees.

And also,

I would ask you to write her a prescription for a lumbosacral support, manufactured either by DuPuy, Zimmer or Camp. I gave her some counseling on how to wear a brace and the problems with reflux esophagitis and the usual fitting problems.

f. **Dr. A. Finlayson - 21st of May, 1993:**

I saw June today and she reported a recurrence of her right sided sciatica with radiation of pain from her mid-back to her right buttock and down her right leg as far as her toes.

She gets intermittent problems with numbness on the outside of her right foot. She relates the recurrence of her pain to a recent fall.

8. MOTOR VEHICLE ACCIDENT - OCTOBER 28, 1993

a. June Cashen

Mrs. Cashen had indicated in April, May, June 1993 in retrospect she was not getting any worse, not any better and it was frustrating to her because of her strong desire to return to employment. It was in June of 1993 that she tried a back brace and moved on to acceptance in the course for a one year certificate in health administration. She had not returned to employment from the date of the slip and fall March 23, 1996, when she was injured in this motor vehicle accident on October 28, 1993 slightly over seven months from her second workplace accident. Mrs. Cashen has described what happened to her. She learned at the emergency room that she had fractured her coccyx, a lump in the area above her right ear, bruised buttocks and hips and puncture wounds in the legs. She first saw her family doctor, Dr. Begin when he made a house call, which was necessary because she was in severe pain, nausea and vomiting. She remained in bed until November 2 and she went to her appointment with Dr. Canham and during this period she was prescribed Demerol for pain, and gravol for nausea. The nausea dissipated in approximately a week and the puncture wounds, after being cleaned, healed in reasonably short order. It is Mrs. Cashen's evidence that she never had pain on her left side before, nor pain and spasms to the extent resulting from the motor vehicle accident. The swelling over her right ear resolved; however, she indicated that she suffered headaches and even now, they are episodic and she continues to have them. They produce some practical difficulties for her in addition to pain, such as trouble blow drying her hair and using a mirror and she says that she never had trouble with her neck and shoulders before and although she retained relief from moist heat and

showers, she says the difficulties in this area persist to the present time. Dr. Canham, for some reason, does not refer to the motor vehicle accident when she saw him in November. Mrs. Cashen went to the hospital November 23rd for the myelogram and enhanced CAT scan. Mrs. Cashen saw Dr. Canham the 30th of November and does not appear that Dr. Canham dealt with any problem in relation to her shoulders and neck and Mrs. Cashen's evidence is that he did not, on this occasion, examine her in those areas and I made a note at the time that I accept her evidence in that regard. When asked how she is today, she indicated she has a lot of pain from the hips down. The pain is in both hips and severe pain in her legs. That she has pain to touch, which never existed before, pain in her feet goes into her ankles and toes and she repeatedly indicates that she never had any difficulty, other than occasional discomfort on the left side. As a result of this accident, she says she is very limited in what she can do, even with respect to her own personal care and she says her sleep pattern is totally different. She said it is extremely hard for her to get comfortable and that prior to this accident, she could sleep through a night. She had used a Jacuzzi in her home since 1991, which was installed because of her and her husband's physical problems and now finds that she uses it as much as two or three time a day since 1993. She saw Dr. Alexander December 13, 1993 and says that he did not do a thorough physical examination of her and that it was a very short appointment, the purpose of which to see what could be done, because she says she received relief in the 1988 surgery and assumed (hoped) maybe this would happen with more surgery. She acknowledges that no doctors ever recommended further surgery. In 1994 she saw Dr. Raiche-Marsden, who had taken over Dr. Begin's practice and she also saw a Dr. Seaman, a Chiropractor on several occasions, but he had nothing to offer with respect to her back. Her evidence is that Dr. Seaman recommended a soft collar and moist heat and she says that she has followed his advice and still wears the soft collar on occasion, as it gives her a sense of support. In January 1994,

she was back living in PEI and relying upon the Jacuzzi and she has remained in PEI since 1994. She maintains that she was optimistic with respect to returning to work. Her CPP application was declined and she was required by CPP to see a Dr. Tweel. She claims that her attendance on Dr. Tweel was an extremely unpleasant and painful experience and that as a result of his examination, she was, within 24 hours literally immobile. In December 1995 she received the retroactive CPP to 1993 and continues to receive Canada Pension Plan Disability. I have already covered her position with respect to WCB and that she has an outstanding appeal with respect to the level of disability assessed. Mrs. Cashen saw Dr. David King and after her visit with him, she saw Dr. Brooks, a psychiatrist and her own view is that she did not feel overly depressed, but was extremely frustrated. By 1994, a year had gone by and she had not been able to get back to work and the family had no income other than the WCB and CPP. She still wanted to return to Dalhousie. She had a further appointment with Dr. Reardon, arranged by the WCB lawyer, which was for the specific purpose of an assessment for her impairment with respect to her surgery of 1998. She saw Dr. Thomas Loane at the Rehab, but was not offered any treatment. Mrs. Cashen was asked if she was improving in 1995 and she responded not really. The fracture resolved and I will not recite at any great length, the evidence with respect to the fracture of the coccyx. The medical evidence very clearly indicates this could, should and did clear within a two year time frame, although during that period, particularly at the earlier stages, Mrs. Cashen went through considerable pain. I do not fault Mrs. Cashen for indicating she still receives pain from the fractured area. In fact, that is related to chronic low back pain that exists as a result of the first two workplace accidents, and prior to the motor vehicle accident. She saw other doctors. At the present time, she takes Tylenol when it is necessary and a half of a gravol at nights, when she finds it difficult to get into a comfortable position and continues to use the Jacuzzi. She estimates non-prescription

drug expenditures on a monthly basis, at somewhere between \$25.00 and \$35.00.

With respect to her neck, she says it has not been resolved and that she has bouts of severe pain and muscle spasm and her headaches are episodic. She indicated radiating pain in her legs and feet. Her constant burning nature and sometimes results just from touching. She cannot stand any length of time, particularly on cement or concrete floors or walk any distance. She has been asked about any falls and she says that they happen without warning. She has severe spasms and says these did not exist prior to 1998 and maintains that prior to her surgery in 1988, she had only problems with one foot occasionally. She indicates prior to 1993, that is in 1992, she was working at the QE Hospital. Her daughter was sick, her husband was sick and she could oversee things, do the banking, drive to Charlottetown, go for supplies, but not been able to do any of these things since October 1993, and relates this to the severe constant pain that she says was not there in 1992. Both Mrs. Cashen and her husband indicate that there has been a serious interference in their personal relationship, related to the pain resulting from the car accident and this is a matter of considerable concern to both her and her husband.

Mrs. Cashen acknowledged, prior to the motor vehicle accident, she couldn't do any vacuuming but said she enjoyed baking and she was able to do general housekeeping for longer periods of time then compared to now. She acknowledged the baking and cooking sometimes was with difficulty before this accident. She says she could knit and crochet in the summer of 1993 and now finds it difficult and she has difficulty sitting still for a long enough periods to read. Mrs. Cashen said prior to the motor vehicle accident she could help out in the garden, took pride in it and was able to do some work. Her evidence is that there social life has been dramatically curtailed as a

result of this third accident. She was back walking and swimming and says she started dancing in the summer of 1993 and although she goes to mass, she is not involved in the Parish Counsel since this motor vehicle accident. Mrs. Cashen was asked to outline a typical day. She says in the morning she starts off with the Jacuzzi, mass, makes basic meals when she is up to it, but her husband is very helpful. She enjoys reading when she is able to sit and is active in various church activities and a ladies barber shop group and repeats on many occasions, that her sleep prior to the 1993 motor vehicle accident was not a real problem. She has related measures of embarrassment because she says she has episodes of severe lower back pain into the rectum and at times, she says it results in incontinence. I quite frankly do not remember any reference to incontinence by any of the doctors. It is Mrs. Cashen's evidence that this never occurred prior to the motor vehicle accident. In summary she says the motor vehicle accident has changed her whole life.

I have also mentioned that it is somewhat perplexing that on occasions, when one would have thought Mrs. Cashen would have mentioned the motor vehicle accident, there was silence. Again, I recognize that Mrs. Cashen has gone through an extremely long period of stress and difficulty. She had to appeal the Canada Pension Plan Disability and she is still under appeal with respect to the WCB Claim.

Mrs. Cashen was asked when she began using a cane and she repeated that she has good days and bad days and she has to use it because of a number of falls and that when her back is feeling bad, she limps and has spasms in her feet. Mrs. Cashen acknowledged that she used a lumbar brace for a while after her surgery in 1988 and there is the reference by her family doctor April 5, 1998, that she would eventually need a lumbar brace.

b. Lynn Cashen

Ms. Cashen was there when Dr. Begin made his house call after this accident. She says her mother was basically in bed for several months. Mrs. Cashen went back to PEI to run the office in the summer of 1994 and hired two people because she could not do it all by herself and that her mother could not do what she did before. She was asked to contrast 1994 with 1993 and said that in 1994, her mother had no real contact with the business. She could not do anything in the garden because she could not get up. She continued to use the Jacuzzi and occasionally, the swimming pool and Ms. Cashen says there has been no improvement in her mother's condition since 1993 and expresses the position she has got worse. She cannot, according to her daughter, shop for a couple of hours. She said that in the summer of 1993 she could shop for a few hours at least, but acknowledged that prior to the motor vehicle accident, she was not able to shop a full day. She describes her mother as being more frustrated after this accident, emotionally upset and goes so far to indicate that they have had to use a wheelchair on occasion. Now, her father does more cooking around the home and previously, her mother used to do a great deal of baking. Ms. Cashen indicated that since this accident, her mother does have falls. Apparently they occur both when she is going upstairs and downstairs, etc. Ms. Cashen referred to her mother going for a walk recently and returning with grass stains. She said, obviously came from a fall. The hiring of staff is in some respects, related to the inability of her mother to contribute. She acknowledged that her brother has had his own business in Halifax since the spring of 1998 and that one of the reasons they had to hire people was that with her brother tied up in his own business, they were short one person. Ms. Cashen was read the report (p.862, line 4) and asked, does that sound like your mother after the accident, she said yes. Ms. Cashen said they were able to go on trips, for example to Maine without any discomfort and this was the sort of thing that cannot be done now. Ms. Cashen is somewhat

surprised at the report of October 1, 1993 that her mother's condition has deteriorated and this report is not all that far in advance of this motor vehicle accident. She acknowledged the family finances in 1993 were a real struggle.

Overall, Ms. Cashen is a fine young lady, quite naturally supportive and concerned for her family, which concern manifests itself in an absence of objectivity.

c. Donald Cashen

After the slip and fall accident, he looked after the business and the kids chipped in. He says by June of 1993 Mrs. Cashen was getting along fairly well and functioning, getting meals, but not doing any vacuuming and no heavy dancing, but some socializing. He says that in the summer of 1993 she did some of the things she could possibly do and still wanted to get back into the workforce. When she tried to plant things, she would be a little stiff and he acknowledged her income is needed. He thought she was getting close to being able to go back to work at the time of the motor vehicle accident. After the accident, she couldn't be left alone initially. She was essentially dead weight and he says her physical ability is very limited since the motor vehicle accident and her frustration level is higher and he confirmed the interference with their personal life, and its impact upon them. He says his wife feels guilty and essentially portrays this accident as the straw that broke the camels back. He says Mrs. Cashen does not go a day without pain or discomfort. She cannot use the central vacuum. While she did not do it on a regular basis prior to the motor vehicle accident, he says she did a little bit. Now he carries the laundry downstairs. Mrs. Cashen finds the stairs difficult, she has problems falling and that with respect to her sleep, he says she is up two or three time a night; although, I am left with the impression that she had some difficulties with sleeping prior to the motor

vehicle accident, although Mr. Cashen did not come outright and state such. Now there are problems with respect to traveling and Mrs. Cashen has a problem with respect to spasms in her foot. These are current since the motor vehicle accident. At least he cannot recall any spasms prior to the motor vehicle accident. He takes the position that she did not have any pain in both legs and that this is only since the motor vehicle accident and that sometimes, she has to wear her collar. Mr. Cashen confirms their social life has definitely changed since the motor vehicle accident. They do not go to dances, house parties, theatre. She just cannot sit long enough and she exhibits pain. She is very irritable.

d. David Holmes

Mr. Holmes is a retired RCMP Officer, who was involved with respect to the security in building the fixed link to PEI. In 1995, he was the Safety and Security Manager. In 1995, a number of workers increased from 500 to 1500 and he hired two additional registered nurses who worked twelve hour shifts, four on and four off. There was also a doctor on staff on contract and a standing order permitting the nurse to administer narcotics. There was an on-site nursing facility and he had known Mrs. Cashen off and on since June 1982 when they met at the same camp ground. He knew that in 1988, 1989 (actually it was 1986) that they purchased cottages and homes and started out at that time to visit occasionally, as friends. He was asked if he discussed a nursing position with her. He said in 1995, he knew he had to increase the nurses on site from two to four and then to eight. They were doing the interviewing and had a lot of young and inexperienced nurses and he knew of June's experience in the emergency department and I was looking for someone more mature with industrial background and asked her to take over the nursing program. It involved going to the site, lifting, whatever, and she could not take the job because of her back. The pay schedule was \$16.00 per hour and in six month, it was \$18.00 per hour and

would average about 40 hours per week. Overtime was time and a half.

In cross examination, he was asked how frequently he saw them. He said once every three or four months. He lived 15 to 20 minutes from them, but then he got out of traveling and built a cottage the other end of the island. In Borden, there was an on site emergency room, with an ambulance. In 1995, one nurse of the four on duty would go with the security guard if there was an injury on site. He was asked if they were looking for a physically fit person, he said yes. Would it be rough terrain, etc., yes. He said would you be looking for her to do administrative work, he said looking for not only work on shift, but supervisor and Mrs. Cashen was not able because of her medical problems. She had a bad back, couldn't lift and do that kind of work. He saw them socially and knew about the accident but did not know how bad the situation was. 1989 he referred to her having a bit of a limp, but he was not aware she could not do any lifting. Mr. Cashen was asked if he knew Mr. Holmes and said they were social friends at a number of functions during the year, three to four possibly, into 1991 they would see them four or five times a year, but did not see them much since his retirement because he is on the other side of the Island. Mr. Holmes left me with the impression that he did not have any real consciousness of the extent of the disability now being projected for Mrs. Cashen. It is projected as manifesting in fairly constant difficulties, and one would have thought Mr. Holmes would have had a greater awareness.

In any event, although this employment required some supervision, very clearly it required on-site rough terrain and nursing involving some lifting. In other words, work somewhat comparable to general nursing, for which medical advice was overwhelmingly against her participating in, due to her condition from the first accident and surgery and without consideration of the consequences of the slip and fall injury and the subsequent motor vehicle

accident.

e. Mr. Thomas D. Loane

Dr. Loane was requested to see Mrs. Cashen by Dr. M. Raiche-Marsden and he saw her initially June 15, 1995 and filed a report August 1, 1995. He noted that she initially hurt her lower back in 1987, that Dr. Shears reported low back problems but also neck pain. Mrs. Cashen had a slip and fall in March of 1993 and then the motor vehicle accident October 28, 1993, just after a CT Scan of the spine had been carried out. He commented that she has been unable to work since March 1993, but since the October accident, has been significantly disabled for daily activities. On both occasions when he saw Mrs. Cashen, she wore a cervical collar and his physical examination concluded:

In summary, her physical findings showed signs of marked pain and restrictions around the cervical spine but without any evidence of cervical nerve root impingement. In the lower back, there were some findings of S1 irritation but the only L5 finding today was some weakness of the EHL. There was restriction and painful lumbar range.

Review of the x-rays did not show any real problems with the cervical spine. There was narrowing of the C5-6 disc space and some lack of flexion in the upper cervical segments. However, there were no signs of trauma. These x-rays were done about six months after the car accident and I think it unlikely the cervical findings relate to that traumatic event.

Dr. Loane went on to state:

The big question is whether there is any real difference between the CT scans done in

October of 1993 and November of 1993, before and after the car accident. I personally could not see any changes in these but will have them reviewed by our radiologist.

It is perhaps an opportune time to refer to the radiologists' report. Dr. C.G. Llewellyn reported to Dr. Loane August 2, 1995:

"IMPRESSION

There is no change between the VG CT of October 25th, 1993 and the IWK CT of November 24th, 1993."

Dr. Loane went on to state:

In terms of treatment, the medical aspects of this case are less likely to be important to the outcome than the other components contributing to Ms. Cashen's overall stress level. This includes the various appeals and litigation regarding the etiology of her complaints, the worry and concern over her future disability and employability, and her own perceptions regarding the cause and the seriousness of her medical condition.

I see the problem being one of primarily of resolving the various components feeding into what is becoming a chronic pain syndrome and attempting to deal with this on a functional basis, attempting to prevent her from excessively restricting her activities because of pain. A case in point is the cervical collar. She should not be wearing a collar at this point in time after the accident, almost a year and a half following the sprain.

Dr. Loane made some recommendations with respect to management:

1. That Mrs. Cashen should see a psychologist. It would help her in

dealing with the chronic pain issues.

2. That it is unlikely anti-inflammatory medication would be effective and they have had significant GI side effects in the past and that she may benefit from using tricyclic medications such as a low dose Elavil or Flexeril, in a single dose at bedtime in an attempt to relieve her night time spasms and pain.
3. She should avoid using the cervical collar and consider a home and recreational exercise program.
4. He noted her lower back pain has been present off and on for seven years. That she could improve her function in spite of pain, if she was involved in a more active exercise program, which might involve walking, aquafit classes, the use of an exercise bicycle or other repetitive conditioning exercises.
5. With respect to work related disability, it is his opinion that the major source of disability is pain rather than impairment, and he acknowledged that this is always difficult or impossible to accurately assess.

Dr. Loane provided a medical report to Mrs. Cashen's solicitor, dated October 19, 1995. When he saw her on July 18, 1995, she indicated her symptoms on a standardized pain chart.

Interestingly at page 803 of the report, Dr. Loane states:

"She denied any change in bladder control or continence, but did describe occasional rectal spasms, interfering with defecation."

f. Dr. D.I. Alexander

Dr. Alexander is an Orthopedic Surgeon and he was brought in, essentially to deal with the narrow issue of whether or not Mrs. Cashen should have a second operation.

It is interesting and perplexing that in his report of December 13, 1993, there was no mention of the motor vehicle accident. He indicated normally that it would be recited, but he cannot recall Mrs. Cashen did or did not mention the motor vehicle accident, but obviously, if she mentioned it to him, one would probably expect to see it recited.

He conducted a physical examination and reports:

Her physical examination reveals a lot of subjective complaints of pain on flexion and extension of her spine. Her straight leg raising is not abnormal when she is distracted and her neurological exam does not show any har abnormality that I can detect. Her myelogram shows a little blunting to the nerve roots which is common after lumbar surgery, and her CT scan is unremarkable.

g. Dr. B.K.H. Tweel

Dr. Tweel as previously reference, was engaged to conduct an examination and report for CPP and in his report of November 18, 1994, he indicated he did not take a past history from her, but she had expressed the view that there was no suitable vocation for her and that it was hard to carry on the activities of daily living, because of her limitations.

Dr. Tweel appears to have conducted fairly extensive physical examination

and Mrs. Cashen complains bitterly that his examination was so aggressive, it provided her with considerable pain. Nevertheless, Dr. Tweel's report concludes:

When the patient was asked to lay on her back, range of motion was again tested. While on her back, straight leg raising performed by the patient was limited to 30 to 40 degrees bilaterally. Note is made that while lifting her right leg there was no downward pressure of the left heel against the bed and similarly vice versa. When distracted, I was able to raise the patient's right leg to 90 degrees and similarly the left leg to 90 degrees. Range of motion of the hips was full with knee bent. While lying prone and with my assistance, full extension of both legs at the hip was demonstrated, i.e. 10 to 15 degrees extension at each hip tested 1 at a time. When the patient was asked to lift her upper body off the bed, i.e. extent at the waist, she demonstrated essentially no movement at all.

In addition to recording his objective findings, he advanced that subjectively, she had a tendency to under perform. He agreed that indeed, Mrs. Cashen had experienced significant amounts of pain in the past and in his view, her capabilities are greater. They commented on a possible need for a period of aggressive physical therapy motivation, for which he felt she was lacking.

h. Dr. Reardon

I have already commented on Dr. Reardon's report of March 26, 1993. Dr. Reardon saw Mrs. Cashen at the request of her counsel, April 11, 1995 and filed a report April 27, 1995. He noted that it is important to note that Mrs. Cashen was experiencing difficulty with her lower back prior to the car accident and had surgery. He referred to his review of January 11, 1993 and

that at that time, she was having persistent difficulty with her lower back, causing her activities of daily living, to be restricted. Had difficulty in bending and lifting, both in the home and at work and driving her motor vehicle brought pain.

Mrs. Cashen indicated to him that her back pain was more intense following the incident of October 28, 1993 and that it also produced neck pain that persisted. She was now complaining of pain in both of her lower limbs, indicating that prior to the motor vehicle accident, she experienced pain only in her right leg. Dr. Alexander noted the CAT Scan performed October 25, 1993 prior to the motor vehicle accident and the myelogram performed November 24, 1993, following the motor vehicle accident. He described this as a complex case. She had a very significant problem prior to the motor vehicle accident and had been off work for seven months prior to it because of the significance of her lower back complaints, and at this time, had a six year history of persistent lower back complaints which had not responded to conservative treatment nor to surgical intervention. At the time of the accident, she was being investigated for her persistent complaints. The only change of any significance with regards to her lumbar spine condition following her accident, is the fact that her pain has increased. There are no significant clinical findings, either on a physical exam or on diagnostic imaging exams that would suggest a significant, pathological change as a result of the October 28, 1993 accident. Dr. Reardon relates her neck problems to the motor vehicle accident. He stated in this regard:

It is apparent that her cervical spine symptoms are directly related to the October 28, 1993, incident. She had no history of neck problems, to by knowledge, prior to this trauma. Cervical spine x-rays do show some mild degenerative changes which were asymptomatic. It is not unusual to have such

degenerative changes which do not become symptomatic until an injury occurs, if one looks at a classification system of mild, moderate, and severe. I do not believe that she will exhibit much improvement in the future with regards to her neck complaints. It is my opinion that her persistent neck complaints will detrimentally affect her level of physical function in the future, particularly with activities requiring persistent and repetitive utilization of her upper limbs.

I do not believe that this patient will ever return to gainful employment. This, of course, is because of a combination of her lower back and her neck problems. The patient, herself, feels that she would have eventually returned to work had it not been for the October 28, 1993, accident. This is somewhat speculative in that her pre-accident complaints were very significant. She had failed all attempts at treatment and there was really nothing else left to offer her treatment wise that likely would have altered the course of her recovery. I cannot say with any certainty that this patient would have returned to work had it not been for the October 28, 1993, accident. I certainly cannot say that she would not have returned to work.

He went on to note that when he examined her January 11, 1993, she was having a difficult time with her job duties and that he did not examine her with respect to the slip and fall, March 26, 1993 incident, which forced her off the job. His report of June 20, 1995, he confirmed his 20% assessment of her overall disability as relates to the initial work related injury of January 1987.

Dr. Reardon, April 27, 1995

Dr. Reardon, in this report, reviews the background of the epidural steroid injections, the use of a brace without benefit and that Mrs. Cashen felt her

condition was worsening and she sought attention from Dr. Begin in September 1993, which brought forward the appointment for the CAT Scan of October 25, 1993.

The only change of any significance with regards to her lumbar spine condition following the accident is the fact that her pain has increased. There are no significant clinical findings, either on physical exam or on diagnostic imaging exams, that would suggest a significant pathological change as a result of the October 28, 1993, trauma. She did sustain an un-displaced fracture of the sacrum, but these injuries will heal without complication. Nonetheless, it is apparent that there was significant force applied to her lower back region as a result of this accident and it is fair to accept the fact that her pain level will increase as a result of this trauma. In a case such as this I think that a fair attempt at assessing what proportion of her symptoms should be applied to her pre-accident status versus her post-accident status, would be a 90/10 split. By this I mean that 90% of her lower back complaints should be attributed to her pre-accident status and 10% to her post-accident status.

I. General

There are other medical reports and records, all of which I have reviewed more than once and I assure the parties that their contents have been carefully considered in reaching my factual determinations.

9. FINDINGS

Mrs. Cashen - Physical Condition - October 27th, 1993

Throughout the course of my reviewing and commenting on some of the evidence, I have addressed various aspects and stated conclusions. These findings are in addition.

There is nothing in the evidence that suggests to me her Crohn's Disease has, or was a factor in any way in her employability or general health.

I express concern that Mrs. Cashen indicated that she had "never" suffered a cervical sprain prior to the motor vehicle accident. I have already concluded the reference in her family doctor's records of 1985 to "severe neck strain", it is not of significance because there was no further reference to neck strain in the family doctor's records. Of concern is the complaint she obviously made to Dr. Arthur Shears with respect to her neck. As he recited in his report of November 27, 1987, reference to her neck being extremely painful and tender, with a decrease of range of movement of her neck and her lower back. This complaint to Dr. Shears must be related to the initial injury of January 26, 1987. Once again, given her presence in the medical field, it is hard to accept her evidence indicating that she "never" suffered a cervical sprain prior to the motor vehicle accident. After very careful reflection and from my observation of Mrs. Cashen and some of the other witnesses, I am satisfied that there was no residue of cervical sprain in the 1987 accident and the slip and fall accident of March 23, 1993, so that the cervical sprain manifest post the motor vehicle accident, is a direct consequence of the trauma she received in the motor vehicle accident.

Prior to the slip and fall accident, Mrs. Cashen had mechanical low back pain. Dr. Canham reported to the WCB solicitor, August 26, 1992, Mrs. Cashen requires epidural steroids several times a year to keep functioning. Mrs. Cashen saw Dr. Reardon January 11, 1993, for the purposes of him providing a report and he did provide a report March 26, 1993, which is three days after the accident but based on her condition **prior** to the slip and fall accident, and Dr. Reardon noted Mrs. Cashen was complaining of persistent difficulty with her back and restrictions in relation to living, housework, driving a motor vehicle, etc. The epidural steroids were necessary because of the severity of the pain and they continued well into 1993, over five years after her first accident. With respect to the family business, her husband made it clear that only sometimes, could she when her back was

OK, make a bed or fold towels etc., and this is the type of residue limitation she had prior to the slip and fall accident, bearing in mind that she did function in a general nursing setting for several months, but she must have done so with avoidance of physical effort and it is highly probable that she would not be able to sustain such, based on the residue of limitations from her first accident alone, and I so find.

The family evidence is of a reasonable, but reduced level of social life, after the first accident and I have weighed this evidence carefully with the evidence of her having good days and bad days and factoring in the disastrous impact of the second accident, March 23, 1993. I find that they had a severely limited social and personal life, after the second accident and that it was of permanency in most areas, other than perhaps their personal life, which may well have a major stress component to it. Nevertheless, the motor vehicle accident virtually obliterated the residue of limited social life that existed October 27, 1993.

There is no doubt that the accident of 1987 and the subsequent surgery in 1988 rendered Mrs. Cashen, in the words of Dr. Begin, totally disabled. In his evidence, he limited that opinion to general nursing. I have some reservations that if pressed at the time of expressing the opinion she was totally disabled, Dr. Begin would have stated such a limitation as relating to general nursing only. In any event, administrative nursing was the direction Mrs. Cashen was advised to explore and returning to general nursing, carried with her the high probability that sooner than later she would have aggravation on her back, precluding continuation of the requirements of general nursing or the administrative nursing job opportunity involving sporadic lifting, that was advanced by Mr. Holmes.

As previously noted, Mrs. Cashen was asked if she ever had a concussion and after responding in the negative, she was referred to the doctor's notes, which indicated on March 18, 1986 "Cerebral Concussion", followed by a further entry Marcy 26, 1986 indicating that the cerebral concussion was worsening and that she was referred to the VG Hospital, Neuro Surgery and there follows a radiology report.

I have some difficulty understanding her forgetting the concussion and forgetting having gone to the Victoria General Hospital to have it checked out, particularly where she had been involved in the medical field as a Registered Nurse for many years prior to these attendances. Nevertheless, with respect to the neck strain and concussion, I conclude that whatever problems she had in 1985-1986 in this regard, they did not have any recurring consequences and are sufficiently remote and I infer from the absence of further reference, sufficiently minor, that they are not factors to be given any weight in my assessment of Mrs. Cashen's damage entitlement.

Mrs. Cashen's failure to recollect the cerebral concussion aspect, etc. does confirm my overall credibility assessment that she is a hard working, strong family person who along with the other members of her family that gave evidence, are under considerable stress and indeed fear of the possible financial consequences of this law suit, which other than the WCB appeal outstanding, represents their last avenue for securing of sufficient funds to maintain their family dream and business. This fear is understandable and adds to the general stress and concern that quite naturally, Mrs. Cashen has had for some time, as to what the future holds. Nevertheless, I readily conclude that in many respects, she is lacking in objectivity and this particularly manifests itself in the attempt at almost every turn to relate any and all problems to the motor vehicle accident and to diminish the serious physical limitations that existed immediately prior to the motor vehicle accident.

Mrs. Cashen had serious residue of limitations from the 1987 injury that introduced restrictions in a heavier type of housework, such as vacuuming, and ironing. It interfered with any sustained driving in a motor vehicle. Residue weakness on the right side and she had experienced foot drop prior to her surgery in 1988.

In the course of her evidence, Mrs. Cashen indicated a problem with incontinence and I do not recall any medical reference to such a state, let alone it being a consequence of the motor vehicle accident, except for her advice to the contrary to Dr. Loane, as previously reported at page 803 of the report, Dr. Loane states:

"She denied any change in bladder control or continence, but did describe occasional rectal spasms, interfering with defecation."

I do not recall any complaints to any other doctors, by Mrs. Cashen, of rectal spasms. My reading of her evidence, is that any difficulty she occurred at any time after the 28th of October, 1993, she assumed and advanced as being a consequence of the motor vehicle accident. Quite possibly, she had occasional rectal spasms that would have been related to the earlier pain due to the fractured coccyx.

Prior to the slip and fall injury of March 23, 1993, she had limitations with respect to cooking, house cleaning and the limited involvement in the family business that occurred in the summers of 1992 and 1991, which was eliminated for the summer of 1993, by the consequences of the slip and fall injury. Prior to the slip and fall injury, when Mrs. Cashen was attending university, she had to be careful with all activities that might aggravate her back. While she indicates no real difficulties while attending university, it is clear that her husband was very supportive in driving her, carrying books and generally addressing activities that caused her some distress. Mrs. Cashen's description after the first injury, good days, bad days is the same description she utilizes after the slip and fall, when in fact, the evidence supports the conclusion that after the slip and fall injury, her situation deteriorated, she was experiencing if not constant, very frequent pain and required medical attention. Without reproducing it, I refer to the report of Dr. Reardon of his examination, January 11, 1993. Dr. Canham, prior to the slip and fall injury, had expressed the view that in general nursing, one is vulnerable because it is very demanding on the spine. Mrs. Cashen herself, referred to her functioning and living with limitations prior to the slip and fall accident. When she wrote to the liability adjudicator of Canada Pension Plan, December 27, 1994, post the slip and fall injury, she was advancing the view that:

" in July 1993 prior to the motor vehicle accident, when it was obvious I could not return to any form of work, I contemplate the possibility of taking some courses toward a certificate of health services administration, to keep my

mind occupied."

Mrs. Cashen, prior to the motor vehicle accident, had difficulties walking, although she would drive her own car and go grocery shopping. Her daughter, in her observation of Dr. Begin, that prior to the motor vehicle accident, her mother's condition had deteriorated, responded that it was a day to day thing and that her mother had sustained a level of activity, but the daughter was not suggesting she was out skating and things like that.

From my overall assessment of all the medical evidence, both written and presented in court, and my notes of observations of the various witnesses, for example the human approach of the family doctors who tried to be as supportive as possible of Mrs. Cashen, etc., the inevitable conclusion to me is that on October 27, 1993, Mrs. Cashen was **not** going to return to full time employment of any kind, due to her physical limitations and her chronic back pain, resulting from the two accidents from 1987 and then the slip and fall of March 23, 1993. Of particular weight, is the evidence of Dr. Loane.

Mrs. Cashen did indicate since 1987 she had been physically limited due to her back pain, but essentially, related it as being more constant since the car accident and that her problems with sleep disturbance became worse since the car accident. Dr. Loane's report is extensive and I have given it very careful consideration in its entirety. In cross-examination, he was asked if the label chronic was used to describe a condition that lasts longer than six months, and he acknowledged his agreement. He did not think he had the report of Dr. Reardon, but agreed the findings of Dr. Reardon, set out of his examination, the 11th of January, 1993, were similar in nature to his findings in 1995. He acknowledged from March 1993 to October 1993 chronic back pain was in place and he acknowledged merit in the report that, with respect to chronic back pain, the likelihood of returning to employment diminishes rapidly and that there is a correlation between the time of the accident and returning to employment. It was put to Dr. Loane if chronic back pain prevails for six months, would you agree that there is less than a 50% likelihood of returning to

work, and he answered "I would say a fair statement. He acknowledged that Mrs. Cashen did not return to implement any of the follow-up he had recommended and that Dr. Llewellyn did confirm there were no changes between the two CAT Scans of October 25, 1993, prior to the motor vehicle accident and November 24, 1993, post the motor vehicle accident.

10. ATHEY V. LEONETTI [1986] 3 SCR 458

Before reciting the application of this case, I want to make it clear that I was fully conscious of its direction and the significance of reaching the factual determination, that immediately prior to this motor vehicle accident, the combined effect of the 1987 accident and surgery of 1988 with the slip and fall accident of March 20, 1993, June Cashen, due to chronic back pain rendered, was totally disabled from any type of full time employment before the motor vehicle accident.

In **Athey**, the issue was whether the loss should be apportioned between motor vehicle accidents and mild stretching exercise where both were necessary to create the injury (disk herniation).

Facts:

Following the first motor vehicle accident in February of 1991 Mr. Athey had physiotherapy and chiropractic treatments and was on his way to recovery when the second motor vehicle accident, occurred in April, 1991. He continued his physiotherapy and chiropractic treatment and by the fall of 1991 his condition had improved and he was again on the road to recovery. His doctor suggested that he try to resume his regular exercise routine and when he attempted to do so while stretching as part of his warm up him he felt a "pop" in his back and immediately experienced a great deal of pain. His condition was diagnosed as disk herniation which was ultimately treated by surgery. As a result of the disk herniation it was necessary for him to change his employment to one without heavy physical duties and his new employment was at a reduced rate of income.

There was no allegation of negligence on the part of Mr. Athey nor on the part of his

doctor. The Supreme Court of Canada held that it was not necessary for Mr. Athey to establish that Leonati's negligence was the sole cause of his injury (disk herniation). Leonati having been a part of the cause of the injury is liable even though his act alone was not enough to create the injury.

Major J. at page 467:

“there is no basis for a reduction of liability because of the existence of other preconditions...defendants remain liable for all injuries caused or contributed to by there negligence.” And the Court went on to reiterate that the essential purpose of Tort Law is restore a plaintiff to the position he or she would have enjoyed but for negligence of the defendant.”

After noting that apportionment is expressly permitted between tortious causes by Provincial Negligence Statues and further that such apportionment is consistent with the general principles of Tort Law, Major, J stated at page 469:

“each defendant remains fully liable to the plaintiff for the injury since each was a cause of the injury. The legislation simply permits defendants to seek contribution and indemnity from one another according to the degree of responsibility for the injury.”

Major, J. went on to state at page 469:

“Apportionment between tortious and non-tortious causes is contrary to the principles of tort law...”

The reason being that the plaintiff would not be placed in the position he or she would have been in absent the defendant's negligence. And finally Major, J. at page 470:

“The disc herniation and its consequences are one injury, and any defendant found to have negligently caused or contributed to the injury will be fully liable for it.”

Athey v. Leonetti above is therefore, based on a factual finding that the disc

herniation was caused or contributed to by the injuries received by Mr. Athey in the motor vehicle accidents which were treated as one event.

This is not to say that a defendant is liable for injuries which were not caused by or contributed to by his or her negligence. Major J. at the bottom of page 469, top of page 470:

“Separation of distinct and divisible injuries is not truly apportionment: it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries had non-tortious causes: Fleming, *supra*, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.”

In my view, if your negligence injures a person and as a result that person's balance is impaired and the injured party, not acting recklessly but reasonably, breaks both legs from a fall that would not likely have occurred except for the imbalance created by the breach of duty, then you are liable for the resulting injuries, i.e., broken legs. This conclusion is the only one consistent with the fundamental requirement of damages, namely, insofar as can be the injured person should be placed in the same position, not better, not worse, as the injured person was in immediately prior to the breach of duty.

“But for” the imbalance caused by the negligence, the fall would not likely have occurred. At the very least the imbalance created by the negligence materially contributed to the occurrence, i.e., the fall.

There may be several causes, indeed that is the position advanced by Mrs. Cashen's counsel and it would have been enough for Mrs. Cashen to establish the motor

vehicle accident was one of the causes which in itself could be established by inference that the motor vehicle accident materially contributed to her inability to handle full time employment. If one is a contributing party to the cause of the injury, one is held liable for it.

Using the same analysis as indicated in **Athey v. Leonetti**. The injuries suffered by Mrs. Cashen eliminating her ability to handle full time employment of any kind, were as a result of the initial two work place accidents and not as a result of any non-tortious act or the tortious act of Dale Donovan. My finding of facts, as I have stated, included that Mrs. Cashen had been rendered unemployable in any nursing capacity or any full time basis is attributable and was caused solely by the first two industrial accidents. My careful weighing of the evidence, including assessing it by comparison and observation of the witnesses, leaves me in no doubt that there is no basis to infer that her degree of disability precluding full time employment came in any respect from the breach of duty by Mr. Donovan.

Wishes, possession of the work ethic and strong determination all existed in considerable measure in Mrs. Cashen, as clearly indicated by her willingness to return to general nursing, despite the residue of difficulties from her first accident and against medical direction. In addition, with her husband rendered unemployable, the family had the pressure of financial concerns, etc. etc. These are however, not capable of overcoming the physical condition and limitations Mrs. Cashen suffered from the first two accidents that accumulatively rendered her totally disabled from full time employment leaving her with a residue of employability that would not permit her, on a sustained basis, working six or seven hour time frames daily in employment involving any standing or sitting or walking or any weight bearing activities, or a combination of any of these features for sufficient periods of time to maintain anywhere near full time employment.

Dale Donovan's negligence did not cause or contribute to her inability to perform full time employment.

In Athey, Major J. at page 471:

“The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.”

Major, J. also at page 471:

“Likewise, the negligent conduct either was or was not a cause of the injury.”

I determined the position of Mrs. Cashen, immediately prior to the motor vehicle accident was one where she would not be able to, on a strong balance of probabilities, return to full time employment of any kind. The damages she is entitled to against Dale Donovan are those that are a product of the motor vehicle accident. The same stellar qualities that she has exhibited, possession of the work ethic, financial pressures, determination, etc. are ones that she would have used to be able to work with difficulty in a part time clerical type or possibly in a part time solely and entirely administrative nursing employment setting, even with the strain, pain and tiring that would result.

11. DAMAGES

1. General Damages

Mrs. Cashen suffered a number of injuries in this motor vehicle accident.

The shopping cart hit her with considerable force, after being propelled by the Donovan motor vehicle. This produced puncture wounds in her shins, which caused pain of very limited duration. Similarly, she had minor lacerations and bruising. She suffered a fracture of the coccyx and based on the evidence, I conclude that it healed within a two year time frame. Nevertheless, this fracture particularly during this period, added significant pain and suffering to a person who already had chronic back pain of a debilitating nature, sufficient to render her unemployable on a full time basis. Mrs. Cashen also suffered cervical sprain and she reported to Dr. Michelle Raiche-Marsden that she had hit her head on the pavement. In any event, she has since this motor vehicle accident, presented complaints related to her back, frequent headaches, neck stiffness, spasms, pain down both sides, etc. Dr. Raiche-Marsden reported 19 August, 1994 "prognostically, it can be expected that Mrs. Cashen's neck pain and headaches would likely be present with flares of severe pain and stiffness for at least the next few years and likely for the remainder of Mrs. Cashen's life. The prognosis regarding her low back complaints is uncertain. According to the literature, coccygeal pain, following fracture, is very common for up to two years following injury."

A considerable period of time has passed since Mrs. Cashen received injuries in the motor vehicle accident, and in addressing the general damages she is entitled to, Mr. Donovan must take Mrs. Cashen as she existed immediately prior to the accident. The injuries caused by Mr. Donovan, had

a far more serious impact, because Mrs. Cashen was a person who already had extreme and almost constant pain and substantial physical limitations, due to her previous accidents. Mr. Donovan is liable to place, so far as damages can, Mrs. Cashen, is no better nor worse, but in her original position immediately preceding this accident. She has had over five years of additional pain, increased difficulties with respect to normal living such as walking, interference with her ability to tolerate shopping for any period of time and diminished ability to drive or be present in a motor vehicle for any sustained period of time. Limitations Mrs. Cashen had with respect to housekeeping, physical activities, social and church, etc. were exacerbated, extended and in some cases, added to. She now suffers headaches that are of some frequency and episodic. The cumulative affect of these additional injuries upon the state of her health that existed immediately prior to the accident, rendered her quite likely unable to handle the pain, stress and fatigue of even part time, secondary type employment, of a nature that would allow her to stand and move in such a manner as to avoid stiffness and strain, and limit the pain level that would otherwise preclude her from part time employment of any kind.

I accept the evidence of Mrs. Cashen and members of her family to the extent that I have carefully weighed it, that the additional injuries and their consequences have had a dramatic impact on the residue of quality of life that she possessed, immediately prior to this accident, although I would not

be surprised to see her attempt some measure of employability because of her nature and character. The impact of these additional injuries upon Mrs. Cashen sadly interfered with the personal relationship between her and her husband, which added to her considerable distress, which hopefully, closure will alleviate.

The likelihood of her attempting part time employment is extremely limited, although closure to this law suit should provide some relief from the frustration and stress, which I think has been immense. I accept the opinion of Dr. Brooks, the psychologist that there is no evidence to suggest Mrs. Cashen has any kind of psychiatric disorder. I differ however, with his conclusion that there is no evidence to substantiate Mrs. Cashen has some measure of depression. In fairness to Dr. Brooks, he has not had the benefit of reviewing all the medical reports, or of hearing and seeing the medical evidence and observing the obvious distress and concern of Mrs. Cashen and members of her family, that was clearly and loudly conveyed in the manner in which they gave their evidence. I have the hope, and to some extent anticipate a real sense of relief to Mrs. Cashen and her family, to have closure of this litigation. An appropriate award of general damages to compensate so far as money can, Mrs. Cashen, for the past, present and future pain and suffering, loss of amenities, consequences suffered by her as a result of the injuries received in this motor vehicle accident that have had, as I have stated, a dramatic impact on the residue of the quality of life

that she possessed immediately prior to this accident, is in the amount of \$70,000.00.

2. Loss of Past Income

It has not been an easy task to ascertain when Mrs. Cashen was likely to be ready to test the possibility of part time, limited employment. Undoubtedly, it would take a considerable period of time to reach this stage, as a result of the severity of the consequences of the first two accidents and the extent of her chronic back pain.

Adding to the stress and delay was the uncertainty with respect to the continuation of WCB Benefits, and also the difficulties she had with respect to securing CPP Disability. From recollection, it was very late in 1994 when she saw Dr. Tweel. The inordinate delay in determining her position with respect to her appeal of the WCB award, limiting her disability from the first accident to 8%, as compared to the 20% advanced by her orthopedic surgeon. All these factors contributed to the delay before she would be ready to commence part time employment, following the slip and fall accident of March 23, 1993.

On balance, I accept the target date of January 1, 1996 suggested by her counsel, even though I wish she would have returned to Dr. Loane and followed his recommendations. I conclude, as a matter of fact, that she

would have been ready to try part time employment on the 1st of January, 1996.

This means the period of time for which she should be reimbursed for loss of income to date, runs from the 1st of January, 1996 to the 1st of February, 1999, a period of three years and one month.

An extremely difficult task is to determine what she likely would earn from January 1, 1996 onward. There are many factors that could come into play. While she had already achieved a Bachelor's Degree in Nursing, it is clear that she felt a further year of specialized training would be, if not a prerequisite, it would certainly be helpful in the pursuit of employment as a part time administrative nurse. There is some evidence before me of the changing dynamics in the nursing field and I find the evidence of Nancy Pike, Director of Human Resources at the Nova Scotia Hospital, consistent in this regard. There was no direct evidence as to the availability of clerical/receptionist primary secondary type employment in medically related fields, nor with respect to part time administrative nursing.

Although I had no reservations in concluding Mrs. Cashen's work ethic and strong determination were not sufficient to overcome the physical limitations Mrs. Cashen suffered from the first two accidents to permit her to do anything approaching full time employment, these same attributes, coupled with the

financial limitations facing the Cashen family, lead me to conclude a likelihood that she would have made a supreme effort to find part time employment and to sustain it, even with a necessity of working through pain and stress.

One question I must ask is were such jobs available? I can only infer that in all the circumstances, the termination of her lost income to date and future loss of income as well, must be discounted by the probably difficulties in securing limited, part time employment and I would assess such limitation conservatively, at 25%.

What would have been the rate of remuneration had Mrs. Cashen returned to part time employment, effective the 1st of January, 1996? Again, I have some general evidence as to the income of clerical staff and of administrative nurses, but no direct evidence that full time jobs in either category were or were not available, let alone part time jobs and the factual situation is more difficult because Mrs. Cashen, on October 27, 1993, was only capable of future part time employment. Nevertheless, courts are called upon to make assessments by using their best judgment as to quantifying pain and suffering, etc. and I must do likewise in quantifying what was likely to be her remuneration.

If she returned only to clerical type employment, then the salary available to

her would likely be approximately 50%, of the level advanced by the actuary, John Tarrel, in his report. Incidentally, I prefer the report of John Tarrel and agree that some of the assumptions provided to Mrs. Cashen's actuary are wrong, and in particular, "we have been asked by you to assume that had it not been for the car/pedestrian accident on October 28, 1993, Mrs. Cashen would have successfully retrained and found employment with administrative functions and that her earnings would have been at the rate of \$45,000.00 per annum. This income would appear to be reasonable, given the above discussion as consistent with Industry Statistics." This assumption is wrong and a wrong assumption produces results that are of no assistance, **King v. Leahy, [1992] 109 N.S.R. (2d) 163**. Returning to Mr. Tarrel's report, he suggests a realistic annual earnings potential in the hospital type field for PEI would be approximately \$26,000.00 per annum for full time, full year employment, this, without any accounting for the issue of availability of such employment. I have concluded the issue of employability introduces a discount factor of 25% and utilizing this approximate level of \$26,000.00 per annum, Mrs. Cashen, on a part time basis, would be \$13,000.00 per annum for three years and one month. It would produce \$40,083.33 discounted by 25%, \$10,020.83 leaves a loss of income to February 1, 1999 of \$30,062.50

3. Loss of Future Income

I have already clearly stated from the evidence and the manner in which

family members gave their evidence, that I have concluded without reservation, Mrs. Cashen would not have continued employment to age 65 and at the very latest, would have packed it in by age 60. Her family made a determination as early as 1986 as to where they were heading. They have consistently followed that path, despite the horrendous interruptions and difficulties both Mr. and Mrs. Cashen have been confronted with. Only the need for some additional cashflow would likely keep Mrs. Cashen in the employment field to age 60, bearing in mind that if she did not continue in part time employment to that age, she would have had a measure of employability of a part time nature in the business to approximately age 60. Dealing with future loss of income, the starting date is the 1st of February, 1999 and the first question to determine is the likely length of part time employment, had Mr. Donovan's negligence not deprived Mrs. Cashen of such. Mrs. Cashen was born the 6th of June, 1947 and therefore, would have attained age 60, the 6th of June, 2007. I conclude the time frame for loss of future income covers from the 1st of February to that date, a period of eight years and four months. The actuary tables are structured in such a manner that they can be utilized in such a manner as is directly relates to the likelihoods I determined directly and by inference from the evidence that I have weighed.

I have already accepted Mr. Tarrel's estimate of approximately \$26,000.00 per annum for full time employment and I have already discounted for the

contingency of employment not being available and I will extent that discount to also cover the contingency that once employment is obtained, that employment may be lost for any number of reasons during the duration of employment. I have applied the estimate of approximately \$26,000.00 to the loss of wages to February 1, 1999. As to the future, I must factor into account, the possibility of increased income through possible wage and cost of living increases. Mrs. Cashen's pre-existing health conditions and disability prior to the motor vehicle accident would mitigate against her remaining too long in the work force, and there is no allowance for unemployment opportunities or unemployment occurring after employment in the multiplier tables. In using an actuarial report, one must recognize that such is providing a table of multipliers for use in calculating present values of future losses. The multiplier tables can be used to calculate present values of loss for any alternative annual levels and durations of loss of future earnings or services, as factually determined.

I have already determined Mrs. Cashen's loss of income to the 1st of February, 1999 and my assessment of the evidence is that she would likely, in time, have some increase in income and with the passage of time, an increased likelihood, albeit not substantial of securing the higher paying level of part time administrative nursing. I can approach this in one of two manners, including one selecting a point near her end of employment, at which time she might secure the higher paid employment of part time

administrative nursing (prospects very limited, due to geographical limitation, likely PEI and little, if any, likelihood of Mrs. Cashen acquiring the administrative nursing certificate without WCB funding) or to utilizing a somewhat earlier date, factoring an average projected income at a somewhat lesser rate over a longer period of time. I have chosen the latter and I have carefully considered the variances between an average of \$26,000.00 and the evidence of full time administrative nursing, at the rate of \$45,000.00 per annum that are advanced as possible incomes now, and the respective likelihood of increases. I have grave reservations that the projected increases for administrative nurses used by Mrs. Cashen's actuary, are likely to be accurate.

I conclude that as reasonable an estimate as I can make for the balance of the period of the 1st of February, 1999 to June 2007 is an annualized duration estimate of \$35,000.00, 50% of which is \$17,500.00 which must be discounted by 25%, for a net of \$13,125.00. There is further built in, a safeguard beneficial to Mrs. Cashen, in that I could well have use a higher discount than 25% based on my conclusion there is a considerably greater likelihood of the type of employment other than part time administrative nursing, then of obtaining part time administrative nursing.

The time frame of eight years and four months is from Mrs. Cashen being 51.7 years of age as of the 1st of February, 1999.

Incidentally, I agree with Mr. Tarrel that employability in the first instance and the possibility of loss of employability during the duration is in this factual situation, and in most cases too subjective for inclusion in the multiplier.

The multiplier is 7.385

I also accept Mr. Tarrel's evidence that a short span of a couple of months is not of great significance and using the time frame from 51.7 years to 60.2 years, the multiplier is 7.385. The mathematical exercise is $7.385 \times \$13,125.00$ is an entitlement of \$96,928.13.

4. Loss of Valuable Services

The claim advanced in the brief on behalf of Mrs. Cashen under this heading, advances:

(d) Loss of Valuable Services

67. As defined in the Gmeiner Actuarial Report, Mrs. Cashen has lost the ability to perform "valuable services". She is unable to perform usual household duties such as household cleaning to the same extent as she was able to prior to the October 28, 1993 incident. Heavy housework such as lifting and scrubbing are impossible for her to perform.

68. Mrs. Cashen would have been involved in the maintenance and running of the cottage business in P.E.I., but given her physical limitations she is unable to

participate in the upkeep of this business. As a result, the Cashen's have been forced to rely on hired help and relatives to assist with this business.

69. The Gmeiner Actuarial Report quantifies Mrs. Cashen's loss of valuable services at \$36,624 for which she ought to recover from the Defendant.

The position of the defendant is essentially, that there is no factual evidence to support this claim and that in addition, her health and previous condition would indicate she would probably have required assistance without the intervention of the motor vehicle accident.

It is clear that loss of the ability to perform household duties and home related duties is a separate heading of damages. **Carter v. Anderson [1998] 168 N.S.R. (2d) 297.** The Nova Scotia Court of Appeal in allowing the appeal, allowed Mrs. Carter \$41,000.00 for lost future housekeeping capacity. Mrs. Carter, a 34 year old mother of four young children, suffered serious injuries in a 1994 motor vehicle accident, leaving her partially disabled and unable to do heavy housework. The Court of Appeal concluded the Trial Judge accepted the evidence that Mrs. Carter was unable to perform some of the housekeeping activities for which she had previously assumed responsibility. Mrs. Carter said that prior to the accident, she had 99% of the household responsibilities. She testified that since the accident her husband, with the assistance of the oldest child, had taken over several tasks from her, including most of the cleaning, the vacuuming, the mopping, the tidying up, putting the laundry away, the lawn mowing, the annual spring cleaning, and the weekend bathroom and floor scrubbing.

Her husband estimated that he now spends one and one half hours daily on household chores previously done by his wife, and on the weekend he works

all morning cleaning the house.

Our Court of Appeal in confirming that future loss of housekeeping capacity was to be treated as a separate heading of damages, stated:

[14] The Daly case, reported at *Daly v. General Steam Navigation Co.*, [1980] 3 All E.R. 696, of the English Court of Appeal is considered to have "judicially initiated" the modern approach to compensation for future loss of housekeeping capacity. (See *Personal Injury Damages in Canada*, Cooper-Stephenson, (2nd Ed.), p. 317) In *Daly*, the issue before the trial judge was

"whether it is right to treat the plaintiff's partial loss of housekeeping capacity as a separate head of damage, or whether it should be regarded only as one element in the loss of the amenities of life for which general damages have to be awarded."

And went on to recite page 304, paragraphs 20 and 21:

[20] In *Cairns v. Harris*, supra, the Prince Edward Island Supreme Court Appeal Division, adopted the reasoning in both *Daly* and *Robel* in upholding awards for pretrial and post trial loss of housekeeping capacity. Chief Justice Carruthers said at p.225:

"The law, therefore, now appears to be well satisfied that Mrs. Cairns can be compensated for her lost capacity to do the housework she used to do even though she

has not been directly paid for doing it in the past and even though someone has done the housework, or a portion of it, since the accident without remuneration. The real issue is how the compensation is to be determined."

[21] And at p. 228, he continued:

"It is now clear that the homemaking capacity has an economic value which is capable of quantification. ... A trial judge should determine which elements or components of homemaking have been impaired or lost and then award damages for such impairment or loss.

"The compensation for future loss of housekeeping ability is the estimated cost of employing domestic help for the estimated period of disability of the victim. These damages are awarded as pecuniary damages."

The loss of housekeeping capacity is clearly a separate heading of damages. It seems to me that it is an economic loss for which there ought to be an evidentiary basis, in other words, some evidence as to nature and extent of services that cannot now be performed as a result of the injuries received and a quantification of the cost to place the injured person in the same position as she was prior to receipt of the injuries. The evidence will vary considerably from case to case, depending upon the age of the party, whether or not there are children, such as in **Carter v. Anderson** above, etc.

etc. and the projection of the continuation of the services that would have taken place, had there not been an injury. For example, lawn and gardening, snow removal, pet attention, etc. etc. The loss will be related to the evidentiary basis and you could have, for example, a person residing in a condominium or apartment where virtually all heavy, certainly exterior services are not performed, nor anticipated to be performed by the injured party who, if living alone, would probably require some type of weekly attendance by a maid service and perhaps nothing else. As Roscoe, J.A. said at page 306

"managing one's home and keeping it clean and organized is important and necessary for the health and safety of the family. The partial or total loss of that ability has economic value, which should be recognized. In another case, it may be more appropriate to compensate most of the loss with a nonpecuniary award for loss of amenity, if for example the plaintiff proved that he deprives personal gratification from doing housework.

[28] In this case there has been an economic loss for which no compensation has been provided."

In **Carter v. Anderson** above, there was evidence from commercial cleaning establishments indicating the weekly cost of the house cleaning and the Court of Appeal in utilizing actuarial figures made its determination to accept the five hour per week example used by the actuary, but concluded that it was reasonable to assume that people without children spent less time on household chores. In addition, the Court of Appeal appear to have recognized the requirements of household will probably gradually reduce as the children grow up and awarded the sum of \$41,000.00.

It should be recognized that pain and suffering associated with limited housekeeping capacity or would flow from Mrs. Cashen's residue of housekeeping capacity, remains part of the general damage award and this heading, loss of valuable services, is a separate economic loss.

I am duty bound and do follow the Court of Appeal in dealing with this as a separate heading of damages. I express however, some concern that the court is now being faced with claims under this heading, of such magnitude that they often exceed what a disabled person is seeking or is entitled to by way of general damages. There seems to be a growing practice of assuming that blind reliance can be placed upon Statistics Canada or other statistical information that is not tested by cross-examination. Often, the statistical information is based upon surveys that are advanced and collected in part, to advance political agendas, such as developing and permitting homemakers to participate in Pension Plans such as the Canada Pension Plan. It is not for the court to comment on whether this is appropriate goal or otherwise; however, some caution should be exercised into readily accepting Statistics Canada and other sources as gospel and in replacement of an evidentiary base in each case. In the factual situation before me, there is no evidence of the actual or projected cost. Mrs. Cashen's actuary simply uses Statistics Canada's publications such as "where does time go" and "the value of household work in Canada in 1992" and assumes that Mrs. Cashen would have spent five hours a week on tasks which she is no longer able to do and that this is approximately 25% of the Canadian average, and the actuary applies replacement cost of household work in Nova Scotia as advised by Statistics Canada.

The factual situation before me is that Mrs. Cashen, prior to the motor vehicle accident, was totally disabled from any full time employment and she had limitations starting from the 1987 accident that precluded her from doing certain types of housework, in particular, heavy lifting, vacuuming, ironing,

etc. Mrs. Cashen's actuary, based her calculation on the advice given to her that Mrs. Cashen cannot perform any tasks around her home, which would require any physical effort and related that exclusively to the motor vehicle accident and such is simply not the case. Mrs. Cashen did not, for example, do any work of any consequence in relation to the business or around the home, in the summer of 1993, after the slip and fall accident and her condition was deteriorating. It is my assessment on the evidence and from observation of some of the witnesses that Mrs. Cashen had a residue of ability to handle relatively light household chores for limited duration, as a result of the first two accidents and what Mr. Donovan's negligence has deprived her is that residue ability. Her headaches, cervical pain, spasms, etc. superimposed on the condition she was in immediately prior to the motor vehicle accident, render her unable to do limited household activities including some baking, some cooking, light duties and she is entitled to be compensated for that loss. It must be factored in that had there not been this motor vehicle accident, Mrs. Cashen would have worked through pain and stress on a part time basis, but the result of working on a part time basis would render her exhausted and barely, if at all, up to doing most, if any, light household chores and the compensation she is entitled to, must avoid duplication. Compensating her for a loss of part time employment income carries with it a recognition that had she secured and continued part time employment, it would have seriously impacted on her limited ability to attend to light household duties. Separate and apart, I have concluded that she would not, in any event, have had any major part to play in the operation of the business as a result of the injuries received by her in the two earlier accidents, unless she did so by way of substitution for the part time employment for which she is being compensated.

I readily recognize there is no precision or scientific basis for these judgement calls and I have weighed them the best I can in concluding that

the better approach to Mrs. Cashen's loss of valuable services is a global lump sum award approach, as taken by MacAdam, J. in **Lawrence v. Bateman [1996] 162 N.S.R. (2d) 257**, where he recognized there was a real possibility housekeeping services would be required, in any event, as the plaintiff aged,. Given all the factors in this case, the loss to Mrs. Cashen is not anywhere near as substantial as calculated by the actuary and I conclude that a lump sum of \$12,000.00 will adequately compensate her for her loss in this regard, including whatever she might have lost from January 1, 1996 onward.

5. Special Damages

The brief filed by Mrs. Cashen simply indicates that particulars will be provided at trial. The evidence introduced at trial is not all that specific or clear.

There is evidence of a summary of charges from Marine Atlantic Ferry Crossings incurred to September 13, 1995, totaling \$1,242.00. There is a summary of gasoline expenditures to the same date totalling \$1,905.66.

There is also a summary of charges suggesting that from November 15, 1993 to January 4, 1995, \$1,225.00 was expended on additional employees being retained to do the work in the family business, previously done by Mrs. Cashen.

There is a summary of miscellaneous travel charges to the same date, which includes such items as bridge tokens, parking charges, meals and hotel accommodations totalling \$755.20. This summary of payments for legal reports I leave for taxation. There were additional expenditures incurred after 1995. There is also expenditures for medications September 13, 1995, in the amount of \$427.27 and some evidence of continual medication for Mrs.

Cashen. Mrs. Cashen, when asked how much she spent on medication of a non-prescription nature, she said it was difficult to say but estimates \$25 to \$35 per month.

Additional exhibits were filed with respect to more recent gas expenditures.

The difficulty is that Mr. Cashen, in his evidence, acknowledged for example, that with respect to the medications, both he and Mrs. Cashen used them and many of the expenditures for gas, etc. would have been billed through their business operations. Not all of them are related exclusively to Mrs. Cashen.

We seem to have moved away from the requirement of special damages being specifically pleaded and specifically established. When a plaintiff does not keep total, complete and isolated records of actual expenditures related to the claim, then such a party cannot complain if the allowance for special damages is substantially limited. The court recognizes that circumstances often prevail, that provide a mixture such as occurred here with some expenses being paid through the business. I repeat however, if a party wants to collect actual expenditures, then actual expenditures must be established. Fairness dictates that some allowance be made for the expenditures in these areas, as the court is satisfied expenditures for Mrs. Cashen were incurred, but in the circumstances, only a conservative allowance is appropriate and I allow the sum of \$2,000.00 special damages to cover, what I am satisfied, are expenditures in these areas, solely related to Mrs. Cashen's injuries relevant to the motor vehicle accident. The cost of future medications is a matter that I have generally considered in the award of general damages.

With respect to the claim for retention of additional employees, the evidence

is clear that at one time, the son was available throughout the summer, but subsequently, had acquired his own business. Daughter Lynn indicated the extent of assistance her brother provided and acknowledged that in 1992, her brother took a driver training course of six months, that effectively his last summer was 1992 and thereafter, he was only occasionally at home. It is true that some of the work the son did was outdoors and not exclusively the kind of work indicated in the summary. Nevertheless, I am satisfied that the hiring of additional assistance was in part, related to the son's departure and unavailability on a regular basis, during the time frames indicated. At the time of the motor vehicle accident, Mrs. Cashen had not recovered sufficiently to undertake limited part time employment, and I have concluded that the earliest she would have reached that stage, had there not been a motor vehicle accident, was the 1st of January, 1996 and accordingly, all of these expenditures to the extent they represent any replacement of Mrs. Cashen's efforts, relate to her 1988 condition and the slip and fall accident of March 23, 1993.

6. Pre-Judgment Interest

a. General

There is an indication in one of the briefs of consideration for compound pre-judgment interest. I confirm my questioning as to whether or not there is any basis whatsoever, for compound interest in the *Judicature Act*. **Thomas-Canning v. Juteau [1993] 122 N.S.R. (2d) 23.**

In **Thomas-Canning v. Juteau** above, I agreed with the view expressed by Justice Saunders in **Connor v. Canada Life Assurance Company [1992] 108 N.S.R. (2d) 361**, that there is no authority for compounding of interest in a wrongful dismissal case and also accepted the view expressed by Gruchy J. in **Parnell v. Singer [1992] 111 N.S.R. (2d) 127**. The state of the law has been for some time, as stated by Gruchy J.:

"I distinguished between a personal injury case such as this and commercial cases, such as where there has been a deprivation of commercial use of funds."

With respect to MacAdam, J. in **Lawrence v. Bateman**, above and **Thomas-Canning v. Juteau**. I would go further and add to the remarks of Justice Gruchy that if compound interest is permitted under the *Judicature Act*, then there has to be a evidentiary base, such as may be possible in a commercial situation where the party might be able to establish a loss due to actual borrowing costs incurred on top of the loss of interest that flows from the deprivation of the funds.

- b.** On general damage award, the pre-judgment allowance on this heading is 2.5% from the date of the accident October 28, 1993 to the date projected for the granting of the order, which should be by the 28th of February, 1999, a period of five years and two months, amounting to \$70,000.00, which is \$1,750.00 per year x five years, which amounts to \$8,750.00. \$1,750.00 divided by 12, which gives a monthly rate of \$146.00, a total of \$9,042.00.

- c. Pre-judgment interest on lost wages to date, at the agreed interest rate of 5.5% x \$30,062.50 is \$1,653.55 per year, which for three years, would be \$4,960.65. The monthly rate would be 12 divided by the annual rate of \$1,653.55, which is \$137.79, added to \$4,960.65, gives \$5,098.44 divided by 2, which equals \$2,549.22.

- d. Pre-judgment interest on special damages at the agreed interest rate of 5.5%, \$110.00 per annum and given they were incurred over a time frame, I limit recovery to five years, the sum of \$550.00.

12. SUMMARY

Mrs. Cashen is entitled to recover the following:

1.	General Damages	-	\$70,000.00
2.	Past Lost Wages	-	\$30,062.50
3.	Loss of Future Wages	-	\$96,928.13
4.	Loss of Valuable Services	-	\$12,000.00
5.	Special Damages	-	\$ 2,000.00
6.	Pre-Judgment Interest on Past Lost Wages	-	\$ 2,549.22
7.	Pre-Judgment Interest on General Damages	-	\$ 9,042.00
8.	Pre-Judgment Interest on Special Damages	-	\$ 550.00
	TOTAL		\$223,131.85

13. COSTS

Counsel are entitled to be heard on costs and disbursements, if they are unable to agree. The "amount involved" for cost purposes is exclusive of pre-judgment interest, with a recovery of \$210,990.63.