Toronto 1967

May 9-12, 18-20, 23-26

Ottawa July 12

BETWEEN:

WILLIAM KERR .... SUPPLIANT;

AND

HER MAJESTY THE QUEEN .... RESPONDENT;

AND

ALLIED BUILDING SERVICES (1962) LTD. .... THIRD PARTY.

Crown—Suppliant slipping on floor of airport terminal in occupation of Crown—Whether floor in dangerous condition—Evidence purely conjectural.

Suppliant was walking in an area of the Toronto International Airport in the occupation of the Crown when he slipped and fell on the tiled floor and suffered injuries. He claimed damages from the Crown on the ground that the floor was in a dangerous condition in that the tile on which he slipped was highly over-polished compared to the surrounding tiles or, alternatively, that such tile contained a spot of grease or similar slippery substance. The evidence to establish the Crown's liability consisted of suppliant's testimony that after his fall he observed that the tile on which he fell was shinier than the neighbouring tiles, and the testimony of witnesses that when suppliant was helped to his feet after the accident his coat was covered with a white flour-like substance and there was a brown mark on the floor where he fell.

Held, dismissing the action, this was not a case of *res ipsa loquitur,* and on the evidence it was a matter of pure conjecture that the floor was in a dangerous condition by reason of one tile being more highly polished that the others or that there was a spot of grease or similar substance thereon. *Meredith v. The Queen* [1955] Ex. C.R. 156, referred to.

PETITION OF RIGHT.

Paul R. Jewell, for suppliant.

N. A. Chalmers, for respondent.

C. F. McKeon, Q.C., for third party.

CATTANACH J.:—By his Petition of Right the suppliant seeks to recover damages from the Crown for personal injuries and losses sustained by him as the result of a fall on the morning of January 12, 1964 on the floor of the Toronto International Airport at Malton, Ontario, being premises owned and occupied by Her Majesty. The suppliant had entered the premises for the purpose of paying for passage on an aircraft owned and operated by Air Canada

bound for Jamaica, British West Indies, pursuant to a prior reservation and arrangement and for the purpose of boarding the aircraft so destined.

In paragraph 2 of the Respondent's Statement of Defence to the Petition of Right it is admitted that the Toronto International Airport is owned by Her Majesty, represented by the Minister of Transport. However, during the trial, the respondent introduced in evidence a lease dated November 5, 1965 effective January 12, 1964 with Air Canada whereby the respondent, as lessor, rented certain space in the building, hereinafter referred to as the Aeroquay, to Air Canada, as lessee, for use by it in connection with the operation of its airline. The area so leased included ticket counter space on the departure level, where the suppliant conducted his business with Air Canada, but did not include the general concourse area, the circular perimeter area with departure holding rooms adjacent thereto, hereinafter called the ring concourse, nor the western connecting link between the general concourse and the ring concourse, in which connecting link the suppliant suffered his fall. This link remained under the occupation and control of the respondent.

The suppliant, who was sixty years of age at the time of the accident, described his occupation as being primarily that of a contractor engaged in specialty work. During the war years his principal business was that of laying gypsum roofs and the construction of radial chimneys. He appears to have abandoned these particular enterprises and concentrated on the installation of acoustical ceilings. Still later he became less active in this type of work due to a purchase of two carloads of material subject to a tax which was subsequently removed and rendered his prices uncompetitive. His contracting business became limited to smaller acoustical ceiling jobs and repairs to larger buildings. He undertook his last job in 1961.

His wife operated a custom retail furniture store which she has now abandoned except for occasional advice and the procurement of furniture on behalf of persons who may enlist her services.

The suppliant also acquired revenue producing real property and bought, sold and developed lands as opportunity presented itself.

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While no evidence was adduced as to the suppliant's income in the years immediately preceding his accident, I think it is fair to assume that the bulk of his income came from investments and from revenue producing properties and that his contruction business had been practically abandoned.

The suppliant had been particularly active in community affairs and in municipal politics. He was a member of a service club, the Shriners and the Toronto Board of Trade. He served on the Parks Board and the Board of Education and for six years he was an elected member of the Council of Etobicoke. He unsuccessfully ran for the office of Reeve and was re-elected as councillor in 1961 for a two year term.

He did not stand for re-election in 1963 because in 1961 he had started the construction of a ten room resort hotel at Montego Bay in Jamaica, British West Indies which project required his undivided attention. He acted as his own general contractor in this construction. He would lay out plans for construction, engage local sub-trades and employ local labour, all of which required his constant personal supervision.

The purpose of the suppliant's trip to Jamaica on January 12, 1964 was to press forward the completion of the hotel to be in readiness for full operation about the end of June 1964. The project consisted of three buildings, the first of which was a cottage occupied by the suppliant and his family and which had been completed at that time. The second building was designed as sleeping accommodation for guests and was substantially completed, although lacking in furniture. The third building which required much more work to ready it for occupancy, was to supply further sleeping accommodation and was to house a dining room and bar. In addition to work already completed with respect to filling in the grounds, the suppliant contemplated further like work. The hotel was owned by the suppliant as sole proprietor although he entertained more ambitious plans for the development of the site by additional financing. However, these plans were uncertain and no steps were taken to bring them to fruition. The suppliant enjoyed certain tax concessions, in accordance with the laws of Jamaica for a period of fifteen years, designed to

encourage the tourist industry in that area. I think it is fair to conclude that the suppliant's Jamaican hotel project constituted his principal business interest from approximately 1961 forward.

The suppliant left his home for the airport at approximately 8:45 on the morning of January 12, 1964. He was driven to the airport by his wife in her car. Mrs. Kerr did not accompany her husband on the flight to Jamaica but joined him later, leaving on January 15, 1964 because she had to attend to certain domestic responsibilities. The day was cold and clear with little snow on the ground. At his home, where he entered his wife's car, the ground was bare of snow. The entrance to the airport, where they arrived some twenty-five minutes later, was in a covered area and was also dry and free from snow. The suppliant was wearing a blue silk suit, a blue cashmere overcoat and brown leather brogue shoes. The suppliant did not wear goloshes or rubbers because he would have no need for them in Jamaica and because the snow conditions in Toronto, on that day, did not dictate their use. Because of the cold the heater in Mrs. Kerr's car was in operation during the journey to the airport. I have no doubt that upon his arrival at the Aeroquay the soles of the suppliant's shoes were dry.

The shoes the suppliant was wearing merit description. They had been purchased by the suppliant in 1957 from a well-known retailer in Toronto and had been repaired by that retailer in August 1963 by the replacement of the full sole and leather heels. The suppliant described them as being in good condition. The shoes in question were manufactured of fine quality leather to the retailer's design and specifications. The soles were of leather and of exceptional thickness measuring between 5/8 and 3/4 of an inch and comparatively inflexible. The heels were also made exclusively of leather.

Upon their arrival at the Aeroquay, the suppliant entered the general concourse on the departure level and went directly to the Air Canada ticket area which is located at the westerly end of the bank of ticketing areas and the station to which he went was the most westerly stand in the Air Canada area. Meanwhile Mrs. Kerr parked her automobile.

The suppliant paid for his ticket, changed the classification of his ticket to an open return trip which was good for one year and checked his baggage except a brief case which he carried. A minor altercation occurred between the suppliant and an Air Canada employee about the weight of the suppliant's brief case. The brief case weighed twenty-one pounds, being one pound overweight for which excess the employee insisted upon charging. The suppliant considered this additional charge as picayune but paid the charge and promptly dismissed the matter from his mind. He was then directed to the appropriate holding room located off the ring concourse. The suppliant was joined by his wife at the ticket counter as he was giving his cheque for his ticket and together they made their way to the holding room.

To do so the suppliant walked directly from the ticket counter to the western link. The western link is one of two links joining the general concourse of the departure level to the ring concourse. The floors in all three areas are of the same level and constructed of the identical terrazzo material; that is the floor of the link is not on an incline. The link is sixteen feet wide and approximately seventy-two feet in length. The north and south sides of the link are completely enclosed by glass looking into open decorative court yards on either side and exposed to natural daylight. On the northern side of the link is an escalator which descends to the arrival level one storey below. The ceiling of the link is completely illuminated by lights installed beneath the structural ceiling and the lighting is enclosed in solid translucent plastic. These lights are turned on throughout the entire day and were lighted on January 12, 1964, the day in question.

As the suppliant and his wife had walked at a slow pace approximately twenty feet into the western link and at its approximate centre the suppliant's right foot slipped forward from beneath him and he fell heavily to the floor. He landed in a seated position striking his back on the floor slightly above his buttocks then fell flat on his back striking his head on the floor. Immediately upon landing on the floor from his fall the suppliant's legs and arms appear to have been extended into the air at least his right leg was and the arm with which he was carrying his brief case. He then came to rest on the broad of his back in a prone position diagonal to the link with his feet towards the ring con-

course and his head towards the general concourse. The brief case put suppliant's thumb out of joint and the fall to the floor dazed him.

The suppliant, in his evidence, stated that he was walking along and the next thing he knew he was on the floor, that he had slipped and that his right foot went from under him.

At the time of his fall, Mrs. Kerr and the suppliant had just been passed by a young man going through the link. A Commissionaire, Erferd Bailey, was standing about five feet into the ring concourse looking into the link. He saw Mr. and Mrs. Kerr approaching and described their pace as slow and leisurely. Because of their pace he did not think that they were going to board an aircraft. He saw the suppliant fall. Mrs. Kerr, Mr. Bailey and the suppliant's accounts of his fall substantially coincide and are as I have described it above.

Mr. Bailey and Mrs. Kerr immediately offered their assistance to the suppliant as did the young passerby who did not testify. He asked them to permit him to remain lying on the floor momentarily until he recovered from his dazed condition or perhaps Mrs. Kerr advised him to do so. Both Mrs. Kerr and Mr. Bailey described the suppliant's face as white and ashen. When the suppliant had recovered sufficiently from his shock he was assisted to his feet by Mrs. Kerr and the Commissionaire.

Mrs. Kerr, with natural wifely solicitude, brushed off her husband's coat with one hand while supporting him with her other hand. She described her husband's coat as being covered with white which she elaborated upon as being a white flour-like substance. The Commissionaire did not notice this substance on the suppliant's coat, nor Mrs. Kerr's action in brushing it off.

The suppliant was then taken to the departure room where particulars were taken from him by a Royal Canadian Mounted Police Constable. His thumb had become swollen and pained him so that he was unable to extract his wallet containing his identification from his hip pocket. Mrs. Kerr did so and furnished particulars to the Constable.

Mr. Bailey, the Commissionaire suggested that the suppliant might see a doctor, who was on duty in the Aeroquay, for medical assistance but that proffered aid was

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refused by the suppliant who said be would consult his own physician at his destination if he felt he needed to do so.

After particulars of the incident had been taken, the suppliant was still suffering from the consequences of his fall and wished to remove himself from the many people about the departure room. He, therefore, walked back along the ring concourse to the entrance to the west link and from that point looked into the west link towards the general concourse. He identified the tile or square of terrazzo upon which he had fallen, to his own satisfaction, and observed that that particular square seemed shinier to him than those bordering upon it.

During cross-examination, when faced with the suggestion that it would be difficult for him to pick out the particular tile upon which he had slipped from a distance of approximately fifty-four feet, the suppliant explained that when he was assisted to his feet after his fall he noticed that the tile upon which he had slipped had a different sheen from the others and that such circumstance was confirmed by his second look into the link from the ring concourse when he saw one square shinier than the others. He had not noticed it on entering the west link, nor did he notice any foreign substance on the floor at that time, presumably because he did not direct his attention to the floor. From his observation of the floor he formed the opinion that this particular tile had been more highly polished than those surrounding it. He hazarded the guess, from his experience in the construction industry, that this particular tile was being used to test various types of sealer or finish in a heavily trafficked area. Upon arising from the floor he did not notice any scuff marks. However, he did testify that the shinier tile was approximately 24 to 30 inches by 3 feet, 6 inches to four feet. In fact the tiles in the general concourse, the connecting link and the ring concourse are all of terrazzo and laid out in exact squares measuring 30 inches by 30 inches. Each square is separated by a thin metal strip. Conceivably, therefore, the suppliant may have had in mind that two adjacent squares were shinier than those surrounding them.

The evidence does not establish the precise time of the suppliant's fall. He estimated the fall at about 9:00 o'clock

and that his flight took off at 9:15 a.m. On the other hand, the Commissionaire places the time of the fall at 9:50 a.m. The suppliant could not locate his ticket so that the time of takeoff could be ascertained. Bearing in mind that the suppliant had left his home at 8:45 a.m. and allowed twenty to twenty-five minutes for the trip to the airport and that the airline usually requires passengers to check in about one hour before the scheduled takeoff times for international flights and approximately ten minutes were taken up at the ticket counter, I would conclude that the fall took place well after 9:00 o'clock and more approximate to the time of 9:50 a.m.

The suppliant did board the aircraft for Jamaica. He was suffering from severe headache and pain in his back. He was revived somewhat by the cold fresh air on the tarmac and made his way up the boarding steps with some difficulty but without assistance. En route he was given pills by the stewardess to relieve his headache.

I propose to postpone a detailed recital of the suppliant's injuries and physical condition until I deal with the assessment of damages.

After having arranged for a statement to be taken by the police constable and offering aid to the suppliant, the Commissionaire, Bailey, returned to the spot where the suppliant had fallen. He placed that point at three tiles, or seven feet, six inches, from the head of the escalator and observed a brown mark where the suppliant had fallen. The Commissioner's observation can best be reviewed by the following transcript from his evidence:

Q. I see. Now, did you return to the spot where he fell?

A. Yes, sir.

Q. And what did you observe there?

A. I found a brown spot just exactly where he fell. It looked like a scuff mark off his shoe.

Q. Would you describe this brown spot that you found?

A. Yes. It was a dark brown spot about an inch wide, about two or three inches long.

HIS LORDSHIP: What was that again?

THE WITNESS: It was a brown spot; a dark brown spot, sir, about an inch and a half wide to two to three inches long. It looked like brown shoe polish to me.

HIS LORDSHIP: What colour were Mr Kerr's shoes?

THE WITNESS: Brown, sir. Brogues.

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MR. JEWELL:

Q. Did you notice that at the time?
A. Yes, sir.

Q. Now, did you make any arrangements to remove this spot?
A. No, sir.

Q. You say that it was...

MR. CHALMERS: I am sorry, my lord. What was the answer?

THE WITNESS: Pardon, sir?

MR. JEWELL: His answer was "no".

MR. CHALMERS: Thank you.

MR. JEWELL:

Q. Now, you say that the spot was approximately one inch...

HIS LORDSHIP: An inch and a half.

MR. JEWELL: An inch and a half wide and three or four inches long.

HIS LORDSHIP: Two to three.

MR. JEWELL:

Q. Oh, did you say two to three?
A. Yes, sir.

Q. Approximately how thick was the spot?
A. Well, I couldn't tell how thick it is, sir.

Q. You didn't measure it?
A. No.

HIS LORDSHIP: Now, what do you mean "how thick"?

MR. JEWELL: Well, how thick (indicating). In other words we have got the length of it...

HIS LORDSHIP: Yes.

MR. JEWELL: ... we have got the wideness of it. What was its density?

MR. CHALMERS: Vertical height is what my friend wants.

MR. JEWELL: Vertical height.

HIS LORDSHIP: It is pretty difficult.

THE WITNESS: Absolutely.

MR. JEWELL: All right.

HIS LORDSHIP: Of course the witness did say that it looked like a scuff mark.

MR. JEWELL: Yes. He also said, I think, my lord, it looked like shoe polish.

HIS LORDSHIP: Yes, that is right.

MR. JEWELL: And that is why I wanted to get the thickness of it, my lord.

Q. So you can't give us the thickness?
A. No, sir.

HIS LORDSHIP: Well, it certainly isn't an inch or a half inch or a quarter of an inch?

THE WITNESS: No, sir.

HIS LORDSHIP: It was a scuff mark?

MR. JEWELL:

Q. Did you examine this mark in any detail?
A. No, sir.

Counsel for the suppliant tendered the evidence of Mr. D. E. Manson, a shoe salesman employed by the retailer from whom the suppliant had purchased the shoes he wore on January 12, 1964. The shoes then worn by the suppliant were later stolen in Jamaica. Mr. Manson took a new pair of the same model from stock and conducted a series of experiments. I permitted the results of such experiments to be introduced in evidence, subject to objection by counsel and to my admonition that while, in my view, the evidence might be admissible its probative value appeared to be negligible. I based that observation on the circumstances that the witness was in no way qualified as an expert to conduct such tests and the experiments were not made under the identical or conditions similar to those prevailing at the time of the accident here involved. Mr. Manson, by placing his hand in the right new shoe and bringing it into contact with a slab of terrazzo, similar in composition to that in the floor of the Aeroquay, concluded that the mark described by the witness, Bailey, was not made by the suppliant's shoe. It was obvious to me that Mr. Manson could not duplicate the manner in which the suppliant fell, either in position or weight applied, nor was the condition of the suppliant's shoe duplicated. He applied a shoe cream carried in the retailer's stock to the shoe which was immediately absorbed by the leather. The suppliant customarily had his shoes shined at a shoe shine parlour and there was no evidence that the type of cream was similar to that used in shoe shine parlours. However, by placing a quantity of shoe cream on the terrazzo slab and forcing the heel of the shoe over the cream Mr. Manson succeeded in making a mark of the approximate size and appearance described by the witness Bailey. It would seem to me that the size of the mark is dependent upon the amount of the shoe cream placed on the tile. From the conclusions reached by Mr. Manson from the experiments he had conducted, counsel for the suppliant submitted that I should infer that the suppliant's fall was caused by him stepping upon a small quantity of substance similar to shoe cream, that I should infer the presence of such substance on the floor of the Aeroquay, and that such substance caused his right foot to slip from beneath him resulting in the fall which gives rise to the present Petition of Right.

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The allegations of negligence on the part of the respondent, upon which the suppliant relies as giving rise to liability, are set out in the Petition of Right as amended by order of the President, dated April 27, 1967, as follows:

. . .

> 5. The aforesaid fall and resulting injuries were caused by a dangerous condition of the floor tile of which Kerr prior to the fall was unaware and the servants of the Crown were or ought to have been aware, namely:
>
> The tile upon which Kerr slipped and fell was highly overpolished whereas the surrounding tiles upon which Kerr had been proceeding prior to the fall were relatively unpolished.
>
> In the alternative the tile of the floor on which the suppliant slipped and fell contained a spot of grease or similar slippery substance.

January 12, 1964 was the opening day of the new Aeroquay at Toronto International Airport which had been built, at considerable expense, to replace the outmoded and inadequate facilities previously in use. The Aeroquay was modern in design to afford the utmost convenience and efficiency to air passengers and traffic and to operating air lines. Naturally the prime contractor, sub-contractors and personnel responsible for the operation of the Aeroquay made every effort to have the building in condition for the reception of the public and for operation in time for the deadline date. At one minute past midnight of January 11, 1964 the building was opened and began operation.

The supervising architect, Ivar Kalamar, gave his preliminary certificate under date of January 15, 1964. He explained that the preliminary certificate justifies a takeover and that the building so certified was substantially completed and was ready for occupancy and operation. Appended to the architect's preliminary certificate was a list of defects and deficiencies, which, while numerous, were of a minor nature. The purpose of giving a preliminary certificate, subject to listed deficiencies, which is the usual procedure, is to ensure that the contractor remains responsible for their correction and that payment is not to be made until the deficiencies or defects have been corrected. The architect also explained that while his certificate was signed on January 15, 1964, the list of deficiencies appended were as at January 6, 1964 and that it took from that date until January 15, 1964 to type the document on which date it was signed. He testified that between

January 6 and January 12 a great many of the deficiencies were corrected and others were corrected after that date. However, he did acknowledge that there was work to be completed on the apron level, which is outside the building, and on the parking floors and that certain rearrangements had to be made in the staff rooms and in the mechanical area but these areas were far removed from the public areas on the departure level which were complete subject to the deficiencies he had listed. The architect's final certificate was given on November 9, 1966 when all deficiencies had been corrected.

Mr. Kalamar testified that terrazzo flooring was the safest type for use in public buildings and that fact accounted for its extensive use in such buildings. He also testified that the floors on the departure level had been poured, ground twice and that two coats of sealer had been applied by August 25, 1963. He further testified that he concurred in the application of two coats of sealer and neither saw nor instructed the use of wax. He also testified that no tile or square was used for test purposes in the west link or elsewhere.

This witness had occasion to be in the west link at 2:00 a.m. on January 12, 1964. The west link was then well lighted, people were walking through the link, the escalator was running and he further testified that the floor of the west link was clean, that the floor was not slippery, but firm to his step (he was wearing shoes with leather soles and rubber heels) and that there was no variation whatsoever between the tiles on that floor which were all of the same sheen and texture.

The only deficiency listed in the appendix to the architect's preliminary certificate relating to the west link is item 163 on page 18 reading as follows:

> Complete luminous ceiling. Repair spray fire proofing. Adjust expansion joint cover. Adjust radiator covers. Touch up black enamel mullions. Complete escalator. Complete all signs.

The architect's complaint about the luminous ceiling was that the fittings in the grid system should be trimmed to permit proper butting. When the lights were installed, which was prior to the installation of the translucent plastic, bits of the asbestos fireproofing which had been sprayed on the ceiling to a thickness of three-quarters to

two inches had been knocked loose. This would depreciate the fire rating. These defects were repaired about March, 1964. Mr. Kalamar testified that it was impossible for any of the asbestos material to fall to the floor of the west link on January 12, 1964 because the luminous ceiling was a solid one and not of the egg crate or open design as used in the general concourse. The defects in covers of the heating units and window frames would not affect the condition of the floor. The escalator was operating on January 12, 1964 and had been ready for operation about two months earlier. The defect to be corrected was with respect to laminated panels under the escalator which were visible from the lower floor. This was done in late 1964.

Some trouble was experienced with pitting in the terrazzo floor but this did not occur until April, 1964 well subsequent to the date of the accident here involved.

Remo Gasparini, the subcontractor for the installation of the terrazzo flooring and ceramic tiling throughout the Aeroquay, testified that the terrazzo flooring had been completed and sealed in accordance with the terms of his contract in August, 1963. On January 12, 1964 there were still deficiencies to be corrected, such as a spot of cement, a cracked tile, a hole in a wall, a hairline crack in the terrazzo or an open crack and the like. A hairline crack would be filled with grout but if the crack were an open one the entire square would be chipped out to the cement base, new topping poured, ground and resealed. He stated that he was at the Aeroquay from Monday to Friday of the week preceding Sunday, January 12, 1964 to ensure that the public areas were cleaned up and in readiness for the opening on that date. He said that any deficiencies in the areas to which the public would have access on that date had been remedied. Two tiles at the entrance to the escalator were replaced prior to August, 1963 but after that date no replacement or resealing was done in the floor of the west link and the deficiencies did not apply to the west link.

The terrazzo topping was described as being composed of marble chips bound together by grout. It was poured, then levelled. After it was set it was ground by machine with coarse carborundum plugs. Two days were allowed to elapse and the floor was then again ground with finer plugs. A coat of sealer was then applied. The purpose of the

sealer is to be absorbed by the porous composition of the terrazzo to prevent the penetration of stains. It was on the recommendation of this witness that the architect authorized a departure from the specifications to the application of two coats of sealer as opposed to one coat of sealer and two coats of wax. The sealer used was an approved brand of the solvent type. This witness expressed the view that a finished floor would have the same sheen throughout its area and that if one tile had been replaced and resealed it might be darker or lighter than the surrounding tiles but that it would not be shinier. He also swore that no experiments were conducted with any tile in the floor of the west link, and that no wax had been applied to that floor by his firm or anyone else. When he left the building on the Friday prior to the Sunday when the accident happened, the floor in the west link was in the same condition as the terrazzo floor throughout the general concourse. It was, in his words, just normal terrazzo floor, clean to the eye and no more slippery than elsewhere.

The respondent entered into a contract dated December 24, 1963 with Allied Building Services (1962) Ltd., the third party herein and hereinafter so referred to, for a term of two years beginning January 6, 1964 whereby the third party undertook to carry out cleaning services in the new Air Terminal Building Complex, at the Toronto International Airport, which complex includes the Aeroquay.

The specifications appended to the contract require that the third party shall have staff on duty twenty-four hours a day, seven days a week, but during the hours from 1:00 a.m. to 6:00 a.m. when traffic is substantially lower, the number of staff is reduced, which period of lesser activity is to be compensated by special situations, such as inclement weather and heavier traffic when more numerous staff is required by the greater frequency of the services required.

The floors in the heavy traffic area of the Aeroquay, which include the general concourse, the west link and the ring concourse, are required to be dust-mopped every eight hours, damp-mopped and buffed every four hours, scrubbed or deep cleaned twice weekly and emergency cleaning is to be performed as required.

Evidence was given by Edgar Collins, who was the successful candidate in a Civil Service competition for the

position of Supervisor Cleaner, Department of Transport at Toronto upon his retirement from his service as an Armament Officer and Station Warrant Officer, Warrant Officer First Class, in the Royal Canadian Air Force. He began his duties at the old facilities at the Toronto Airport on November 18, 1963 and his duties at the new Aeroquay began on January 6, 1964.

He described the operation of dust-mopping as going over the floor area by cleaners with a long-handled brush upon the cotton strands of which a small quantity of a commercial preparation known as Misto is atomized. This product is sprayed on the brushes at the beginning of the operation and one application is adequate for the entire operation. I would assume that the use of this product serves as a method of dust control. He testified that the product contained an oil base but that the quantity applied to the brushes was so minute that it did not leave an oil film on the floor, and if there had been an over application and any oil adhered to the floor it would do so uniformly and be immediately absorbed in the grout.

He described damp-mopping and buffing as a "two pail —two mop" process. To a pail of clear water a small amount of a neutral liquid cleaner, free from alcohols, acid, salts or other strong ingredients, is added. This solution is applied to an area of the floor, the second mop is then immersed in a second pail filled with clear water, wrung dry in a mechanical device and the floor is then dryed or buffed. He added that sometime subsequent to January 12, 1964 this manual method of damp-mopping had been replaced by a machine method.

Prior to January 12, 1964 Mr. Collins was constantly inspecting to ensure that the building was clean, free of debris and obstructions and in good repair to be in readiness for the opening day.

From 7:00 a.m. until midnight on January 11, he spent ninety per cent of his time in the public areas of the departure and arrival levels. During that time he was in the west link many times and invariably found it to be clean, free from obstruction and soil. The floor was even textured and of an even low level lustre throughout and afforded a firm and even footing and did not differ from

the floor in other areas. Throughout his stay on the premises he observed the employees of the third party performing their duties.

Mr. Collins acknowledged that some construction work was continuing, but indicated that this was being done in areas removed from the west link and the general concourse. There was some work being done in the concessions area, in the mechanical area on a lower level, in the open court yards to which the public did not have access, and in the north-eastern quarter of the departure level. The workmen arrived at, and carried their equipment to those places from the lower level and in doing so had no occasion or reason to pass through the west link, which would be an inconvenient route for them. In this Mr. Collins was confirmed by Mr. Kalamar, the architect and Mr. Gasparini, the terrazzo subcontractor.

On January 12, 1964 Mr. Collins arrived at the Aeroquay at 6:45 a.m. It was apparent to him that the employees of the third party had scrubbed the floors between midnight of January 11 and his arrival on the morning of January 12. He made five inspections of the west link that morning, the first at 7:15 which was a double inspection, once going out on his tour and the second upon his return approximately twenty minutes later. He did a second double inspection in company with Mr. Naud, his immediate superior, the beginning of which he placed at between 9:00 and 9:10 a.m. He described this inspection as a detailed and exhaustive one. At that time he found the west link clean, free of soil and debris. The floor of the west link was of even texture and lustre. He did not see one tile shinier than the surrounding tiles. If he had seen one tile in such condition he would have brought that fact to the attention of the third party for immediate correction or to the attention of one of the fourteen Department of Transport employees under his direct control for emergency cleaning. In his view it would be impossible for one tile to be more highly polished than those surrounding it, because the floors were not polished, no wax had been applied to them, no resealing had been done and no tile was being used for testing purposes.

Because of the well lighted condition of the west link, he stated he could readily see any foreign substance on the

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floor such as a wad of gum, chocolate bar or ice-cream remnants which he would have had removed forthwith. He testified he saw no such things on his trip through the west link shortly after 9:00 a.m. nor upon his return trip some twenty minutes later. He was directing his attention to the floor particularly and was looking for such things as was his superior who accompanied him.

He did not keep a log book or record of his inspections because he had been instructed not to do so by his superiors for thirty days in order that the third party might have an opportunity to "groove in".

There was no damp-mopping or dust-mopping conducted in the west link between 7:00 a.m. and 10:00 a.m. on January 12, 1964.

Emergency cleaning was the responsibility of the third party and the Department of Transport staff. It was the responsibility of commissionaires on duty, Air Canada employees, the police constables, the departmental management and supervising staff to report any unusual condition which came to their notice and it would be remedied within three or four minutes.

I am satisfied that it was after Mr. Collins' inspections of the west link between 9:00 a.m. and 9:10 a.m. and twenty minutes thereafter that the suppliant fell there.

The mark described by the witness Bailey, after the suppliant's fall was not seen by the suppliant, Mrs. Kerr, Bailey nor Collins prior to his fall, nor was it seen by either Mr. or Mrs. Kerr after his fall.

The Crown's liability is created by section 3(1)(*b*) of the *Crown Liability Act*[1] which reads as follows:

> 3. (1) The Crown is liable in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
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> . . .
>
> (*b*) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.

As a prelude to a consideration of the inferences to be drawn from the evidence adduced and recited in detail above, it should be recalled that the onus is on the suppliant to show that the respondent was negligent and that

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[1] S. of C. 1952-53, c. 30.

negligence was the cause of the suppliant's injury. It is not enough for the suppliant to say that he came, he fell, he was injured and therefore he has a claim. Many slips happen without negligence and accordingly the doctrine of *res ipsa loquitur* does not apply.

The negligence of which the suppliant complains is as set out in paragraph 5 of his Petition of Right, which is quoted above. It is, in summary, that the floor upon which the suppliant fell was in a dangerous condition in that

(1) the particular tile upon which the suppliant fell was more highly polished than the others, or

(2) that tile contained a spot of grease or similar slippery substance.

Dealing with the first of the particulars of negligence above, there is no preponderance of evidence that the suppliant fell on account of a slippery condition of the floor. The evidence goes no further than that he fell. In his evidence the suppliant has said that he was walking along and the next thing he knew he was on the floor. Mrs. Kerr and Commissionaire Bailey also testified to the suddenness of the suppliant's fall and for no explicable reason at that moment. Naturally when the suppliant recovered he began to speculate as to the reason for his fall. He recalled that his right foot slipped forward from beneath him. In this he is confirmed by Mrs. Kerr and Bailey. He next sought the reason for his right foot slipping. Upon arising he observed that the tile upon which he had fallen appeared shinier than the others and because of that higher gloss he concluded it had been more highly polished than the surrounding tiles and therefore more slippery. He also hazarded the guess that the particular tile may have been replaced or was being used to test various finishes. These latter two suppositions are definitely rebutted by the evidence of the architect, Mr. Kalamar, the terrazzo subcontractor, Mr. Gasparini and Collins, the cleaning supervisor. These same three witnesses also rebut the supposition that the particular tile had been highly polished. The floor had received two coats of sealer some four months previously, no tile had been replaced and no tile had been resealed. No wax had been applied. The cleaning processes were scrubbing, damp-mopping and dust-mopping. None of these processes

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were polishing processes and it is inconceivable to me, therefore how one particular tile could have been shinier than the others for any of those reasons.

It was suggested in argument that the use of the oil based dust control product might result in a thin film of oil being upon the floor. I do not think that this is possible having regard to the infinitesimal amount used, because, if an excess amount were applied to a brush, it would be spread uniformly over the entire surface and would not result in one tile being shinier than the others and because if there had been an excessive application of this product any excess which may have adhered to the floor would be quickly absorbed. Further this application was done at the beginning of the dust-mopping operation and no further applications were made during the process thereof. If my recollection of the evidence serves me correctly, the applications of this dust control substance took place in a central storeroom for cleaning equipment located on a lower level of the Aeroquay.

Mrs. Kerr testified that after assisting her husband to his feet she brushed a white flour like substance from his blue cashmere overcoat. I accept Mrs. Kerr's testimony in this respect without question. But I do question that the substance was asbestos from the fire-proofing in the ceiling or plaster dropped by workmen passing through the west link. Mr. Kalamar testified that fire-proofing could not fall to the floor because of the installation of the luminous plaster ceiling and its construction. I also conclude from the testimony of Collins, Kalamar and Gasparini that it would be most irrational for workmen to pass through the western link with their equipment and supplies when a much more convenient route was available to them to the areas far removed from the west link where any work was then currently in progress. Further any debris such as asbestos or plaster would have been noticed by Collins on his inspections and he did not notice anything of this nature. Accordingly, I can only conclude that the substance on the suppliant's coat which was removed by Mrs. Kerr was dust from the floor. The evidence established that the west link is a very heavy traffic area and that the flow of traffic was very heavy on that morning. In addition to normal dust tracked upon a floor by the passing of many feet, it is likely that grout of the terrazzo may have

been disturbed by the traffic. Neither the suppliant nor Mrs. Kerr noticed anything unusual upon entering the west link. It is reasonable to infer, therefore, that there was a thin uniform film of dust on the floor. The only thing this evidence establishes with certainty is that the floor had not been damp-mopped or dust-mopped for some time prior to the suppliant's fall.

It is conceivable that as a result of the suppliant's fall the floor was cleared of surface dust by it adhering to the suppliant's coat where his coat came into contact with the floor which would result in that area appearing shinier to him.

Still later the suppliant returned to the west link and from the ring concourse looked into the west link. He testified that he then observed one tile, which he identified as the tile upon which he had fallen and that that tile was shinier than the tiles bordering upon it. The distance from which the suppliant made this observation was approximately fifty feet. The suppliant incorrectly estimated the dimensions of the tile he so identified. He was reasonably accurate in one dimension but since the tiles are exact squares he may have identified two adjacent as being those upon which he fell as I have mentioned before. He did state that the higher sheen extended to precise boundaries of the tile which would negative any conjecture that the shinier appearance was caused by the removal of dust by his clothing in the fall. That the shine extended to the precise border does lend credence to the guess that a particular tile or possibly two adjacent tiles were used for testing purposes or had been replaced but I have mentioned before such a conjecture has been effectively rebutted by conclusive evidence to the contrary.

The west link was brightly lighted both from the illuminated ceiling and from natural daylight on either side. I have no doubt that the suppliant honestly thought he observed a tile or two adjacent tiles that were shinier than the others and hence slippery but the reflection of light upon such surfaces has been known to create strange illusions.

Therefore the only evidence I am left with is that of the suppliant's observations, in the circumstances I have outlined, that one or two adjacent tiles appeared shinier to

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him than the surrounding tiles and accordingly relatively slippier. It is also a matter of conjecture that because one tile might be shinier than another that it is necessarily more slippery.

After carefully considering the evidence I am not satisfied that one tile was highly overpolished and that the surrounding tiles were relatively unpolished but rather that the preponderance of evidence is to the contrary.

The establishment of the suppliant's alternative allegation of negligence that there was a spot of grease or similar substance on which the suppliant slipped is dependent on the evidence of Commissionaire Bailey, Mr. Manson and conjectures which flow therefrom. Bailey, when he returned to the place where the suppliant fell, saw a mark on the floor between an inch and an inch and a half in width and two to three inches long. He stated it was brown in colour and "it looked like a scuff mark off his shoe". He added that "it looked like brown shoe polish" to him.

Neither the suppliant nor Mrs. Kerr saw such a mark upon entering the west link, nor did either of them observe that mark immediately after the suppliant's fall. The suppliant did not see it on his second view from the ring concourse. Mr. Collins did not see it on his double inspection of the west link which I have found to have been immediately prior to the suppliant's fall. Neither did Mr. Collins see a spot of grease or similar substance although he stated he could and would have seen a wad of chewing gum. This was the sort of thing for which he was looking and which it was his duty to see. It is abundantly clear to me that the mark was not there before the suppliant fell.

The next question is, therefore, what caused the mark. The implication inherent in Bailey's evidence is that it came from the suppliant's shoe at some stage in the course of his fall.

Mr. Manson's evidence, as I mentioned when I summarized and commented upon it above, was designed to show that the mark could not have been made by the suppliant's shoe. Assuming that premise, it is then suggested that the mark must have been made by the suppliant slipping on some greasy substance which was present on the floor, the presence of which the respondent ought to have known or that it constituted a concealed danger. A great deal of

evidence was introduced as to work in progress designed to account for the likelihood of a workman dropping a spot of grease from his equipment or supplies.

However, I do not accept the premise that the mark could not have been made by the suppliant's shoe. I reject the evidence of Mr. Manson for the reason that the experiments conducted by him were not made under identical or conditions sufficiently similar to those prevailing in the suppliant's fall.

In *Meredith v. The Queen*[2] Fournier J. in commenting upon a suppliant's onus to establishing negligence on the part of the Crown or its servants in the scope of their duties, said at page 159:

> The onus of proof of these facts rests upon the suppliants and no presumption or assumption can displace this statutory obligation. Suppositions, speculations, conjectures, are not sufficient to discharge the duty which lies with the suppliants to establish the above matters; and, if they do not discharge this obligation, their claim fails.

That the mark was not made by the suppliant's shoe, that there was a spot of grease, that grease may have been dropped by a workman, is fraught with supposition, speculation and conjecture. I am, therefore, left far out in the field of conjecture rather than in that of reasonable inference.

It is my view that the suppliant has not proved, by a preponderance of evidence, that there was a spot of grease or similar substance on which he slipped and fell.

While it is most unfortunate that the suppliant suffered this mishap, I can find nothing in the evidence to justify me in finding that the accident was the result of the respondent's negligence. It has not been proven by a preponderance of evidence that the floor was in a dangerous condition by reason of one tile being more highly polished than the others, or the presence of a spot of grease or similar substance. The facts are more consistent with the suppliant having fallen by accident at a place where there was no default by the respondent.

With particular reference to the possibility of a spot of grease being present on the floor of the west link and to a much lesser extent to the possibility of one tile being more highly polished than the others, counsel for the suppliant

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[2] [1955] Ex. C.R. 156.

submitted that the system of inspection instituted by the respondent to discover and correct any unusual dangers was inadequate bearing in mind the number of deficiencies remaining to be corrected and the likelihood of workmen leaving debris about or dropping greasy substances on the floor.

This presupposes the relationship between the respondent and suppliant to be that of invitor and invitee. The standard of care of an invitor to an invitee is that the invitor shall use reasonable care to protect the invitee from unusual dangers of which he knows or ought to know, as contrasted with the responsibility of a licensor not to expose a licensee to a concealed danger or trap. The law imposes a duty on an invitor to ascertain and eliminate perils that might be disclosed by a reasonable inspection.

There was an issue as to whether the relationship between the suppliant and the respondent was that of invitor and invitee or licensor and licensee, but, because of the view I take of the matter, it is not necessary for me to decide that issue. I have already found that it has not been proven that there was either an unusual danger or a concealed danger.

Furthermore I am of the opinion that the respondent's system of inspection was reasonable bearing the existing circumstances in mind. The work still to be done was minor in nature and for the greater part far removed from the public areas. It was the subcontractor's responsibility to remove debris when a job was finished. If he did not do so, the prime contractor would do so at the subcontractor's expense. The respondent engaged an independent contractor, the third party herein, to clean the premises in accordance with reasonable specifications founded on experience. These circumstances do not absolve the respondent from responsibility, but there has been superimposed upon the responsibilities of the independent contractors a system of inspection as described and conducted by the witness Collins. Various persons on duty throughout the premises such as the commissionaires, the police constables, Air Canada personnel, the cleaning supervisor, Collins, and Department of Transport personnel, were instructed to report any debris or foreign matter on the floors that came to their attention to an emergency service by telephone. On receiving such a report the emergency cleaning service conducted

by the third party would be directed to the spot by telephone or public address system and the situation would be corrected within four minutes of the report being received. In addition there were fourteen persons under the direct control of Collins to perform these emergency cleaning services.

Therefore, as I have intimated, the system of inspection instituted by the respondent was a reasonable one and the standard of care taken by the respondent meets the higher standard of care of an invitor to an invitee.

As I have been unable to find negligence on the part of the respondent, it follows that the suppliant is not entitled to the relief sought by his Petition of Right herein and the respondent is entitled to costs.

Having regard to the findings I have made, I do not have to form an opinion under section 4(5) of the *Crown Liability Act*[3].

The suppliant pleaded both the lack of prejudice and the injustice contemplated by subsection (5).

It is conceded that a notice in compliance with subsection (4) was not given. However, Commissionaire Bailey, was aware of the incident as was a police constable on duty who took particulars. I would assume that the duties of these respective persons would require them to report the incident to their superiors although there was no evidence that they did so.

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[3] 4 . . .

(4) No proceedings lie against the Crown by virtue of paragraph (*b*) of subsection (1) of section 3 unless, within seven days after the claim arose, notice in writing of the claim and of the injury complained of

(*a*) has been served upon a responsible official of the department or agency administering the property or the employee of the department or agency in control or charge of the property, and

(*b*) a copy of the notice has been sent by registered mail to the Deputy Attorney General of Canada.

(5) In the case of the death of the person injured, failure to give the notice required by subsection (4) is not a bar to the proceedings, and, except where the injury was caused by snow or ice, failure to give or insufficiency of the notice is not a bar to the proceedings if the court or judge before whom the proceedings are taken is of opinion that the Crown in its defence was not prejudiced by the want or insufficiency of the notice and that to bar the proceedings would be an injustice, notwithstanding that reasonable excuse for the want or insufficiency of the notice is not established.

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The suppliant wrote a letter dated February 12, 1964 addressed to the Manager of the Malton International Airport outlining the particulars of the incident in some detail. He identified the date of the accident, that Bailey was a witness to his fall and that particulars had been taken by an R.C.M.P. constable. He described the injuries he sustained which he thought were minor at the time but stated that they had increased in severity. He assumed that the Airport carried insurance protection against such incidents and requested to be supplied with claim forms. He attributed the cause of his fall to "a highly slippery portion of the terrazzo floor".

Counsel for the respondent conceded that there was no prejudice and that there would be an injustice with respect to the allegation in the Petition of Right that one tile was highly over-polished, but expressed reservations whether the lack of prejudice would apply to the second allegation of negligence, that is, the presence of a grease spot, which allegation was pleaded by way of amendment pursuant to an order dated April 27, 1967.

If it were incumbent upon me to express an opinion, I would be of the view that the letter of February 12, 1964 was sufficiently broad in its terms to cause the respondent to investigate the incident thoroughly and since there is admittedly no prejudice with respect to the first allegation of negligence, it would follow that there was no prejudice with respect to the second and it would be an injustice if the suppliant were not permitted to rely on that allegation.

A further matter arose during the course of the trial. The suppliant served a notice to admit facts dated November 8, 1966 upon the respondent in general terms. Had the respondent admitted the facts in such notice it would constitute an admission that the suppliant's Petition of Right was well founded. The respondent did not admit such facts and I certify that the respondent's refusal to admit was reasonable in accordance with Rule 147.

On the suppliant bringing his Petition of Right against the respondent for damages for injuries alleged to have resulted from his fall at The Toronto International Airport, the respondent issued a third party notice claiming to be indemnified by the third party, Allied Building Services

(1962) Ltd., to the extent of any sum which the suppliant may be adjudged entitled to recover from the respondent.

The ground upon which the respondent claimed to be so indemnified is that by contract in writing dated December 24, 1963 for a term of two years commencing on January 6, 1964 the third party undertook to perform cleaning and related services including the care and maintenance of the floors in the public areas in the Aeroquay and that it was a term of that contract that the third party would indemnify the respondent against any claim occasioned by any default of the third party in connection with the cleaning of the floors of the Aeroquay.

Paragraph fifteen of that contract reads as follows:

> 15. That the Contractor shall at all times indemnify and save harmless Her Majesty from and against all claims, demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to any action taken or things done or maintained by the Contractor under and/or pursuant to any of the provisions of this contract set out and contained, or otherwise howsoever, in connection with the said works.

(The word "contractor" where it appears in the quoted paragraph above may be read as "third party").

The respondent, in the Statement of Claim against the third party alleges that "if a tile was over-polished as alleged in the Petition of Right, it was over-polished by the Third Party in the performance" of cleaning and related services including the care and maintenance of the flood tiles and "if a floor tile contained a spot of grease or similar slippery substance as alleged in the Petition of Right, its containing the said spot was attributable to the manner in which the said services were performed by the Third Party".

In its Statement of Defence the third party pleads there was no breach of its contract and expressly pleaded that it did no polishing in the hall where the suppliant fell. This latter pleading was confirmed by the evidence adduced and there was no evidence whatsoever that the third party was not performing the cleaning services undertaken by it in strict compliance with the express terms of its contract.

It follows from the foregoing and from the fact that I have found the respondent not liable to the suppliant that

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the action against the third party must be dismissed. The third party is to recover the costs of the third party proceedings from the respondent.

In the circumstances of the present case, I do not think that the respondent should recover the costs of the third party proceedings against the suppliant.

Notwithstanding that my decision is adverse to the suppliant on the merits, I propose to deal with the amount of the damages sustained by the suppliant.

All medical witnesses were agreed that the suppliant suffered from peripheral neuritis that the prospect of death was imminent at one time and that the extent of the suppliant's recovery has been remarkable. There was no dispute that the likelihood of the suppliant making a complete recovery is remote.

However, there was a dispute and a direct conflict of medical testimony as to whether the peripheral neuritis from which the suppliant suffers was caused by the suppliant's fall rather than by physical conditions which existed prior to the fall or occurred after the fall.

Two highly qualified neurologists gave diametrically opposite opinions. Dr. H. J. M. Barnett, who attended the suppliant in the critical stages of his illness, was called by the suppliant and testified that in his opinion there was a possible and probable relationship between the suppliant's fall and the onset of his illness. In Dr. Barnett's opinion the most common cause of peripheral neuritis, being of a nutritional nature, was eliminated. On the other hand, Dr. J. L. Silverside who was called by the respondent, expressed the opinion that the results of tests conducted in the Toronto General Hospital do not favour an explanation of peripheral neuritis being caused other than by a cause of a nutritional nature. In Dr. Silverside's opinion there is no evidence that classical peripheral neuritis (which the suppliant suffered) has ever been related to body trauma.

The merits of these conflicting opinions must be judged in the light of the reasons given to support them. The reasons so given are a matter of record. There is no question whatsoever as to the credibility of either of the medical witnesses, nor does their demeanour in the witness box afford any assistance in assessing the weight of their opinions. Having regard to my assessment of the merits of the

supporting reasons, I would be inclined to accept Dr. Silverside's opinion that there is no evidence that peripheral neuritis is caused by trauma.

It has been agreed among counsel that the medical expenses incurred by the suppliant total $11,797.38. It was also agreed among counsel that should it be found that the suppliant's fall was not the cause of the peripheral neuritis, the item of special damages relating to medical expenses should be the total of those expenses incurred to February 14, 1964 and that in assessing general damages I might have resort to life expectancy tables.

With reference to special damages the suppliant claims an amount of $25,000 as loss of profits in business. This particular item is predicated upon the suppliant, by reason of his illness, being unable to supervise the completion of the resort hotel which was his principal remaining business project and being unable to hire competent help to do so on his behalf. It was estimated that the completion and opening of the hotel was delayed one year. However, in the case of a self-employed person whose earnings fluctuate it is impossible to determine loss of earnings by a simple calculation. Further it should be borne in mind that the suppliant's hotel business had not begun. Therefore, I propose to take this matter into account in assessing damages for the loss of prospective earnings generally.

The suppliant had expended in excess of $100,000 upon the construction of this hotel. A chartered accountant estimated, from the records available to him, that for the first complete year after the hotel opened there was an excess of $2,000 in receipts over expenditures. If interest on financing were taken into account there would have been a loss.

When the suppliant fell he suffered a sprained thumb and a compression fracture of the fourth lumbar vertebrae with wedge deformity and osteoarthritic change in the articulation of the fourth and third vertebrae. I am satisfied on the evidence that this fracture was caused by the fall. It is disclosed in an X-ray taken sometime after the fall and is not disclosed in an X-ray taken sometime prior thereto. No injury intervened to account for the fracture. This fracture has mended and there are no residual ill effects.

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On the assumption that the peripheral neuritis was not caused by the suppliant's fall, I would assess the suppliant's general damages at $4,500 plus special damages being the total of the medical expenses incurred to February 14, 1964.

On the assumption that the suppliant's fall caused peripheral neuritis the special damages are agreed to be $11,797.38.

Prior to January 12, 1964, at which time the suppliant was sixty years of age, he was a prosperous business man extremely active in community affairs. He enjoyed a happy home life and partook of the amenities of life.

When he fell at the airport on January 12, 1964 he suffered back pains and his left hand and arm were sore. Nevertheless he took the plane to Jamaica and en route he suffered from headache.

Upon arrival in Jamaica he felt odd. He lacked appetite, he was irritable. He suffered pain in his back and pains in both legs. He could neither sit down with comfort nor sleep. Shortly thereafter he experienced pain in his mid-abdomen and pains in his extremities.

He consulted Dr. Walter of Coral Gables Osteopathic Medical Clinic in Miami, Florida in February 1964. Dr. Walter prescribed and administered therapy and medication. He recognized that the suppliant was seriously ill and advised his immediate return to Toronto.

He returned to Toronto at the beginning of March 1964 and was immediately admitted to the Toronto General Hospital as an emergency patient at the urgent request of his family physician. In hospital he came under the care of Dr. Barnett. He was confined to that institution from March until June when he was sent to St. Johns Convalescent Hospital. He returned to the Toronto General at the beginning of July and was there confined for that month.

On his initial admission to the Toronto General Hospital his legs buckled and he was unable to walk. He became completely paralysed. He was unable to recognize his family.

Later he improved. He was able to move about in a walker device, then on crutches, then with the use of canes and still later unassisted but with great difficulty.

Dr. Barnett testified that he is no longer alert, and that he has undergone an intellectual change due to a reaction to drugs which caused a minor change in brain tissue. He suffered headache, discomfort from light. He lost a great amount of weight and still looks chronically ill.

He suffered loss of position and vibration sense and became sexually impotent. He will not recover his potency.

He suffered an inability to void which has now improved.

Peripheral neuritis affects the fibres that control sweating and skin temperature. This affliction causes the suppliant distress. He wears gloves, heavy socks and underwear at all times. He is perpetually cold regardless of the outside temperature.

From a strong man he has now become physically frail and looks a decade older than his age.

The minor brain damage resulting from drugs has not led to any permanent disability, his loss of appetite is due to tension and an emotional condition and will improve when that condition is removed.

His extra sensory condition, which has persisted for three years, may improve but will continue in some element on a permanent basis.

He tires readily and is restricted in a physical way.

There is no specific weakness in his thought process.

The suppliant's emotional condition is much altered and affects his judgment. He suffers a chronic anxiety state which affects his physical well being.

He has changed from an aggressive business man into a neurotic individual.

There is a twenty-five percent chance of his chronic anxiety reaction improving.

These are all residual effects of peripheral neuritis and it is agreed by the medical witnesses that recovery is uncertain.

His sexual impotency will continue but that potency would have ended with advancing years in any event. His extra sensory condition will continue but there may be some improvement in his ability to walk and in use of his hands. There is no question that he will suffer some permanent disabilities.

On the other hand, the suppliant was sixty years old at the time of the accident. He had his gall bladder removed, he suffers from an enlarged liver, he has undergone a gastrectomy and suffers from a pancreatic ailment. His age and previous physical condition are factors I must consider in assessing damages as well as the fact that he had virtually retired from his other business enterprises and had embarked upon the building of a small resort hotel in the nature of a retirement project although he did entertain more ambitious plans for its development if financing and other circumstances permitted.

There is no doubt the suppliant underwent a long period of pain, suffering and shock. He has suffered serious loss in the amenities of life. His previous happy family life has deteriorated to one of strain without any fault on the members of his family who have struggled to have that relationship returned to its normal and formerly happy state. It would follow naturally that his life expectancy has been reduced slightly and the suppliant has suffered and will continue to suffer inconvenience and discomfort. His ability to run the resort hotel as a profitable venture has been impaired.

Bearing all such factors in mind I have arrived at the sum of $45,000 as the pecuniary sum which will make good to the suppliant, as far as money can do, the loss which he would have suffered as the result of his injury, if the peripheral neuritis were the result of his injury.

Accordingly, on the assumption that the peripheral neuritis was caused by the suppliant's fall, I would assess the general damages as $45,000 to which should be added the agreed medical expenses of $11,797.38 as special damages.