OUTER HOUSE, COURT OF SESSION

[2024] CSOH 92

PD157/21

OPINION OF LORD ERICHT

In the cause

JOSEPH MCILWRAITH

Pursuer

against

BLUEVALE STRUCTURES LIMITED

Defender

Pursuer: Allardice; Thompsons
Defender: Mackenzie KC, Rolfe; DWF LLP

1 October 2024

Introduction

[1] The pursuer, a diabetic, required to have his right leg amputated below the knee. He seeks damages from his employer on the basis that the injury was caused by his employer's breach of common law duty and health and safety regulations.

[2] The pursuer was susceptible to requiring such an amputation for various causes arising out of the fact that he was a diabetic. The issue in this case was whether the cause of the amputation was the pursuer getting his feet wet in the course of his employment.

[3] Quantum was agreed at £85,000 inclusive of interest. This figure is substantially less than the £900,000 concluded for in the summons, and indeed significantly less than the privative jurisdiction of the sheriff court. No question of contributory negligence arises.

The pleadings

[4] The proof was due to commence on Tuesday 18 June 2024. The week before, on the basis of advice received by new counsel who had only recently been instructed in the case, the pursuer enrolled a motion for a minute of amendment to be received and the Record to be amended in terms thereof. The motion was opposed on the grounds *inter alia* that it came too late and too close to the proof, it sought to bring a new case outwith the expiry of the triennium and it required to be answered which would put the proof in peril. On Thursday 13 June 2024, after hearing parties on the motion, I allowed the minute of amendment to be received, allowed the pursuer to adjust the minute of amendment and the defender to answer it, and continued further discussion of the minute of amendment to the first day of the proof.

[5] In the event, the pursuer did not move the minute of amendment on the morning of the proof, and accordingly the proof proceeded on the basis of the unamended Closed Record. During the course of the proof, counsel for the defender objected to certain evidence, on the basis that that evidence was more than a "variation, alteration or modification" of the case on record. Indeed his position was that this would have been the case in respect of certain evidence even if the record had been amended in terms of the minute of amendment. Counsel submitted that there had been no record for negligence outwith the period 28 May 2018 to 1 June 2018, and no fair notice of the defender's

awareness of the pursuer's medical condition. I heard the evidence subject to all questions of relevancy and competency.

[6] In view of the dispute between the parties as to whether certain evidence falls within the scope of the record, it is useful at this stage to set out parts of the record at length.

[7] In statement four, the pursuer averred:

> "Between 28th May 2018 and 1st June 2018, the pursuer was working in the course of his employment by the defender as a demolition worker. The pursuer was instructed to attend at a warehouse premises at Russell Logistics, Napier Road, Woodpark Industrial Estate, North Cumbernauld by the defender. The roof of said warehouse premises had collapsed. The pursuer and his colleagues were instructed to make the site safe. Pieces of metal were being cut from the roof by the pursuer's colleagues. When those pieces of metal fell to the ground, it was the pursuer's role to cut them into smaller sizes. The pursuer was working at ground level. Due to the collapsed roof, the area in which the pursuer was working was unprotected from the weather. Rain had fallen and pooled on the ground of the area in which the pursuer was working. It continued to rain on the days the pursuer was working at the premises. As a result, between 28th May 2018 and 1st June 2018, the pursuer was standing in around 6 inches of stagnant water during the course of his working day. He worked approximately 7 to 12 hours each of those days. He was wearing steel toe capped rigger type boots. The pursuer had purchased said boots. He had been reimbursed for the boots by the defender. The defender had not inspected the boots. As such, the defender had provided the boots to the pursuer. The defender knew, or ought to have known, the pursuer was wearing said boots. The boots were not waterproof. The water in which the pursuer was standing seeped into his boots. It soaked through his boots. Further, the dry room provided by the defender for overnight storage of the pursuer's clothes and wet footwear was not heated overnight. As a result, the pursuer's boots remained wet. The defender took no steps to inspect the pursuer's footwear or to check that it was suitable and adequate for the task required of him. On 1st June 2018, as a result of standing in said water for prolonged periods, the pursuer's right second toe became numb and discoloured. The pursuer suffered the loss, injury and damage hereinafter condescended upon. The defender had a duty to undertake a risk assessment as per Regulation 3 of the Management of Health & Safety at Work Regulations 1999 and Regulation 6 of the Personal Protective Equipment Regulations 1992. The defender knew, or ought to have known, that the pursuer was working in an area unprotected from the weather as they had instructed him to attend at a premises at which the roof had collapsed. They knew, or ought to have known, it had been raining prior to his attendance at the premises. They knew, or ought to have known, it continued to rain throughout his period working at the premises. As such, a suitable and sufficient risk assessment would, or ought to have, identified the risk of the pursuer having to work in standing water. It would, or ought to have identified, a risk of injury from working in standing water. It would, or ought to have identified said risk was

> increased if waterproof footwear was not provided. The defender knew, or ought to have known that not heating the dry room provided overnight would result in footwear remaining wet. The defender ought to have taken suitable and sufficient measures to prevent such an injury. Such measures include: providing work equipment to drain or pump away the standing water; providing the pursuer with waterproof footwear; and providing proper overnight drying facilities. The defender failed to take such measures, and so caused the pursuer's injuries."

[8] In statement five, the pursuer averred:

> "The fact that the pursuer was working in a wet environment with wet footwear caused or materially contributed to his subsequent injuries. The pursuer is believed to have commonly seen intrinsic risk factors for developing a diabetes related foot ulcer. The wet environment with wet footwear were extrinsic factors leading to greater risk of ulceration. The wet soaked footwear was likely also the extrinsic factor needed to cause the damage to the high risk foot to cause an ulcer to then lead to amputation. The pursuer suffered initial injury to his right second toe in keeping with neuroischaemic ulcer. His toe was initially numb and discoloured. He attended the Queen Elizabeth University Hospital, 1345 Govan Road, Glasgow, G51 4TF. His toe was infected. The toe was amputated. Said infection spread. Due to the infection spreading, the pursuer required and underwent a below knee amputation of his right leg. But for exposure to the wet environment with wet footwear it is unlikely that the pursuer would have developed the diabetic foot infection which resulted in the right transtibial amputation."

[9] In statement six, the pursuer averred:

> "The pursuer's claim is based on the defender's breach of their common law duty to take reasonable care for the pursuer. The pursuer's claim is based on the defender's breach of their common law duty to institute and maintain a reasonably safe place of work and reasonably safe work equipment. Inter alia, it was the defender's duty, in the exercise of reasonable care, to comply with the requirements of Regulation 5 of the Workplace (Health, Safety & Welfare) Regulations 1992; Regulations 4 and 6 of the Personal Protective Equipment Regulations 1992; Regulation 4 of the Provision and Use of Work Equipment Regulations 1998; and Regulation 3 of the Management of Health and Safety at Work Regulations 1999. The defender failed in their duties and so caused the pursuer's injuries."

[10] In his submissions at the close of the proof, the counsel for the pursuer refined his position to reflect the evidence as it had come out. He submitted that as a consequence of the defender's failures to take reasonable care for the safety of the pursuer, the pursuer was required to work in conditions whereby his boots became saturated and his feet became macerated over the course of at least several hours a day for 3 to 4 days in a row. The

pursuer was then acting in the course of his employment with the defender at Russell Logistics, Napier Road, North Cumbernauld (the "Site"). The period of 3 to 4 days occurred sometime between 9 May 2018 and 18 May 2018. As a result of the maceration he suffered from Immersion Foot Syndrome resulting in ulceration in the second toe of his right foot. The ulceration led to a breach of the skin which became a portal for infection ultimately leading to the below knee amputation of his right leg.

Pursuer's witnesses

1 The pursuer

[11] The pursuer was born in 1967 and had worked in demolition since leaving school at the age of 16. I found him to be a credible and reliable witness. He gave his evidence in a straightforward manner. His evidence was consistent with other evidence in the case, such as the eyewitness evidence from Gareth Morrow and Jordan Gibson as to the extent of the surface water at the Site, and of Jordan Gibson as to the state of the pursuer's toe and going to hospital on 1 June 2018, and to documentary evidence such as the photographs showing the extent of the surface water on the Site on 10 May 2018, and the defender's records of daily 10-Minute Briefings showing what days he was working on the Site.

2 Gareth Morrow

[12] Gareth Morrow was on the defender's witness list, but was called by the pursuer. He was an employee of the main contractor McLaughlin and Harvey and was site project and health and safety manager at the Site. I found him to be a credible and reliable witness.

3 Karen McNeill

[13] Karen McNeill is a consulting health and safety practitioner. She holds an environmental engineering degree from the University of Strathclyde and a degree level diploma from the National Examination Board of Occupational Safety and Health. She graduated in 2000 and qualified in 2010. She started her career as an engineer on sites also with responsibility for internal health and safety. She is currently a consultant for other companies on health and safety matters. Over the last 10 to 12 years she has produced around 700 expert reports for litigation, with around 70% for pursuers and 30% for the defence and given evidence on six occasions in the Court of Session. She gave expert evidence relating to health and safety matters such as the provision of protective footwear by employers and risk assessments. I am satisfied that she has suitable qualifications and experience to act as an expert witness in terms of *Kennedy* v *Cordia (Services) Limited* 2016 SC (UKSC) 59.

4 David Magee

[14] Mr Magee was an employee of the main contractor McLaughlin and Harvey and spoke to the provenance of two sets of photographs of the Site. The first set of photographs was taken on 3 March 2018 by MRIAS Consulting immediately after the roof fall. The second set of photographs was from McLaughlin and Harvey's records and was taken on 10 May 2018, which was the middle day of the 3 days in which the pursuer claimed he was working with wet feet with there being standing water in parts of the Site. Mr Magee's evidence was unchallenged and uncontroversial.

5 Mr Keith Hussey

[15] Mr Hussey is a consultant vascular and endovascular surgeon at the Queen Elizabeth University Hospital Glasgow, and lead clinician for Vascular Surgery at NHS Greater Glasgow and Clyde/NHS Forth Valley. He has a subspecialty interest in Management of Diabetic Foot Ulceration/Complex Aortic Disease. He holds an MB ChB from Dundee University and an MD from Glasgow University, and is a fellow of the Royal College of Surgeons of Edinburgh. He has published extensively and sits on various medical committees.

[16] Mr Hussey was an impressive skilled witness. The defender did not lead the expert witness who was on the defender's witness list to contradict Mr Hussey's evidence, and limited cross-examination to clarification of certain matters.

Defender's witness

Jordan Gibson

[17] Jordan Gibson was born in 1994 and is currently working as a roofer. He had worked for the defender for around 4 or 5 years. In 2018 he had worked for the defender as site supervisor at the Site. Due to the passage of time his recollection was limited, but I found him to be a credible and reliable witness on the matters which he did remember.

Conditions at the Site and the pursuer's footwear

[18] In February 2018 Scotland experienced the extreme wintry weather conditions colloquially known as "the Beast from the East". As a result of the weight of snow, the metal roof of a loading bay area attached to a bottled water warehouse suffered partial collapse. The defender was engaged as demolition subcontractor to remove the partially

collapsed roof. The roof of the warehouse itself was unaffected and the bottled water distribution operations continued from it during the time of the demolition works. The main contractor was McLaughlin and Harvey.

[19] The Site was an L-shaped area. The Site was secured and separated from the working part of the warehouse by hoarding erected by McLaughlin and Harvey. A welfare unit was provided for the use of the workers at the Site. The welfare unit comprised a Portakabin with an office area, a rest area and kitchen and a drying area. The welfare unit was situated at the entrance to the Site, but outwith the hoarding.

[20] The pursuer's evidence was that the job at the Site started mid-week. By reference to the defender's contemporaneous records of daily 10 Minute Briefings which the pursuer attended, he confirmed that he started on Wednesday 9 May 2018 and worked there on Thursday 10 and Friday 11. The job was to strip the roof back to a safe point and clear it away. He worked with his colleagues including Jordan Gibson and Stephen Welsh. The McLaughlin and Harvey supervisor was Gareth Morrow. Stephen Welsh and Jordan Gibson had tickets to operate a cherry picker and the pursuer did not. They would cut down steel and his job would be to clear the steel which had fallen to the ground. They would reverse the cherry picker and he would pull away fallen steel to get it clear. If the steel was in large bits, he would cut it into smaller bits that fitted skips. At the start of the job, there was water underfoot. Sometimes it was as deep as midway up a 6 inch high yellow barrier shown in one of the 10 May photographs. When they moved pallets, there would be water which came out from underneath. He tried to use metal sheets to keep out of the water: when he took roof sheets down he laid them on the floor to make a dry path but stopped doing that because he came to the view that it was unsafe. After the first week, the surface water condition was slightly better as it had dried up a little.

[21] The soles of his feet were stinging with pins and needles when standing in the water. That feeling came on gradually. During the first week the soles of his feet were sore and the boots were damp and soaked through a wee bit. At the end of the day he put his boots in the drying room at the welfare unit but the next morning they were still soaking wet so he had to put his wet socks and boots back on. He and his co-workers travelled to the Site together in a van wearing travelling clothes and trainers. He changed into his work clothes, including his boots, at the Site. After the first night when the whole squad's clothes had not dried out, he spoke to Gareth Morrow and told him he was not happy and that the drying facility in the welfare unit should be left on overnight and Mr Morrow said he would put it back on again. For 3 days in a row, his boots were wet. At the end of the first week, the pursuer bought new boots and left the wet ones to dry to be used at a new job. The new boots which he bought were waterproof with a protective midsole and steel toe cap.

[22] Mr Morrow confirmed that there was water on the Site. The client did not want water going from the Site to inside the operational warehouse so sandbags were placed at the foot of the hoarding to stop the water entering their client's live working areas. The water was a nuisance at the time and people were brushing it away. The water was quite deep, but not deeper than a pallet: a pallet was put down to walk across to keep out of the water. That meant that the water would be no more than 5 inches high, as it was lower than a pallet.

[23] The welfare unit contained a drying room to dry clothes and footwear. Mr Morrow recalled that at some point it was raised that items of clothing were not drying properly so he spoke to his supervisor and arranged for the generator to be left running overnight to supply the drying compartment, to leave the heater on and for the keys to be left with security overnight while the generator was running. Over the course of the job there was

times when the Site was dry or had small puddles, it depended on what the weather was like. There was no cross-examination of Mr Morrow and his evidence was unchallenged by the defender.

[24] Jordan Gibson's evidence was that there may have been water on the floor but he could not say how deep it was but he did not believe it was 6 inches. He did not think it covered his boots but it may have done in certain areas, he was not sure. In the period around 28 May it was mostly dry underfoot.

[25] The recollection of each of the pursuer, Mr Morrow and Mr Gibson that there was water on the ground is supported by the 10 May 2018 photographs of the Site, which were put to each of these witnesses. The 10 May photographs were taken on the middle day of the 3 days in which the pursuer claims to have been working with wet feet. The photographs show the damaged roof. They show that while there were parts of the ground which were dry, other parts were under water. From metal structures and pallets in the water it can be seen that in some parts the water is several inches deep. The evidence from the three eyewitnesses who were on the Site at the time of the demolition works, and the 10 May photographs, give a consistent description of the existence of standing water in parts of the Site at the commencement of the demolition job, albeit that subsequently conditions became dryer.

[26] Subject to the question of competency and relevancy, I find that during on 9, 10 and 11 May 2018 there was standing water on the Site. The standing water did not cover the whole of the Site, but did cover parts of it. The standing water in places was several inches deep, but no more than 5 inches. The pursuer's feet became wet at work on 9, 10 and 11 May. However, after that week they ceased to be wet as the pursuer bought and used new waterproof boots.

[27] This brings us to defender's objection to the admissibility of evidence. The Closed Record puts the pursuer standing in water between 28 May 2018 and 1 June 2018. However the evidence puts the pursuer getting wet feet from standing in water on 9, 10 and 11 May and no later than that. Over the weekend of 12-13 May, the pursuer bought a new pair of waterproof boots and thereafter ceased to use his old non-waterproof boots which had become wet in the standing water on site, and instead used his new pair of waterproof boots.

[28] Counsel for the pursuer frankly accepted that if the evidence was confined to the period between 28 May and 1 June, the pursuer's case would fail. However he submitted the evidence of the pursuer working in the standing water on 9, 10 and 11 May rather than between 28 May and 1 June, was admissible as it was merely a variation, modification or development of what was pled on record. He submitted that amendment was not necessary if what was proved in evidence was merely a "variation, modification or development" of what was pled, but is necessary if what is pled is "new, separate and distinct". *Burns* v *Dixon's Iron Works Limited* 1961 SC 102, 107, *Cleisham* v *British Transport Commission* 1964 SC (HL) 8, *O'Hanlo*n v *John G Stein & Co Limited* 1965 SC (HL) 23, 42, *Hamilton* v *John Brown and Co (Clydebank) Limited* 1969 SLT Notes 75, *McCuskar* v *Safe Heat Cavity Wall Insulation* 1987 SLT 24, *McCluskey* v *Wallace* 1998 SC 711. The factual basis and the legal basis of the case were all still the same, the only thing that had changed was the date. None of the factual basis for the pursuer's case appeared to be in dispute. The actual dates were not particularly significant: it was not necessary to prove where the water came from, it was working in standing water that caused the harm. The defender knew there had been standing water. The defender had been well aware of the conditions and having had investigated them, there was no prejudice.

[29] Counsel for the defender submitted that proof ought to be restricted to the dates of 28 May to 1 June. The function of pleadings was to give fair notice (*Esso Petroleum Co* v *Southport Corp* [1956] AC 218, 238). What amounted to fair notice depended on the circumstances (eg *D* v *Amec Group Limited* [2016] CSOH 176 at para [54], *Clifton* v *Hays Plc*, unreported, 7 January 2004 at 11, *Baillie* v *ECG Group Limited* [2005] CSOH 40 at para [7], *Morrisons Associated Companies Limited* v *James Rome & Sons Limited* 1964 SC 160 at page 182). The pleadings on liability had remained unchanged for 3 or so years that the action had been in court. The defender had investigated the allegations *inter alia* by taking precognitions and obtaining expert evidence focusing on the period between 28 May and 1 June 2018, to depart from the well-settled rule would prejudice the defender: potential witnesses had died and memories had faded. The defender had not been able to take precognitions from the pursuer's work colleagues Stephen Welsh, William McLellan, John Paul Clark or Henry McLean. The change of date to the 9-11 May was new, separate and distinct from the allegations made on record.

[30] The essence of the pursuer's case on record is that the pursuer was standing in water in non-waterproof boots during the course of his work at the Site. In my opinion, evidence that this took place on 9 to 11 May rather than on 28 May to 1 June is not a "new, separate and distinct" case. All that has happened is that the dates have been advanced by around 2½ weeks. The rest of the case remains the same. It remains the case that the incident occurred during the course of the pursuer's employment. It remains the case that the incident occurred at the Site. It remains the case that the incident occurred during the course of the defender's sub-contract for demolition work: the only difference is that it occurred at the beginning of rather than later in the demolition work. It remains the case that the allegation is that the pursuer was working in standing water. It makes no difference

that the weather was dry in late May and June, as the issue is not how the water came to be there but whether it was there and the pursuer stood in it, and the 10 May photographs show that the water was there at that date. The defender was not prejudice by inability to lead evidence of other potential witnesses as to the presence of water on the site. Given the evidence of two of the witnesses on the defender's own witness list (Mr Morrow and Mr Gibson), as to the presence of water on the site, it is improbable that further investigation of possible defence witnesses would have produced evidence to the contrary. The defender's witness list already contained witnesses such as Henry McLean who were present at the Site and might be expected to be able to give evidence as to the state of water on the Site but the defender did not call these witnesses.

[31] Accordingly I repel the objection, and make the findings of fact set out in para [26] above.

Presentation to hospital on 1 June 2018

[32] On 1 June 2018 the pursuer was in pain and he spoke to Scott Wylie, the defender's contract manager who ran the defender's yard. He took his boot off and his colleagues saw his right toe and came to the conclusion that he should go to hospital. He was taken to hospital by Jordan Gibson. The pursuer told Jordan Gibson that at first he had pins and needles and then the toe started to get sore and started to discolour. He thought that the problem was probably work related as he just works and then goes home and does not go anywhere else. At that time he had not made a connection between getting his feet wet on site, and the colour of the toe which had been getting darker. Jordan Gibson confirmed in evidence that the pursuer had shown him his toe and driven him to hospital. When he saw

the toe, Jordan Gibson thought that the pursuer had to go to hospital: the toe was black, like cremated burnt.

Causation

[33] The pursuer had a long history of type II Diabetes Mellitus.

[34] This makes the question of causation in this case a difficult one.

[35] Patients with Diabetes Mellitus are at a high risk of amputation for a number of medical reasons, of which ulceration of a toe due to immersion in water is only one possibility. As Mr Hussey put it in his report:

> "5.2 Patients with a diagnosis of Diabetes Mellitus are at higher risk of amputation than non-diabetic patients. Therefore with the chronicity of Mr. McIlwraith's Diabetes Mellitus history he would have been at increased risk of major limb amputation.
>
> 5.3 There was NO history of diabetic foot complication prior to the initial presentation, although Mr. McIlwraith had NOT had regular diabetic foot review.
>
> 5.4 Diabetic foot ulceration is a complex pathophysiological process which is a product of multiple different intrinsic and extrinsic aetiological factors which include one or more of the following: acute and/or chronic infection, endothelial dysfunction (previously described as microvascular disease), atherosclerotic arterial disease, biomechanical dysfunction (Charcot arthropathy), neuropathy, the metabolic state associated with a diabetes diagnosis and trauma."

[36] In cross-examination, Mr Hussey agreed with the following passage from the report of the defender's expert Mr Cross:

> "Toe ulceration, and even limb amputation are common in diabetics and even diabetics who have paid assiduous attention to the care of their feet can end up in the same or worse situation as the pursuer: it is the nature of the disease."

[37] As Mr Hussey went on to say in his report:

> "5.5 The primary issue to address is whether the exposure to the wet environment (an extrinsic factor) was relevant to the subsequent RIGHT transtibial amputation.
>
> 5.6 In my opinion, consistently working in a wet environment with footwear which was not adequately dried… has resulted in the development of an Immersion Foot Syndrome (this is defined as a clinical syndrome that results in tissue damage to of the extremities exposed to cold in a wet environment for prolonged periods).
>
> 5.7 The balance of probability is that this extrinsic factor caused tissue damage which has resulted in the development of ulceration.
>
> 5.8 At the time of the initial presentation to hospital it was clear that there was infection. Following admission to the vascular surgical unit of the Queen Elizabeth University hospital there was radiological evidence of clinically significant atherosclerotic arterial disease on the MR angiogram performed (although there had been NO pre-admission arterial symptoms). At the time of clinical assessment there was evidence of peripheral neuropathy.
>
> 5.9 Therefore, but for the exposure to wet conditions of the working environment, in my opinion it is unlikely that Mr. McIlwraith would have developed the diabetic foot infection which has resulted in the RIGHT transtibial amputation."

[38] Mr Hussey explained that maceration is a commonly experienced physiological condition and gave the example of white wrinkly feet after a bath. Macerated feet return to normal when they dry. Immersion Foot Syndrome, also known as trench foot, is uncommon. He described the kind of soaking required for immersion foot syndrome as being like that of a homeless person with consistently wet feet. Even feet that have Immersion Foot Syndrome tend to recover when they dry. The mechanism Mr Hussey described for the pursuer's injury was that Immersion Foot Syndrome caused ulceration in the right second toe which became the portal for infection.

[39] As the defender did not lead its expert medical witness, Mr Frank W Cross FRCS, a consultant general and vascular surgeon, there was no medical challenge to Mr Hussey's

evidence. However counsel for the defender challenged the factual basis for Mr Hussey's conclusion and submitted that there was no evidence that the pursuer suffered ulceration because of wet feet and that the most likely scenario was that the pursuer's ulceration, infection, narcosis, and amputation in 2018 arose because he was diabetic.

[40] Mr Hussey's expert report was based on his instructions that the date of injury was 28 May. That is the timing which was set out in the Closed Record. On that timing and scenario, there was no gap in time between the period when the toe was immersed in water on 28 May to 1 June and presentation at the hospital on 1 June. However, I have found above that the pursuer's feet ceased to be wet after 11 May. That means that there was a gap of 3 weeks between the end of immersion and the visit to the hospital. When that factual scenario was put to Mr Hussey in examination in chief, he explained that this would only make a difference if the toe had been normal between the immersion and presentation to hospital on 1 June: if the injury had occurred because of immersion, the toe would have been abnormal from immersion to the visit to the hospital. He was asked in cross-examination that if there was no visible break in the skin from the withdrawal from water and 1 June, what was the link between the water and the toe on 1 June. In response he expressed the view that the immersion causes ulceration which becomes a portal for infection, but if the toe was completely normal between the immersion and 1 June there may be no causal link.

[41] It is clear from the medical evidence that even diabetics who do not get their feet wet can end up in the same position as the pursuer in respect of amputation of a limb. It is in the nature of the disease of diabetes. In order to succeed in this case, the pursuer requires to prove on the balance of probabilities that, rather than the cause being one of the other incidents of diabetes which could lead to amputation, the cause was infection caused

by toe ulceration caused by Immersion Foot Syndrome caused by getting his feet wet at the Site on 9, 10 and 11 May. In my opinion the pursuer has failed to do so. He has not demonstrated that he suffered from Immersion Foot Syndrome. At the end of the working day on each of 9, 10 and 11 May, the pursuer changed into dry shoes for the journey home and his feet remained dry until his return to work the next day. That is not eloquent of the consistent soaking and lack of drying off referred to by Mr Hussey as being required for the development of Immersion Foot Syndrome. Further, there was no evidence of any visible ulceration after 11 May. While I accept the pursuer's evidence that his feet were sore and he suffered from pins and needles, that does not assist in proving causation as he had been experiencing that since 2012 as a symptom of his diabetes. There was no evidence that his toe had been abnormal from the end of the immersion on 11 May onwards.

[42] In all the circumstances I find that the injury suffered by the pursuer was not caused by getting his feet wet by standing in water in the course of his employment.

Conclusion

[43] The pursuer's case fails on causation. I shall grant decree of absolvitor.