SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 92

PN1377-18

JUDGMENT OF SHERIFF FIONA LENNOX REITH, QC

in the cause

JENNA SHARP

Pursuer

against

THE SCOTTISH MINISTERS

Defender

Pursuer: McCulloch; Digby Brown LLP
Defender: Fairweather, Anderson Strathern

Edinburgh, 19 November 2019

The Sheriff, having resumed consideration of the cause, finds in fact:

1. On 23 and 24 February 2017 the pursuer was working in the course of her employment with Ailsa Response as a support worker. She was working at HMP Low Moss, Crosshill Road, Bishopbriggs, Glasgow. HMP Low Moss was owned, operated, occupied and maintained by the defender.

2. HMP Low Moss was the pursuer's workplace in terms of the Workplace (Health, Safety and Welfare) Regulations 1992 ("the 1992 Regulations").

3. At about 7.50am on 24 February 2017 the pursuer made her way from the entrance door at HMP Low Moss to where she had parked her motor vehicle in the visitor car park.

4. The pursuer had parked her motor vehicle in the visitor car park on the evening of 23 February 2017 before commencing her shift at about 8pm that day. Her shift had been due to end at 8am on 24 February 2017.

5. Employees of the defender use the staff car park at HMP Low Moss. As she was not an employee of the defender, the pursuer was not permitted to use the staff car park.

6. As the pursuer was making her way from the entrance door at HMP Low Moss to the visitor car park at the end of her shift on the morning of 24 February 2017, she was accompanied by her work colleague, John McSharry. Mr McSharry had been working the same night shift. The pursuer held Mr McSharry's arm as she walked from the entrance door to the visitor car park. She was wearing trainers. She had not been told by the defender that they were inappropriate footwear to wear in winter. She was watching where she was placing her feet. She could not have taken any other reasonable steps to have prevented the accident referred to below.

7. In order to reach her motor vehicle, the pursuer made her way from a pavement in the visitor car park onto the first zebra crossing and onto a tarmac road within the visitor car park. Shortly after she had stepped off the pavement and onto the road, she slipped on a small patch of ice on the road. She fell to the ground. As a result, she suffered loss and injury reasonably estimated at £3,250. This included her feeling dazed, dizzy and sick, and experiencing double vision, as a result of the slip and fall.

8. The road, including the area where the pursuer slipped and fell, was a traffic route in terms of regulation 12 of the 1992 Regulations.

9. There were no warning signs on display at the time of the said accident. Warning signs would not have made a difference. The pursuer was aware of the weather conditions and the conditions underfoot.

10. The accident was reported to the defender about a week after the accident.

11. No other slip in the visitor car park on 24 February 2017 was reported to the defender.

12. The pursuer's accident was investigated by the defender. Mr John Hardie, Health & Safety and Fire Safety Co-ordinator at HMP Low Moss, completed parts of the defender's Immediate Accident Investigation Report dated 14 March 2017, number 6/19/1 – 6/19/3 of process, and the defender's Accident at Work Report Form dated 3 March 2017, number 6/19/4 – 6/19/7 of process.

13. Mr Sergio Buonaccorsi, one of the defender's first line managers, also completed parts of the said Immediate Accident Investigation Report on 14 March 2017.

14. No gritting was carried out at HMP Low Moss on 23 February 2017.

15. Following the accident, the pursuer provided statements on 2 and 10 March 2017. These are contained in number 6/20 of process. Mr McSharry provided a statement, number 6/21 of process, on 10 March 2017. There was no mention in any of the statements that the visitor car park had not been gritted.

16. Mr Craig Clements and Mr Angus Yuile, both employees of the defender, were on call to carry out any gritting or snow-clearing required out-of-hours at HMP Low Moss in the week commencing 20 February 2017. They were both "industries staff". They are both are trained in the operation of vehicles used in the gritting process and in how to carry out gritting effectively. They are both experienced in gritting at HMP Low Moss.

17. Mr Eddy Davidson, the defender's night shift manager at HMP Low Moss, conducted hourly patrols on the night of 23 February 2017 and the morning of 24 February 2017. In accordance with the defender's winter protocol for HMP Low Moss ("the protocol"), number 6/1 of process, on-call staff are typically called at 5am when icy

conditions develop overnight. At about 5am on 24 February 2017, Mr Davidson phoned Mr Clements and Mr Yuile to attend HMP Low Moss to carry out gritting. At about 5:55am, Mr Clements and Mr Yuile arrived at HMP Low Moss to carry out gritting. The protocol is reviewed annually.

18. Between about 6.05am and 6.15am on 24 February 2017, Mr Clements and Mr Yuile commenced gritting all external areas of HMP Low Moss. The protocol prioritises the gritting of the visitor car park and staff car park. The visitor car park, staff car park and access walkways were gritted as a priority that morning. Mr Clements gritted the visitor car park and all pedestrian areas at the front of HMP Low Moss. Mr Yuile gritted the staff car park. Mr Clements and Mr Yuile visually inspected the ground for areas not gritted as they were gritting and then re-gritted those areas. The visitor car park received about two coatings of rock salt. The visitor car park was sufficiently gritted by about 6.30am. The whole external area at the front of HMP Low Moss was gritted by approximately 6.45am. Mr Clements and Mr Yuile then gritted all internal areas within the prison perimeter. The whole establishment was gritted in about one hour. Between about 50 and 70 bags of rock salt, weighing 25kg each, are required to grit the whole of HMP Low Moss.

19. Mr Clements and Mr Yuile both received overtime pay for four hours "winter on-call" work carried out on 24 February 2017. Their main shift for the day on 24 February commenced at 8am.

20. Freezing temperatures and icy conditions were forecast by the Met Office on 23 February 2017 for that day and into 24 February 2017.

21. At 4am on 23 February 2017 the Met Office published a weather forecast for Strathclyde which was valid for broadcast between 6am and 6pm that day. It predicted scattered heavy showers that evening, spreading east overnight before clearing towards

dawn (on 24 February), with minimum temperatures of -2 degrees C. This weather forecast was checked by the defender's Regimes Manager, Allan Burns, on 23 February. At 4pm on 23 February 2017 the Met Office published a weather forecast for Strathclyde which was valid for broadcast between 6pm that day and 6am on 24 February. It predicted scattered further showers in the evening and at night (23 February), a frost and some ice, with minimum temperatures of -2 degrees C.

22. A yellow weather warning for ice was issued by the Met Office late afternoon on 23 February 2017 for the area including HMP Low Moss. It stated that icy stretches would be expected on untreated roads and pavements during the evening of 23 February, the early hours of 24 February and into the morning of 24 February.

23. On 23 February 2017 it rained heavily in the area including HMP Low Moss. Most of the rain fell in the morning. The rain would have resulted in a wet surface with some standing water (small puddles) present on the ground surface. The rainfall on the afternoon of 23 February in the area was slight. There was no heavy rainfall there after 3pm. There was no recorded rainfall between about 3pm and about 5pm. Between about 6pm and about 7pm there was rain of moderate intensity in the area. There was no recorded rainfall in the area after about 7pm on 23 February.

24. It did not rain in the area including HMP Low Moss until about 14.00 hours on 24 February 2017.

25. The said wet ground surface and freezing temperatures would have caused ground frost and icy patches to form in the post code area including HMP Low Moss from about 20.00 hours to 21.00 hours onwards on 23 February 2017 if it was in its natural state without any human influence such as traffic. About 100 people entered and left the prison between 8pm and 9pm. The prison was then locked at 9pm until it opened again the next morning at

about 6.15am for the early operational staff in preparation for the prison opening again at 7am for the normal residential staff coming in. The development of some icy patches was delayed as a result of the staff changeover between 8pm and 9pm. They started to develop at some point after 9pm on 23 February but they did not become significant until the early hours of 24 February.

26. The staff car park, visitor car park and access walkways are first order of priority areas for gritting at HMP Low Moss.

27. HMP Shotts and HMP Barlinnie also have a system of prioritisation for gritting.

28. HMP Barlinnie also prioritises external areas for gritting.

29. The defender did not provide the pursuer with personal protective equipment.

30. The protocol includes the following: "It will be the Industrial staff's responsibility to grit all roads, paths internally and externally before the end of each shift 1530 – 1600 (Monday – Friday) if frost or snow is expected overnight. This should limit the call outs required by backshift and night shift managers, with the exception of when rain or snow has occurred after the staff have gritted." On 23 February 2017 frost was forecast to occur overnight into 24 February 2017. The car park where the said accident occurred was not gritted before the end of the shift 1530 – 1600 hours on 23 February 2017.

31. Number 6/3 of process is the defender's risk assessment for the main car park (general use by vehicles and pedestrians) at HMP Low Moss dated 20 January 2012. The main car park comprises both the staff car park and the visitor car park. The risk assessment is reviewed annually. It was a suitable and sufficient risk assessment as required by regulation 3 of the Management of Health and Safety at Work Regulations 1999 ("the 1999 Regulations"). It is not possible to completely eliminate the risk of a slip on ice. The

protocol was devised to reduce to an acceptable level the risk of persons slipping on ice at HMP Low Moss.

32. Numbers 6/8/1 and 6/8/2 of process are photographs of the car parks at HMP Low Moss and of the entire establishment. Number 5/13 of process is also a photograph of the said car parks and the establishment.

33. Number 6/2 of process is the defender's Standard Operating Procedure for HMP Low Moss.

Finds in fact and law:

(1) That the defender exercised reasonable care for the safety of the pursuer.

(2) That the defender did not breach the Workplace (Health, Safety and Welfare) Regulations 1992, the Personal Protective Equipment at Work Regulations 1992 or the Management of Health and Safety at Work Regulations 1999.

(3) That the pursuer not having suffered loss, injury and damage through fault and negligence on the part of the defender, or those for whom they are liable, the defender is entitled to be absolved of liability.

Therefore, assoilzies the defender from the craves of the initial writ; finds the pursuer liable to the defender in the expenses of the action as taxed; appoints an account thereof to be given in and remits the same when lodged to the auditor of court to tax and to report.

NOTE

Introduction

[1] This is a personal injury action in which the pursuer seeks an award of damages in respect of injuries sustained by her when she slipped and fell in the visitor car park at HMP Low Moss.

[2] In summary, the pursuer's case on record is that, at about 7.15am on 24 February 2017, she was working as a support worker at HMP Low Moss and that, as she was making her way back to her car in the visitor car park at the end of her shift, she slipped and fell on ice on the ground, as result of which she suffered loss and injury. Her primary position was that, although there had been rain, snow, ice and freezing temperatures on 23 and 24 February, the car park had not been gritted, sanded or otherwise treated, that no steps had been taken to remove the ice on the ground of the car park and that if the defender had followed its gritting policy, the pursuer's accident would not have occurred. Her *esto* position was that, if the car park had been gritted, the defender's employees did not adequately grit the car park and that they had left large areas of it not gritted. The pursuer averred that her claim was based on the defender's breach of its statutory duty under Regulation 12 of the 1992 Regulations and Regulation 3 of the 1999 Regulations. It was also based on the defender's vicarious liability for the actions and omissions of the defender's employees. It was also averred that the defender had failed to institute and maintain a reasonably safe place of work for the pursuer in terms of its common law duty. The pursuer did not insist on her case under reference to the Personal Protective Equipment at Work Regulations 1992.

[3] The defender denied liability. It admitted that certain duties of care were incumbent on the defender, but explained that these duties were fulfilled. If the defender was liable to

the pursuer, the accident was caused or at least materially contributed to by fault and negligence on the part of the pursuer.

[4] Two joint minutes agreeing certain matters were lodged. They were numbers 25 and 33 of process. Quantum was agreed at the sum of £3,250 inclusive of interest and net of recoverable benefits in terms of the Social Security (Recovery of Benefits) Act 1997 to the date of the proof. I was told by parties that they were agreed that the second joint minute should be regarded as replacing two notices to admit and corresponding notices of non-admission, numbers 29, 30, 31 and 32 of process. There were also an initial notice to admit and a notice of non-admission, numbers 17 and 19 of process which had been lodged at an earlier stage. These were accordingly not founded upon by either party. The proof was, therefore, restricted to the question of liability. The evidence was led over six days between 14 May 2019 and 16 July, followed by a day for submissions on 5 August 2019. Both parties lodged comprehensive written submissions and these were supplemented by oral submissions, all of which I have taken into account. I have addressed all the points raised in so far as I have considered them to be relevant to the issues requiring to be resolved in this case. I am indebted to agents for both parties for the care and trouble they took both during the proof and in their careful and detailed submissions.

[5] The matters agreed in the joint minute are included in the findings-in-fact so far as I have considered it appropriate to do so. Both parties helpfully suggested certain findings-in-fact. However, the findings-in-fact I have made are limited to findings in relation to factual matters which I have considered to be relevant.

[6] The pursuer gave evidence on her own behalf and led evidence from Mr John McSharry, Ms Karly Stewart, Dr Richard Wild and Mr Alexander Taggart. The defender led

evidence from Mr Craig Clements, Mr Angus Yuile, Mr Allan Burns, Mr Eddy Davidson, Mr John Hardie and Mr Sergio Buonaccorsi.

[7] Evidence about a number of matters such as the layout and photographs of HMP Low Moss, and equipment there, and the weather forecasts for 23 and 24 February 2017 was not in dispute. There was also no dispute that the pursuer slipped and fell in the visitor car park on the morning of 24 February 2017. However, there were areas of dispute about certain aspects of the case, including the question of the inferences to be drawn from some of the evidence. The principal areas of factual dispute were in relation to the timing of the pursuer's slip and the gritting of the visitor car park. There were also other, more minor, matters in dispute. I have referred to these where I have considered them to be relevant.

[8] The expressions "gritted" and "salted" were used interchangeably in the course of the evidence. As explained by Allan Burns for the defender, the salt used at HMP Low Moss is a white salt grit, and not the sandy grit used on roads. Number 6/7 of process shows a bag of the de-icing salt used. There was no suggestion that the salt itself was other than appropriate material for use at HMP Low Moss.

The averments

[9] The pursuer averred in statement of fact 4:

> "On or about 24 February 2017, at or around, 7.15am, the pursuer was working in the course of her employment with Ailsa Response, 32 Cheapside Street, Glasgow, G3 8BH as a Support Worker. The pursuer was based at HMP Low Moss, Crosshill Road, Bishopbriggs, Glasgow, G64 2PZ. HMP Low Moss was owned, operated, occupied and maintained by the defender at the material time. The pursuer had been making her way from the entrance door at HMP Low Moss to the visitor car park. The pursuer had parked her motor vehicle in the visitor car park. HMP Low Moss is the pursuer's workplace in terms of the Workplace (Health, Safety & Welfare) Regulations 1992. At the material time, the pursuer had stepped off of the pavement and onto the road within the visitor's car park at HMP Low Moss. The pursuer was accompanied by her work colleague, John McSharry. Freezing temperatures

occurred on the night of 23 February 2017. The freezing temperatures continued throughout the night into the morning of 24 February 2017. Rain, sleet, snow, ice and freezing temperatures occurred on 23 February 2017 and 24 February 2017. The defender knew or ought to have known of these weather conditions on 23 February 2017 and 24 February 2017. The defender ought to have carried out gritting which would have been effective in these weather conditions. There was ice on the ground of the visitor car park at the time of pursuer's accident. The ground of the visitor car park was slippery underfoot. The pursuer slipped on ice on the road of the visitor car park at HMP Low Moss. She fell to the ground. As a result of the accident, the pursuer suffered loss and injury…The defender was under a duty to comply with Regulation 3 of the Management of Health & Safety at Work Regulations 1999. The defender is under a further duty to comply with Regulation …12 of the Workplace (Health, Safety & Welfare) Regulations 1992. The ground of the visitor car park was covered in ice at all material times. The ground of the visitor car park had not been gritted, sanded or otherwise treated. No steps had been taken by the defender to remove the ice on the ground of the visitor car park. No warning was given to the pursuer of the presence of ice in the visitor car park. Given the weather conditions and freezing temperatures, it would have been reasonably practicable for the car park to have been gritted. The defender knew, or ought to have known, of persons using the car park at the time of the pursuer's accident. The gritting policy of the defender states that on call staff are to be called in during inclement weather when gritting is required. The gritting policy of the defender states that on call staff are to be contacted by the night shift manager at approximately 5am in icy weather. It would have been reasonably practicable for on call staff to be contacted by the night shift manager earlier than 5am. It would have been reasonably practicable for the nightshift manager to carry out a dynamic risk assessment of the weather throughout the night. The areas to be gritted or cleared of snow include the visitor car park. Had this policy been followed and the gritting carried out, the pursuer's accident would not have occurred. HMP Low Moss has no system of prioritisation in terms of gritting. The defender knew or ought to have known of the size of the area within which they require to grit. It would have been reasonably practicable for the defender to have a system of prioritisation in place. HMP Shotts has a system of prioritisation for gritting in place. HMP Barlinnie prioritise external areas for gritting. HMP Barlinnie prioritise the gritting of the main avenue; footpaths; all car parks and the entrance to the prison. It would have been reasonably practicable for the defender to provide the pursuer and the defender's employees with a gritted designated traffic route to follow to their vehicles safely in winter weather. It would have been reasonably practicable for the defender to prioritise an exit route from HMP Low Moss for gritting… It would have been reasonably practicable for the defender to allow the pursuer to use the staff car park. Employees of the defender use the staff car park at HMP Low Moss. The pursuer was not allowed by the defender to use the staff car park at HMP Low Moss. It would have been reasonably practicable for the pursuer to have been told by the defender that the car park had not been gritted. It would have been reasonably practicable for the defender to use suitable gritting material for the weather conditions on 24 February 2017. It would have been reasonably practicable for the defender to carry out a dynamic risk assessment of the weather conditions. The defender knew or ought to have known

> of staff entering and exiting HMP Low Moss at the time the pursuer's accident occurred. The defender failed to take all reasonable and practicable steps to prevent the pursuer's accident from occurring…"

In relation to her own actions at the material time, the pursuer averred:

> "Explained and averred that the pursuer had taken reasonable care for her own safety. The pursuer had paid close attention to the underfoot conditions. The pursuer was wearing trainers at the material time. She was holding onto John McSharry's arm as she walked from the prison entrance to the visitor car park. She did so as a result of the ice on the pavement from the prison entrance and on the road of the visitor car park. She was taking baby steps prior to her fall. She was carefully watching where she placed her feet prior to the fall. The pursuer could not have taken any other reasonable steps to have prevented her accident from occurring…"

The pursuer also averred:

> "Esto, had the visitor car park at HMP Low Moss been gritted at the time of the pursuer's accident (which is denied), the defender's employees did not adequately grit and had left large areas of the car park not gritted. Had the visitor car park at HMP Low Moss been gritted at the time of the pursuer's accident (which is denied), it would have been reasonably practicable for the defender to make the gritting universally effective. Had the visitor car park at HMP Low Moss been gritted at the time of the pursuer's accident (which is denied), it would have been reasonably practicable for Craig Clements and Gus Yuile to check the visitor car park for areas not gritted and grit those again. Had the defender carried out said reasonable and practicable measures, the pursuer's accident would not have occurred."

[10] In statement of fact 6 the pursuer averred:

> "The pursuer's claim is based on the defender's breach of their statutory duty under Regulation… 12 of the Workplace (Health, Safety & Welfare) Regulations 1992; Regulation 3 of the Management of Health & Safety at Work Regulations 1999.... The pursuer's claim is based on the defender's vicarious liability for the actions and omissions of Craig Clements and Gus Yuile. The defender also failed to institute and maintain a reasonably safe place of work for the pursuer in terms of their common law duty…"

[11] The defender averred in answer 4:

> "Admitted on or about 24 February 2017, the pursuer was working in the course of her employment with Ailsa Response, 32 Cheapside Street, Glasgow, G3 8BH as a support worker. Admitted the pursuer was based at HMP Low Moss, Crosshill Road, Bishopbriggs, Glasgow G64 2QB. Admitted HMP Low Moss was owned, operated, occupied and maintained by the defender at the material time. Admitted the pursuer had been making her way from the entrance door at HMP Low Moss to the visitor car park. Admitted the pursuer had parked her motor vehicle in the

visitor car park. Admitted the pursuer was accompanied by her work colleague, John McSharry. Admitted freezing temperatures occurred on the morning of 24 February 2017. Admitted the pursuer slipped and fell to the ground. Admitted the accident was reported to the defender. Quoad ultra denied. Explained and averred that the defender carried out a suitable and sufficient assessment of the risks arising from cold weather, snow and ice. The defender has a protocol for dealing with snowy and icy weather conditions during winter ("the Winter Protocol"). The Winter Protocol provides that where icy conditions develop during the night, on-call staff should be called at 05:00 to attend HMP Low Moss ("the establishment") and grit all external areas, including the visitor car park. The salt that is used in the gritting process has no effect during rainy conditions. Gritting is not carried out when it is raining. It was raining on 23 February 2017. HMP Low Moss was not gritted on 23 February 2017. Freezing temperatures did not occur on the night of 23 February 2017. During the early hours of 24 February 2017, the defender's nightshift manager, Eddy Davidson, patrolled the external areas of the establishment. Eddy Davidson carried out a dynamic risk assessment of the weather conditions. Eddy Davidson identified that icy conditions had developed in and around the establishment. At 05:00 on 24 February 2017, the defender's night shift manager, Eddy Davidson, phoned on-call staff, Craig Clements and Gus Yuile, to attend the establishment to grit the ice. Craig Clements and Gus Yuile had extensive experience of gritting the establishment. Craig Clements and Gus Yuile are trained in the operation of the vehicles used in the gritting process. At or around 05:55, Craig Clements and Gus Yuile arrived at the establishment. Shortly thereafter, at or around 06:20 to 06:30, Craig Clements and Gus Yuile began gritting the main car park and visitor car park. The main car park and visitor car park were gritted as a priority. The main car park was gritted by Gus Yuile. The visitor car park was gritted several times by Craig Clements. The gritting of the main car park and visitor car park was completed within around 15 to 20 minutes. The visitor car park was adequately gritted prior to 07:00. The pursuer slipped at some point after 07:00. The pursuer slipped at some point between 07:35 and 07:50. The visitor car park was gritted prior to the pursuer slipping. The salt used to grit the establishment was suitable. The gritting of HMP Low Moss on 24 February 2017 was done in accordance with the Winter Protocol. No-one else slipped on ice at HMP Low Moss on 24 February 2017. The slip was not reported to the defender on the 24 February 2017. The pursuer delayed in reporting the slip. When the slip was reported, neither the pursuer nor Mr McSharry reported that the visitor car park had not been gritted on 24 February 2017. The pursuer ought to have taken reasonable care for her own safety. The pursuer ought to have worn appropriate footwear for icy conditions. It was not the defender's responsibility to provide the pursuer with appropriate footwear. The pursuer ought to have paid close attention to the underfoot conditions. Had she done so, she would not have slipped and suffered an injury."

[12] In answer 6 the defender averred:

"Admitted that certain duties were incumbent upon the defender under explanation that the defender fulfilled those duties. Quoad ultra denied. Explained and averred that the defender assessed the risks of snowy and icy weather conditions. The

Winter Protocol exists to, inter alia, minimise the risk of slips on ice. The Winter Protocol was correctly followed by the defender on the morning of 24 February 2017. The defender exercised reasonable care in the gritting of HMP Low Moss on 24 February 2017. The defender took all reasonably practicable precautions to minimise the risks of icy conditions on the morning of 24 February 2017…Esto the pursuer's accident was caused by the fault of the defender (which is denied), it was materially contributed to by the pursuer's own fault."

Statutory provisions

[13] Section 69 of the Enterprise and Regulatory Reform Act 2013 ("the 2013 Act")

provides:

"69 - Civil liability for breach of health and safety duties

(1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7)…
(3) For subsection (2) substitute—
"(2) Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
(2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions)."

[14] Regulation 12 of the Workplace (Health, Safety and Welfare) Regulations 1992

provides:

"12.— Condition of floors and traffic routes

(1) Every floor in a workplace and the surface of every traffic route in a workplace shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used.
(2) Without prejudice to the generality of paragraph (1), the requirements in that paragraph shall include requirements that—
(a) the floor, or surface of the traffic route, shall have no hole or slope, or be uneven or slippery so as, in each case, to expose any person to a risk to his health or safety; and
(b) every such floor shall have effective means of drainage where necessary.
(3) So far as is reasonably practicable, every floor in a workplace and the surface of every traffic route in a workplace shall be kept free from obstructions and from any article or substance which may cause a person to slip, trip or fall."

[15] Regulation 3 of the Management of Health and Safety at Work Regulations 1999 provides:

> "3.— Risk assessment
>
> (1) Every employer shall make a suitable and sufficient assessment of…
>
> (b) the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking, for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions…"

[16] Regulation 4 of the 1999 Regulations provides:

> "4. - Principles of prevention to be applied
>
> Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations."

[17] Schedule 1 to the 1999 Regulations specifies the following principles:

> "(a) avoiding risks;
> (b) evaluating the risks which cannot be avoided;
> (c) combating the risks at source;
> (d) adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
> (e) adapting to technical progress;
> (f) replacing the dangerous by the non-dangerous or the less dangerous;
> (g) developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
> (h) giving collective protective measures priority over individual protective measures; and
> (i) giving appropriate instructions to employees."

Objection renewed

[18] An objection by the defender to evidence given by Mr Taggart on 16 May 2019 was renewed. This was in relation to whether gritting ought to have been carried out on 23 February 2017, the day before the pursuer's accident. In short, the objection was on the

basis that there was no record. The objection commenced at page 21, line 21 of the transcript for 16 May. I allowed the evidence subject to all questions of relevancy and competency at pages 32 and 33 of the transcript. In renewing this objection, the defender submitted that the following passages should be excluded from probation: page 68, line 18 to page 74, line 23; page 75, lines 15 to 17; page 76, lines 10 to 18; page 84, lines 6 to 9, lines 11 and 12 and lines 19 to 25; page 85, lines 50 to 10 and lines 13 to 15; page 99, line 21 to page 101, line 12; page 102, lines 12 to 18; page 106, line 16 to page 107, line 3; page 112, line 23 to page 113, line 13; page 118, lines 18 to 21; page 175, line 21 to page 179, line 17; page 182, line 17 to page 184, line 20; page 188, line 5 to page 192, line 6; and, in the transcript for 17 May 2019, page 7, line 12 to page 9, line 18; and page 27, line 1 to page 32, line 18.

[19] I was told that, on 5 February 2019, the Court had allowed a minute of amendment on behalf of the defender, number 16 of process (later number 22 of process as adjusted), to be received, that answers were lodged on behalf of the pursuer (number 21 of process), that a period of adjustment then followed and that, at a Chapter 18.3 Hearing on 11 March 2019, the pursuer had sought to add to their answers although late. They had sought to add the following averment: "it would have been reasonably practicable for the defender to have pre-gritted the visitor car park on 23 February 2017". The late adjustments were not allowed. The record was therefore amended without this.

[20] The pursuer invited the court to repel the objection. She submitted that there were sufficient averments on record to provide a basis for the evidence to which objection had been taken. She first of all relied on the following averments in statement of fact 4:

> "Rain, sleet, snow, ice and freezing temperatures occurred on 23 February 2017 and 24 February 2017. The defender knew or ought to have known of these weather conditions on 23 February 2017 and 24 February 2017. The defender ought to have carried out gritting which would have been effective in these weather conditions."

[21] In the second place, the pursuer pointed to the following averments on behalf of the defender in answer 4:

> "The salt that is used in the gritting process has no effect during rainy conditions. Gritting is not carried out when it is raining. It was raining on 23 February 2017. HMP Low Moss was not gritted on 23 February 2017."

The pursuer had denied these averments.

[22] Macphail on Sheriff Court Practice (3rd Ed), at paragraph 16.70 reads as follows:

> "The object of examination-in-chief is to elicit from the witness evidence in support of that party's case and in anticipation of or reply to his opponent's case".

The pursuer submitted that, on the basis of the defender's case alone, the pursuer ought to be able to put the defender's case to the witness, namely that gritting was not carried out on 23 February 2017 and to ask whether rain would have prevented gritting from taking place on that day.

[23] In my view, the averments founded upon by the pursuer in statement of fact 4 provided a sufficient basis for the evidence to which objection was taken by the defender. The content of the proposed adjustments which were not allowed late in March did not greatly assist; the question is whether the existing averments did or did not provide a sufficient basis for the evidence. In my assessment, they did. But, even if I am wrong about that, I also take the view – under reference to Macphail at paragraph 16.70 – that the pursuer's second point was well-founded. The defender itself in answer 4 raised the issue of the establishment not being gritted when there are rainy conditions as the salt used has no effect in such conditions and that there had been such rainy conditions on 23 February and so gritting had not taken place that day. I therefore repel the objection.

The witnesses – summary

Pursuer's case

[24] The pursuer told the court that she had left work at some point between 7am and 8am after finishing her overnight shift at the prison. She left with her colleague, John McSharry. She was making her way to her car in the visitor car park. The ground was frozen. It was icy and slippery underfoot. The area leading from the prison to the visitor car park and the car park itself had not been gritted. Shortly before reaching her car she slipped and fell on the road. She reported her accident to the defender when she went back to work about a week later.

[25] Mr McSharry is a work colleague of the pursuer. He was working the same night shift on the days in question. He and the pursuer would usually arrive early for the handover. At the end of the shift they had both started heading out from the main entrance of the prison at about 7.35am. There was very noticeable ice on the ground outside the front door of the prison. It was "slippy". It was hazardous. The pursuer took his arm the whole way to the car park until she slipped and fell. She would not usually take his arm. They walked towards the car park where their cars were parked. As soon as the pursuer stepped off the zebra crossing and onto the tarmac of the car park itself "she went up in the air". When asked if he had seen any salt on the ground of the visitor car park that morning, he replied "…Certainly there was none whatsoever." There had been heavy rain during the night and it started to freeze very quickly. The whole road of the visitor car park was "a sheet of ice". That was the road that the pursuer had stepped onto and where she slipped and fell. When asked what had caused her to fall, he replied: "The road was un-gritted. It's as simple as that." In cross-examination, he said that it had stopped raining between about

4am and 5am on 24 February and that he had seen icy conditions begin to develop at about 5am.

[26] Carly Stewart is the office manager for Ailsa Response, the agency by which the pursuer is employed. She gave evidence about the pursuer's shift pattern.

[27] Dr Richard Wild, meteorologist, is employed by WeatherNet, a private meteorological company. He gave his evidence on commission before a commissioner. In this case, he prepared the reports, numbers 5/20 and 5/24 of process. The difference between the two was that the latter was amended to include weather forecasts and weather warnings issued at the time of the accident. His reports cover the G64 2PZ post code area. This is the post code area for HMP Low Moss. It relates to the weather in this post code area on 23 and 24 February 2017.

[28] Alexander Taggart is director of Adams Consulting Group Health and Safety Consultancy Services. He is a chartered health and safety consultant. He reviews risk assessments and health and safety management plans, and carries out accident investigations on a daily basis. He is involved in the reviewing of winter service plans for large organisations as part of the overall health and safety management plan for an organisation. He is also involved in the development of winter service plans. The development of winter service plans involve the carrying out of a risk assessment. The winter service plan would thereafter be developed based on the evaluation of risk. The winter service plan would be the control measure in place to eliminate the risk or reduce it to an acceptable level. In relation to this case, he prepared the report, number 5/25 of process.

Defender's case

[29] Allan Burns is production and services manager at HMP Low Moss. He held this role as at the date of the accident. He has been trained in relation to conducting and completing risk assessments. He and his colleagues are responsible for all the risk assessments at HMP Low Moss, including the risk assessment at number 6/3 of process. It covers the visitor car park and the staff car park which together comprise the "main car park". The date at number 6/3/2 of process (30.1.2012) was the date when the original assessor (Scott Sidwell, now head of health and safety for the defender) initiated the risk assessment. The risk assessments are reviewed annually unless something has happened that requires him to re-visit the risk assessment. This risk assessment had initially been conducted in 2012 and had been reviewed annually since then. Number 6/1 of process is the winter protocol for HMP Low Moss. He had brought it together in 2012 for the opening of the establishment. It is reviewed annually. It deals with members of staff responsible for call-outs for ice and snow. "Regime staff" and "industries staff" are staff who work in the workshops and in the services and production environment. Mr Clements and Mr Yuile are industries support/regimes officers. They were both on-call at the material time. If there is ice at 5am, the night-shift manager is to call the staff identified as being on-call to ask them to come out to grit the car parks.

[30] Eddy Davidson was night-shift manager at HMP Low Moss on 23 to 24 February 2017. He came on duty at 8.30pm on 23 February and went off duty again at 7.15am on 24 February. If there had been icy conditions when he arrived, he would have reported this. He estimated that about 100 people would have been leaving the prison between about 8pm and 9pm on 23 February, all through the front entrance to the prison. He was not aware of anyone having reported slipping on ice. He secured the prison at 9pm on 23 February. He

then opened the establishment again at between 6.15am and 6.20am on 24 February. This would have been for the early shift operational staff to come on duty in preparation for the opening of the prison at 7am for the normal residential staff coming in. He is familiar with the winter protocol and who to call out if there are icy or snowy conditions. He and two other staff patrol hourly to determine what conditions are like outside and whether to call out staff. It must have been icy on 24 February because he admitted two on-call staff to the prison at 5.55am. He was patrolling outside during the night of 23 February through to 24 February and he had followed the winter protocol by calling out the on-call staff at 5am as he had deemed that there were icy conditions. He did not accept that ice had started forming at the establishment on the evening on 23 February. He was responsible for the safety of the night staff patrolling the establishment. If it had been icy, he would have suspended outside patrols and he did not recall having done that. He confirmed that no-one had reported a slip on ice that morning. If he had had any concerns about icy conditions when he arrived for work at 8.30pm on 23 February, he would have called out on-call staff.

[31] Craig Clements is a prison officer at HMP Low Moss. He is a supervisor and trainer in the waste management workshop. His duties include being one of the out-of-hours on-call staff who are asked to come in to salt or grit. He did not specifically recall the morning of 24 February 2017. However, he could see from number 6/1/4 of process that he and Gus Yuile had been on-call that day. He could also see from numbers 6/1, 6/14, 6/15, 6/16, 6/17, 6/18 and 6/19 of process that he and Mr Yuile had been called out at 5am that day in accordance with the winter protocol to grit which would have been for frost or ice, that they had been allowed entry to the prison at 5.55am and that they had received an ex-gratia payment for four hours overtime work for this. He was confident, on the basis of these documents, that he had "without doubt" been called out to grit that morning and that he

had done this. After arriving at 5.55am, he would have started gritting at the front of the prison at about 06.15am. He then went to grit the visitor car park and Mr Yuile went to grit the staff car park. He would certainly have finished it by 6.30am. Looking at the documentation in relation to the call-out on 24 February 2017, there was no other reason for him and Mr Yuile to be called in other than to grit.

[32] Angus Yuile is also a prison officer at HMP Low Moss. He was on duty on 24 February 2017. He was a regimes officer in the waste management workshop. He is one of the on-call staff for the winter protocol. He did not now remember the morning of 24 February 2017. However, the winter protocol rota showed that he had been on call that day. On the basis of the winter protocol, the night shift log showing that industries staff had been called out at 5am and that HMP Low Moss had been opened at 05.55am to let them in and a diary entry by George Borden, he agreed that he and Mr Clements had been called in to grit due to ice. He had no reason to doubt this. He was paid an on-call allowance which was overtime and meant that he had been called out. When he is called out with Mr Clements, they always do the task in the same manner without fail.

[33] John Hardie is the Health & Safety and Fire Co-ordinator at HMP Low Moss. He completed the Accident at Work Report Form (AWRF), number 6/19/4-6/19/7 of process, on 3 March 2017. The Immediate Accident Investigation Report (IAIR), number 6/19/1-6/19/3 of process was completed partly by him and partly by Mr Sergio Buonaccorsi, on 14 March 2017. He was first made aware of the accident about a week after it had happened. Once it had been brought to his attention, he coordinated an investigation. He had sent the IAIR to the manager responsible at the time, Mr Buonaccorsi, who completed the parts Mr Hardie had not been able to complete. The section headed "H&FSO's comments" was completed by Mr Hardie. His enquiries confirmed that the visitor car park had been gritted before the

accident. Because he was not told about the accident until a week after it happened, he could neither confirm nor deny the pursuer's fall. No other slip in the car park on 24 February had been reported to him.

[34] Sergio Buonaccorsi is a prison officer and first line manager at HMP Low Moss. As at 24 February 2017 he was the first line manager for the front of house, reception area, of the prison. He started work that day at 6.30am. He did not slip on ice on arrival and did not recall seeing any ice that morning. Mr Buonaccorsi was made aware of the pursuer's accident by John Hardie about a week after it had happened. He confirmed that he jointly completed parts 4 through to 7 of the IAIR, number 6/19/1-6/19/3 of process, with Mr Hardie.

Submissions – summary

***Pursue*r**

[35] The court was invited to grant decree for payment by the defender to the pursuer in the agreed sum of £3, 250 net of recoverable benefits, with interest thereon at 8% from the date of decree.

[36] It was submitted at the outset that:

- the defender owed to the pursuer duties of care at common law, the standard of which is also determined by statutory regulations;
- the defender breached those duties; and
- the defender's breach of duty caused loss, injury and damage to the pursuer.

[37] The pursuer was a credible and reliable witness. Her evidence was supported by the evidence of Mr McSharry and should be accepted. The witnesses led on behalf of the pursuer were similarly all credible and reliable witnesses whose evidence should be

accepted. It was confirmed on behalf of the pursuer that the pursuer's primary position was that, as averred on record in statement of fact 4, the visitor car park had not been gritted or otherwise treated and that no steps had been taken by the defender to remove the ice on the ground there. I was told that the pursuer's alternative, fall-back, position was that, as averred towards the end of statement of fact 4, the defender's employees did not adequately grit the visitor car park and had left "large areas" of the car park not gritted and that it would have been reasonably practicable for Mr Clements and Mr Yuile to "check the visitor car park for areas not gritted and grit those again". The pursuer's submissions used such formulations as: "the area where the pursuer slipped" and "the area on which the pursuer slipped".

[38] In relation to the defender's witnesses, the pursuer invited the court to find that each of them was "at the very least unreliable", with the exception of Mr Hardie whose evidence was described as being of no assistance. I was reminded that there was no CCTV evidence of the visitor car park and that there were no records kept of such matters as when the gritting commenced and ended, how much salt was used and of whether "the area where the pursuer had slipped" was gritted.

[39] In relation to the existence and scope of the defender's duty, the defender owed to the pursuer a duty of care at common law (which I understood the pursuer to accept was a duty of reasonable care). The standard of care is also regulated and defined by the defender's duties under statutory regulation. Regulation 3 of the 1992 Regulations confirms that those regulations are to apply to every workplace with certain exceptions. The defender's premises at HMP Low Moss do not fall within any of the exceptions as set out in regulation 3. The 1992 Regulations apply on the basis that the defender had control over the workplace within which the pursuer was working at the material time. Regulation 3(1)(b) of

the 1999 Regulations requires all employers to assess the risks to workers and any others who may be affected by their undertaking. Albeit the pursuer was not employed by the defender, the defender knew of her presence within their premises. The defender therefore had to consider any health and safety risks posed to her whilst working on their premises.

[40] As to the existence of a duty of care, whilst the defender was not the pursuer's employer, the defender's premises were the pursuer's workplace. The defender was in control of that workplace. The defender's duties to his employees are the same as those owed to pursuer. In this case, the duty of care incumbent on the defender was a duty to take reasonable care to provide a safe place of work.

[41] The scope and extent of that duty to take reasonable care is defined by a series of statutory health and safety regulations. In this case, the defender's duty of care is defined by the obligations and requirements upon the defender under Regulation 3 of the 1999 Regulations (as to risk assessment) and Regulation 12(3) of the 1992 Regulations (as to the condition of floors and traffic routes).

[42] As to the applicability of the regulations, as a result of section 69 of the 2013 Act, a claim cannot be made in damages solely, and as a direct breach, of health and safety regulations. A claim for damages can, now, only be founded upon an employer's breach of their duty to take reasonable care. However, the standard of reasonable care is set and informed by those same regulations. When the Bill for the 2013 Act was being discussed in the House of Lords on 22nd April 2013, Viscount Younger of Leckie stated (HL (Deb), 22nd April 2013, Volume 744 Columns 1324 to 1325):

> "We acknowledge that this reform will involve changes in the way that health and safety-related claims for compensation are brought and run before the courts. However, to be clear and to avoid any misunderstanding that may have arisen, this measure does not undermine core health and safety standards. The Government are committed to maintaining and building on the UK's strong health and safety record.

> The codified framework of requirements, responsibilities, and duties placed on employers to protect their employees from harm are unchanged, and will remain relevant as evidence of the standards expected of employers in future civil claims for negligence."

Lord Faulks, QC, previously Minister of State for Justice, also stated (HL (Deb), 22 April 2013, Volume 744 Columns 1328 to 1329):

> "The aim should surely be to ensure that all reasonable steps are taken to protect the health and safety of employees, but at the same time employers should not be overburdened with unnecessary and elaborate bureaucracy which can be the enemy of enterprise. I accept that this is a very difficult target to hit and I confess to being a little nervous about how much is left to regulation. However, I feel much more confident in saying that the debate, principally in the other place, was positively riddled with hyperbole. Both there and in your Lordships' House the opposition Front Bench used the expression "a near impossible burden" when describing the prospects of a claimant bringing a successful action for injuries at work. I simply do not accept that. A breach of a regulation will be regarded as strong prima facie evidence of negligence. Judges will need some persuasion that the departure from a specific and well-targeted regulation does not give rise to a claim in negligence."

It would, in any event, be incongruous to hold that an employer who was in breach of the regulations, and thereby committing a criminal offence, had taken reasonable care for their employees. The regulations founded upon by the pursuer and their approved codes of practice can be relied upon as an accurate foundation for the standard of care owed by HMP Low Moss at common law.

[43] As to risk assessment, regulation 3 of the 1999 Regulations requires every employer to make a suitable and sufficient assessment of the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him in his undertaking for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions. In terms of regulation 4, in implementing any preventative and protective measures, employers are to do so on the basis of the principles specified in Schedule 1 of the Regulations. Schedule 1 sets out a hierarchy of measures to prevent and control the risk of

injury faced by employees in the course of the employer's undertaking. In complying with the regulation, employers are required to follow these principles, moving down the hierarchy where the earlier principles cannot reasonably practicably be applied. Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. The obligation is on an employer at common law to conduct a suitable and sufficient risk assessment, and thereafter to take suitable precautions against those risks identified by that assessment to avoid injury to employees. There is clear congruence between the common law duty and that imposed under Regulation 3.

[44] Turning to alleged failures in relation to risk assessment, the risk assessment which encompasses the visitor car park at HMP Low Moss is dated 30 January 2012 (number 6/3 of process). This risk assessment is split into two columns: the first is headed "hazards & risks of activity" and the second is headed "existing control measures". The defender did not carry out a suitable and sufficient assessment of the risks which icy conditions posed to those working in the course of their employment at HMP Low Moss. The defender knew or ought to have known of the pursuer's presence at HMP Low Moss and that she would be making her way to and from her vehicle parked in the visitor car park at the start and end of her nightshifts. There was an obvious risk to the pursuer's health and safety when entering and leaving her workplace in icy conditions. A suitable and sufficient risk assessment would have identified a risk of injury to staff and visitors slipping on ice when freezing temperatures had been forecast to occur overnight and a weather warning for ice had been issued if the ground was left untreated until the following morning. This risk was within the knowledge of the defender. There is no mention of "ice" in the defender's risk assessment. It would have been apparent to any employer applying his mind to this activity

on the dates in question that there was a substantial risk of injury in the absence of any control measure such as salting. On the basis of the evidence provided by Mr Taggart, the risk assessment by HMP Low Moss for the visitor car park ought to have identified the hazard, evaluated the risk of the hazard in terms of the likelihood of that risk materialising and the severity of that risk which, in turn, would lead to the identification and design of the control measure. There was no evaluation of risk. No competent control measure can be put in place without evaluation. In the absence of any analysis of the risk, the risk assessment cannot properly identify suitable and sufficient control measures to eliminate or, if not possible, at the very least, in so far as reasonably practicable, to minimise the risk. The employer should take all steps in so far as reasonably practicable to prevent accidents from occurring. This simply did not happen. Had the defender evaluated the risk of the pursuer slipping on ice, such an assessment would have ensured that there was no residual ice in the visitor car park.

[45] The defender ought to have considered that, where a weather warning for ice has been issued after 4pm (after the dayshift finishes), salting should be carried out at the first available opportunity thereafter. The Met Office had identified a risk of ice by issuing the weather warning and, therefore, the defender ought to have identified and acted on this.

[46] As to the condition of floors and traffic routes in terms of regulation 12 of the 1992 Regulations, having regard to the meteorologist and health and safety evidence, there was a real risk that the pursuer would slip as a result of ice if left untreated.

[47] The leading case on the meaning of the words 'reasonably practicable' is *Edwards* v *National Coal Board* [1949] 1 KB 704, CA, in which Asquith LJ set out a "balancing test" at page 712. The defender's duty under regulation 12(3) is not simply to salt some of the pursuer's workplace. The defender ought to have salted all of the workplace the pursuer

was expected to walk upon and as such, the defender ought to have salted the area on which the pursuer had slipped. It is irrelevant that the defender may or may not have salted some parts of HMP Low Moss prior to the pursuer's accident. If it is accepted that the pursuer slipped on ice on a traffic route within her workplace, it would follow that the defender failed to take all reasonably practicable steps to prevent her accident from occurring and failed to keep the workplace safe for persons walking on that workplace. An untreated icy road is hazardous. The area where the pursuer slipped had not been gritted, salted, sanded or otherwise treated. The defender has also failed to demonstrate that it was not reasonably practicable to keep the visitor car park free from ice and, thus, prevent the pursuer's accident from occurring.

[48] As to failures in relation to condition of floors and traffic routes, there is, first of all, the question of knowledge of icy weather conditions. In the first instance, the defender knew or ought to have known of the icy weather conditions forecast on both 23 February 2017 and 24 February 2017. These forecasts had been issued within the public domain and were available to the defender at both 4am and 4pm on 23 February 2017. On both occasions, freezing temperatures were forecast. In addition, a weather warning for ice had been issued by the Met Office on the evening of 23 February 2017. This was in force on the evening of 23 February 2017, throughout the night and into 24 February 2017. Frost and ice began to form at HMP Low Moss on the evening of 23 February 2017 at approximately 8-9pm. The defender's winter protocol outlines that Allan Burns or George Borden would monitor the BBC or Met Office weather website to determine if gritting was required. Mr Davidson indicated that he would establish if it were icy through the patrols that would take place hourly during the nightshift. In any event, the defender was aware or ought to have been aware of the freezing temperatures at the very least from 4am on 23 February

2017. The defender ought to have gritted on 23 February 2017 in these circumstances in terms of its winter protocol.

[49] There is next the question of HMP Low Moss Winter Protocol. The first date to consider is 23 February 2017. It would have been reasonably practicable for the defender to have salted HMP Low Moss, including the area where the pursuer slipped there, on 23 February 2017. The winter protocol outlines that gritting will be carried out before the end of each shift (3.30pm-4pm Monday to Friday) if frost or snow is expected overnight. Freezing temperatures were forecast overnight from 23 February 2017 into 24 February 2017. This was forecast at 4am on 23 February 2017 for Strathclyde. Frost and icy conditions were forecast overnight from 23 February 2017 into 24 February 2017. These conditions were forecast at 4pm on 23 February 2017 for Strathclyde. The defender ought to have known of the issuing of the weather warning for ice on 23 February 2017. The defender failed to follow its own winter protocol on 23 February 2017 and failed to implement a preventative measure to stop ice from forming in the first instance. The defender failed to grit when freezing temperatures were forecast to occur. In relation to the defender's position that gritting did not occur on 23 February 2017 due to rainfall and a forecast of rain, the pursuer's primary submission is that rainfall does not affect the integrity of salt, as supported by Mr Taggart. Salt may only be washed in heavy rain. Mr Taggart's opinion in this respect should be preferred. Slight rain occurred between the hours of 6-7pm on 23 February 2017. This would not have rendered any gritting between 3.30pm and 4pm on 23 February 2017 as ineffective. Heavy rain did not occur after 3pm on 23 February 2017.

[50] There is no instruction not to salt when it is raining or when rain is forecast within any of the winter protocol, HMP Low Moss Standard Operating Procedure or HMP Low Moss Safe System of Work for snow and ice. Most importantly, there is no instruction

within the instructions for use noted on the packaging for the rock salt used at HMP Low Moss not to salt when it is raining or when rain is forecast. HMP Low Moss simply cannot make the decision not to grit due to rainfall or the possibility of rainfall without any investigation showing that rock salt is wholly ineffective during rainfall or when it has rained. Mr Burns conceded that the salt would not have maximum effect.

[51] If it is accepted that salting ought not to have been carried out by defender between 3.30pm and 4pm on 23 February 2017, on the basis of the evidence provided by Mr Taggart, it would have been reasonably practicable for the on-call staff to salt later in the evening on 23 February 2017 given the weather warning issued by the Met Office. The winter protocol provides that on call staff may be called out to salt HMP Low Moss at any time from 4pm until 8am the following morning. In light of the weather warning issued by the Met Office in the evening of 23 February 2017, a call out ought to have been made. It was relatively dry after 7pm on 23 February 2017. This dry period lasted until the afternoon of 24 February 2017. It would therefore have been reasonably practicable for the defender to have called on-call staff to salt HMP Low Moss at any time following 7pm on 23 February 2017. The defender created a significantly higher risk in leaving the visitor car park untreated on 23 February 2017 instead of asking staff to salt, whether between 3.30pm and 4pm or later on in the evening on 23 February 2017. Had gritting been carried out on 23 February 2017, there would have been additional opportunity for the defender to re-grit during the night and on the morning of 24 February 2017. Had gritting been carried out on 23 February 2017, it is unlikely ice would have formed. The risk posed to the pursuer was greater than the inconvenience of the defender gritting on 23 February 2017. No evidence has been led from the defender in respect of limited resources, financial implications of salting to HMP Low Moss or the financial or salting budgeting for on-call.

[52] The second date to consider is 24 February 2017. If it is accepted that it was not reasonably practicable for the defender to have salted the area where the pursuer slipped on 23 February 2017, it would have been reasonably practicable for the defender to have salted the area where the pursuer slipped on 24 February 2017 prior to her accident occurring. According to Dr Wild, ice would have begun to form at HMP Low Moss on the evening of 23 February 2017 at around 8/9pm and would have remained present until 24 February 2017. Mr Davidson ought to have been aware of these icy conditions when he commenced his nightshift at 8.30pm and carried out his hourly patrols. Mr Davidson ought to have been aware of these icy conditions prior to 5am. It would have been reasonably practicable for the on-call staff to have been called out to salt HMP Low Moss prior to 5am on 24 February 2017. The defender would have made little sacrifice in salting the car park earlier than the 5am call out on the basis that the winter protocol allows for on call-staff to be called out to salt at any time between 4.30pm and 8am the following morning. It was estimated by both Mr Yuile and Mr Clements that it would take approximately forty five minutes to one hour to complete salting the full establishment. This would have provided additional opportunity for both Mr Yuile and Mr Clements to re-salt any areas which had been missed. It is possible the tractor misses areas when salting. On Mr Buonaccorsi's own admission, the tractor operates a random scatter process when salting. The defender is aware of the possibility that the tractor may Miss areas and, as such, all reasonably practicable steps should be taken to ensure that the pursuer is not walking over an unsafe floor surface within her workplace. If it is accepted that the area on which the pursuer slipped was icy and hazardous, it would be inconsistent for the defender to be found to have instituted a safe place of work for the pursuer. It is the pursuer's position, supported by Mr McSharry, that the area of road where the pursuer had slipped had not been salted by the defender. Aside

from a diary entry confirming that Mr Yuile and Mr Clements were called to grit and that HMP Low Moss had been opened at 5.55am to allow industries staff to enter, the defender has no contemporaneous gritting records.

[53] As to other reasonably practicable measures, the defender could have taken other such measures to prevent the pursuer's accident from occurring. The defender has failed to demonstrate why it would not have been reasonably practicable to keep the visitor car park free from ice. It would have been reasonably practicable for the on-call staff to have been instructed by the defender to have carried out a competent drive round inspection after salting had been completed. A drive round after salting would have ensured that any areas missed by the tractor were identified and salted thereafter. Had a competent drive round inspection been carried out, it is unlikely that the pursuer's accident would have occurred. It would have been reasonably practicable for the on-call staff to have been instructed by the defender to have carried out a competent walk round inspection after salting had been completed. It was estimated by Mr Yuile and Mr Clements that a walk round inspection of the establishment would take approximately one to one and a half hours to complete. A walk round would have allowed the on-call staff to feel underfoot if any areas had not been salted and allow them to be salted thereafter. Mr Yuile said that on-call is overtime. Overtime is extra hours over and above the basic shift. On-call staff are paid at least four hours overtime for on-call salting. On-call staff would have approximately three hours remaining of their overtime to carry out a drive round and, indeed, a walk round after salting had taken place. It would have been reasonably practicable for the defender to have cordoned off any hazardous areas to prevent the pursuer from walking on them. The area where she slipped was hazardous. It would have been reasonably practicable for the defender to have followed their winter protocol and to have displayed warning signs

advising the pursuer of the hazardous conditions. It would have been reasonably practicable for the defender to have designated de-iced walkways. It would have been reasonably practicable for walkways to have been sanded from the entrance of HMP Low Moss to the visitor car park where vehicles are parked. Mr Clements confirmed that it would be possible to do this. Had the defender taken all of these reasonably practicable steps, it is unlikely the pursuer's accident would have occurred.

[54] As to the question of contributory negligence, the court was invited to find the defender wholly liable for the accident, should the pursuer's evidence be preferred. If the defender is found partly liable, any contributory negligence ought to be assessed at 10%. Even if the defender's evidence is preferred in some respects, the court was still invited to find that the pursuer slipped on ice, that the area where the pursuer slipped was untreated and that the defender failed to take all reasonably practicable steps to prevent her accident from occurring. The pursuer felt it slippy underfoot. She was wearing trainers. She was holding onto her work colleague to steady herself from falling. She was watching where she was placing her feet. There was nothing more she could have done to prevent her accident from occurring apart from remaining within HMP Low Moss until the ice had melted.

[55] Authorities in support of the pursuer's submissions were: *Wilsons and Clyde Coal Co Ltd* v *English* [1938] AC 57; *Boyle* v *Kodak* 1969 1 WLR 661; *Baker* v *Quantum Clothing Group* [2011] UKSC 17; *Gilchrist* v *Asda Stores Ltd* [2015] CSOH 77; *Allison* v *London Underground Ltd* [2008] EWCA Civ 71; *Kennedy* v *Cordia (Services) LLP* 2016 S.C. (UKSC) 59; *Gilmour* v *East Renfrewshire Council* 2004 Rep. L.R. 40, and *Edwards* v *National Coal Board* [1949] 1 KB 704, CA.

Defender

[56] I was invited to grant decree of absolvitor in favour of the defender. The defender's *esto* position was that there should be a finding of contributory negligence to the extent of 50%.

[57] The defender accepts that it owed to the pursuer a common law duty of care, that it is vicariously liable for any negligent acts and omissions of its employees acting in the course of their employment and, that, given that HMP Low Moss was the pursuer's workplace at the material time, it owed to the pursuer duties under the 1992 and the 1999 Regulations. However, a breach of the regulations will not result in civil liability attaching. Liability will only attach if the breach of the regulations would also amount to a breach of the duty of care at common law; or, in other words, if the breach was itself negligent. I did not understand the pursuer to take issue with this.

[58] The pursuer requires to prove that, on 24 February 2017, she slipped on ice in the visitor car park at HMP Low Moss and that the visitor car park had not been gritted prior to her slipping. The term "gritting" referred to the process of spreading rock salt on an icy surface. Should the pursuer fail to establish that point as a matter of fact, she requires to prove that the manner in which the defender approached and completed the gritting of the visitor car park fell below the standard of care required to discharge all duties of care incumbent upon it. The visitor car park at HMP Low Moss was adequately gritted prior to the pursuer slipping, and the defender discharged all duties of care incumbent upon it. Accordingly the pursuer's case must fail.

The gritting of the visitor car park

[59] As regards the timing of the pursuer's slip, the pursuer was working nightshift at HMP Low Moss from 8pm on 23 February to 8am on 24 February 2017. The pursuer stated in evidence that she slipped at approximately 7.15am on 24 February 2017. In a statement dated 10 March 2017, the pursuer stated that the slip occurred at "about 07:50". The pursuer accepted that it was possible this was correct. The pursuer then stated in evidence that the slip occurred sometime between 7am and 8am. Mr John McSharry, the pursuer's colleague and a witness to the incident, stated in evidence that he and the pursuer finished their shift at 7.30am after doing a handover with the incoming day shift. Mr McSharry stated that the pursuer slipped shortly after they exited the prison at 7.35am. It is recorded in the defender's AWRF and IAIR that the incident occurred at 7.15am. The AWRF was completed by Mr John Hardie on 2 March 2017, after a delay in the reporting of the incident. Mr Hardie stated he inserted the incident time as 7.15am on the mistaken assumption that the pursuer's shift finished at 7am. Mr Sergio Buonaccorsi, who jointly completed the IAIR with Mr Hardie, stated the incident time of 7.50am was more likely, given the changeover time with the incoming dayshift. The statement provided by the pursuer two weeks after the incident is likely to contain the most accurate time of the slip. Therefore, on the balance of probabilities, the pursuer slipped at approximately 7.50am.

[60] As regards the attendance of on-call staff on 24 February 2017, the defender operates a winter protocol at HMP Low Moss. The winter protocol shows that the defender's employees, Mr Craig Clements and Mr Gus Yuile, were on-call for out-of-hours gritting and snow clearing during the week commencing 20 February 2017. The duty log of the defender's nightshift manager, Mr Eddy Davidson; the diary entry from 24 February 2017 by Regimes Manager, Mr George Borden; the defender's IAIR stating that gritting began to

6.30am; the defender's work and overtime record containing entries by Regimes Manager, Allan Burns, showing that Mr Clements and Mr Yuile were entitled to an ex gratia payment for "winter on-call" work carried out on 24 February 2017; Mr Clements' and Mr Yuile's application forms for an on-call allowance in respect of hours worked during a call-out on Friday 24 February 2017, and Mr Clements' and Mr Yuile's payslips showing a payment for overtime worked on 24 February 2017 all evidenced Mr Clements' and Mr Yuile's attendance at HMP Low Moss on 24 February 2017. None of these had been disputed. The court was, therefore, invited to find that Mr Clements and Mr Yuile attended at HMP Low Moss at approximately 5.55am on the morning of 24 February 2017 to grit the establishment in accordance with the winter protocol.

[61] As regards gritting of the visitor car park, material contradictions as between the evidence of the pursuer and Mr McSharry cast doubt on the reliability of the accounts provided by both of them. The reliability of the accounts provided by the pursuer and Mr McSharry in relation to the condition of the visitor car park and the surrounding areas had been affected by the incident itself. Neither the pursuer nor Mr McSharry made any reference in their statements to the absence of gritting salt in the visitor car park. This omission was significant. Mr McSharry had contradicted himself, the evidence of the pursuer and the evidence of Dr Wild. For example, in his statement Mr McSharry had referred to the pursuer hitting "some black ice" whereas, in his evidence, he referred to the whole road of the car park as being "a sheet of ice" and "almost like an ice rink". Dr Wild's opinion was that there had been no rainfall during the night of 23 February into 24 February, whereas Mr McSharry said that there had been heavy rain during the night and that it stopped between about 4am and 5am. Mr McSharry also contradicted the pursuer in

relation to where she had slipped. The evidence led on behalf of the defender was to be preferred.

[62] As to the evidence for the defender, the manner in which Mr Clements and Mr Yuile gave their evidence reflected positively upon their credibility. Even although Mr Clements and Mr Yuile could not remember the specifics of the morning of 24 February 2017, in light of the records to which they were referred, they were confident that they attended to carry out gritting. The court should find in fact that they did so grit. Given that they approach the task of gritting in the same manner and in accordance with the protocol each time they are called out to grit the establishment, they were able to describe with a high degree of certainty what they did on the morning in question. Both men spoke to substantially the same process as regards gritting and provided reliable accounts. Mr Clements stated that gritting of the visitor car park would have been completed by 6.30am and Mr Yuile thought that gritting would have been completed by 6.25am. On any view, the gritting was completed prior to the pursuer slipping. Given there was no dispute that untreated icy surfaces are a slipping hazard, it is likely that, had gritting not been carried out, others entering or exiting the establishment would have slipped. Mr Hardie stated there was no record of anyone else slipping in the visitor car park on 24 February 2017. There is no reason to doubt the reliability of Mr Buonaccorsi's account that he was told by Mr McSharry that the visitor car park had been gritted but that there were some little pockets that had remained slippery. This broadly accords with Mr McSharry's written statement of 10 March 2017 in which he stated that the pursuer "hit some black ice". It is, therefore, an account the Court should accept. On the balance of probabilities, the visitor car park and all external and internal areas were gritted on the morning of 24 February 2017 and the gritting of the

visitor car park was completed by approximately 6.30am, substantially before the pursuer slipped at 7.50am.

Whether the defender, in carrying out the gritting, discharged its duties of care

[63] As to the employer's liability at common law, the test of an employer's liability for common law negligence was quoted with approval by the Supreme Court in *Baker* v *Quantum Clothing Group Ltd* [2011] 1 WLR 1003 per Lord Mance at paragraph 9:

> "[T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad…He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent."

[64] An employer is under a duty at common law to provide a safe place of work, so far as is reasonably practicable. However, there is no duty upon the employer to make the place of work absolutely safe so that no accident could possibly occur. Furthermore, the fact that a single person has suffered an injury is not, in and of itself, proof that the workplace was unsafe.

[65] Although an employer has implemented a system to reduce a specific risk, there is not necessarily a duty to take steps in accordance with that system. Systems by their very nature have to cover many eventualities. Consideration requires to be paid to the likely effectiveness of the particular steps in the system to deal with the danger that has arisen. Accordingly, a failure to adhere to a system will not necessarily, without more, lead to a finding of breach of the general duty of care.

[66] An omission will not be deemed negligent unless it is shown that the omission was a thing commonly done by other persons in like circumstances, or it was so obviously wanted that it would be folly in anyone to neglect to provide it. Thus, it does not do to show that something could have been done; rather it is necessary to show that it should have been done, in the exercise of reasonable care.

[67] As to the employer's duties under the regulations, the first regulation is regulation 3 of the 1999 Regulations. The purpose of a risk assessment is to identify whether a particular operation gives rise to any risk to safety and, if so, what is the extent of that risk, and what can and should be done to minimise or eradicate the risk. The risk assessment is a "blueprint for action". However, any failure to carry out a risk assessment can never be the direct cause of an injury. It can only be indirectly causative if it is shown that a hypothetical suitable and sufficient risk assessment would have resulted in a precaution being taken which would probably have avoided the injury.

[68] The second regulation is regulation 12 of the 1992 Regulations. In *Edwards* v *National Coal Board* [1949] 1KB 704, Asquith L.J. said, at page 712:

> 'Reasonably practicable' is a narrower term than 'physically possible' and seems to me to imply that a computation must be made by the owner, in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other; and that if it be shown that there is a gross disproportion between them — the risk being insignificant in relation to the sacrifice — the defendants discharge the onus upon them. Moreover, this computation falls to be made by the owner at a point of time anterior to the accident."

In the Inner House case of *Strange* v *Wincanton Logistics Limited* [2011] CSIH 65A, Lord Eassie, giving the Opinion of the Court, said:

> "…the balancing exercise is ultimately a forensic one. It is for the court to carry out after the event, not the employer before the event, albeit that the court must put itself in the position of the employer before the event, informed by such evidence as to risk and sacrifice as the court considers relevant."

The pursuer's allegations of fault

[69] In relation to the alleged failure to conduct a suitable and sufficient risk assessment, the pursuer led evidence from Mr Taggart. In his view, the defender did not carry out a competent risk assessment, primarily as the risk assessment paperwork did not contain a matrix evaluating (a) the likelihood of the risk of slipping on ice (on a scale of 1 to 10), and (b) the severity of harm should the risk materialise (on a scale of low to high). As the risk had not been evaluated in this manner, it was not possible, in Mr Taggart's view, to implement competent control measures. The defender's risk assessment covered pedestrian usage of the visitor car park. It identified hazards which included "slips/trips", "Temperature (cold)", "access/egress" and "traffic routes". Mr Burns, who reviewed the risk assessment and winter protocol annually, stated that the risk of ice was well understood by the defender and did not require a risk matrix. Mr Burns' annual evaluation of the risk of slipping on ice was considered in the context of the winter protocol being in place. The winter protocol prescribes (i) how the weather conditions are to be monitored, (ii) which staff are on-call at any particular time, (iii) the time at which on-call staff should be contacted when snowy or icy conditions arise out of hours and (iv) which areas are to be gritted, and in what order of priority. Mr Burns stated that the call-out time of 5am for ice was designed to give on-call staff sufficient time to arrive and complete the gritting prior to people going on and off shift at around 7am. With the winter protocol in place, the risk was deemed to be adequately controlled. There was no evidence of any other person slipping on ice at any other time at HMP Low Moss. The defender suitably and sufficiently assessed the risk of persons slipping on ice at HMP Low Moss. There is no duty under the regulations to complete a written risk assessment, far less a duty to complete the risk-scoring matrix envisaged by Mr Taggart. Indeed, the courts have previously expressed reservations about

such an approach for tending to "encourage a mechanistic or 'tick-box' approach, rather than a thoughtful appraisal of risk" and that, "by carrying out the template exercise, an employer or other responsible person may lose sight of the real objective of identifying dangers which should be avoided." What is required is evidence that the employer has thoughtfully considered the risk and implemented appropriate and proportionate control measures to reduce the likelihood of that risk materialising. Taking the risk assessment and the winter protocol together, the defender has done that. Accordingly it has discharged its duties under regulation 3 of the 1999 Regulations. In any event, before liability for a breach of regulation 3 can arise, it must be proved that a hypothetical suitable and sufficient assessment would have identified a precaution which could reasonably have been taken and that, had it been taken, it would probably have prevented the incident.

[70] In relation to the alleged failure to grit adequately and to ensure no icy patches remained, the pursuer submitted that it would have been reasonably practicable to ensure that no icy patches remained throughout the establishment. However, Mr Clements and Mr Yuile who had both had extensive experience of gritting the establishment and been trained in the operation of the gritting tractors – including having received training from the Institute of Groundsmanship on how to grit effectively – explained that rock salt is spread via a rotating mechanism attached to the salt funnel at the rear of the tractor. Mr Clements stated that he would drive around the visitor car park twice, spreading salt across the length of the road and in the car park bays. Mr Clements and Mr Yuile stated that they have a panoramic view from inside the tractors and inspected the ground for unsalted areas as they drove. If an area was missed, it would be salted. The salt comes in 25kg bags, and as many as 50 to 70 bags are used to grit the entire establishment. Mr Burns stated it was "impossible to remove ice 100 per cent" and that there may be "minute patches" that are missed,

therefore the purpose of the winter protocol is to reduce the risk of slipping on ice. Mr Clements stated that it was not possible to get 100% coverage because rock salt is like little crystal stones and, therefore, it would not cover the road surface "like paint". Mr Buonaccorsi agreed that, due to the salt being scattered, it was completely impossible to eliminate the risk. He would anticipate there to be "small pockets", around a couple of inches in size, which may not be salted and may, therefore, remain slippery. There was no suggestion that the rock salt used for gritting, or that the method used for spreading it, was inappropriate. There was no duty to eliminate ice. Whatever any witnesses may have said about this, that did not change the duty which is, in law, a duty to take reasonable care to minimise the risk of slipping on ice. In *McCondichie* v *Mains Medical Centre* 2004 Rep LR 4, a case in which the pursuer had slipped on ice in a car park of a GP Practice, the Lord Ordinary (Drummond Young) accepted that gritting reduces the risk that someone will slip; it does not provide a guarantee it will not occur. The defenders were simply required to minimise the risks, not eliminate them entirely. His Lordship held that the defenders in that case had taken all reasonably practicable steps to make the car park free from ice and indicated that he would accordingly have assoilzied the defenders on that ground if he had held the 1992 Regulations to be applicable. That case was on all fours with the present one. Mr Taggart was promoting a counsel of perfection and a duty of care which ran counter to authority. Mr Clements, a trained and experienced employee of the defender, had been thorough in his efforts to spread salt throughout the visitor car park, and had spread salt in the area in which the pursuer slipped. However, the very nature of the way in which salt is dispersed necessarily entails that some small, residual, icy patches may remain. The presence of such patches is unavoidable and is not an indication of a lack of reasonable care. In the exercise of reasonable care, a post-gritting system of inspection is not required in

circumstances where a reasonable inspection is carried out in the course of the gritting process. This was the defender's recognised and general practice, which had been followed for a substantial period without any evidence of 'mishap'. On that basis, the defender was entitled to follow this system. In following this system, the defender provided the pursuer with a safe place of work and discharged its duty of care. Given the minor quantum of risk, the time and labour associated with a post-gritting inspection was not a reasonably practicable precaution, and was not something which should have been done in the exercise of reasonable care. What the defender decides to pay an employee as reasonable remuneration for being on-call is a matter for them. There is no corresponding duty on an employee to actually grit for four hours.

[71] In relation to the complaint of a failure to grit on 23 February 2017, a Met Office forecast, published at 4am on 23 February 2017, predicted scattered heavy showers through the night and into the morning of 24 February 2017, with minimum temperatures of -2 degrees C. A further forecast, published at 4pm on 23 February 2017, predicted further showers in the evening and at night, with a frost, some ice and minimum temperatures of -2 degrees C. At some point, a yellow weather warning for ice was published. In the opinion of Dr Richard Wild, Forensic Meteorologist, there was heavy rainfall on 23 February, most of which fell in the morning, producing puddles on the ground, followed by lighter showers in the afternoon. A moderately intense shower occurred between 6pm and 7pm. Notwithstanding the earlier rain forecast, Dr Wild's opinion was that there was no measurable rainfall beyond 7pm. Dr Wild stated that icy patches would have started to appear on 23 February 2017 at around 8pm to 9pm in a natural environment, uninfluenced by human contact such as traffic, but would have become more significant in the early hours of 24 February 2017 because the temperatures were lower. Mr McSharry, however, stated

that it was definitely raining during the night, and it did not stop until 5am on 24 February 2017, at which point ice began to develop. Dr Wild was clear that anyone looking at either forecast on 23 February would have expected there to have been rain. Mr Taggart stated that, given ice was forecast, gritting ought to have been carried out on 23 February 2017 to prevent the formation of ice. In Mr Taggart's view, the best time for gritting would have been approximately 8pm to 9pm, after the rain had stopped. A rain forecast should be no barrier to this. Mr Davidson stated that he commenced his shift at 8.30am on 23 February 2017 and that he could not recall icy conditions. He explained that around 100 people entered and left the establishment between 8pm and 9pm and that none of them, to his knowledge, had slipped on ice or made mention of it being icy. Given this human influence and traffic, the development of icy patches at HMP Low Moss may have been delayed until after 9pm. The prison is locked at 9pm and, except in emergencies, no one enters or leaves the prison until at least 6.30am the following morning. The winter protocol provides that Regimes Managers, Mr Burns and Mr Borden, will check Met Office and BBC weather forecasts during the day. If frost or snow was expected overnight, the establishment would be gritted prior to staff going off-shift at 4pm. Mr Burns stated that the establishment was not gritted on 23 February 2017. He stated that the only reason for not gritting when ice is forecast would be if it was raining or if rain was forecast for that evening, as it was, in which event there would be no point in going out to grit either. Mr Burns accepted that this was not written in the winter protocol. However, this practice was understood by all who were involved in the gritting process, and was informed by experience and common sense. In their experience, rain dilutes and washes away gritting salt, thereby rendering it ineffective. Mr Clements described gritting while it is raining, or when rain is forecast, as being "a pointless exercise and a waste of resources." The final sentence of the winter protocol at

number 6/1/1 of process indicates that the defender has contemplated that rain reduces the effectiveness of grit. Scientific investigation into this is not required. The evidence of those with day-to-day experience should be preferred to the evidence of Mr Taggart. The evidence of the defender's witnesses indicated that the effectiveness of gritting salt would be minimal or of no effect in rain.

[72] In *McKeown* v *Inverclyde Council* 2013 SLT 937 the Lord Ordinary (Burns) held that the local authority was under no duty to institute a system of "pre-salting" at a school, partly because intervening weather changes could result in ice re-forming. There was thus no guarantee of the effectiveness of "pre-salting" and, in all the circumstances, such a system was not reasonably practicable. In the Lord Ordinary's opinion, a system of reactive salting starting at 7am, with allocated priorities, would have achieved a reasonable balance between the level of risk and the sacrifice involved in averting that risk. The defender in the present case was under no duty to grit the establishment on 23 February 2017. The pursuer appeared to be viewing matters with the benefit of hindsight. The question of whether it in fact rained during the night is of little relevance; the court must put itself in the position of the defender before the event. Before the event, the Met Office at 4am forecast predicted that heavy rain showers would occur throughout the night. The forecast at 4pm also forecast rain. The defender was entitled to rely upon the Met Office forecast. It was entitled to consider, based on its significant experience, the probable effectiveness of daytime gritting. It is not reasonable to require the defender to grit in circumstances where it is probable that the exercise, which could take over an hour, would require two members of staff, would cause disruption to the prison regime, and would require over a tonne of salt, would be rendered ineffective and would therefore require to be repeated. On one side of the balance is that the risk of slipping on ice after it has been gritted is extremely low. On

the other side of the balance is the time, trouble, labour, resources and probable effectiveness of the pre-gritting precaution. The balance comes down firmly on the side of pre-gritting not being a reasonably practicable precaution in these circumstances, and not being something which the defender should have done. There was sufficient information to allow the court to form the view that there would have been a cost to the defender which would have been wasted. The precaution of re-active gritting around 6.30am was a perfectly reasonable one. In any event, there is no guarantee that any gritting at 4pm on 23 February 2017 would have prevented the formation of ice. It would likely have been rendered ineffective either by the puddles which had been left by earlier heavy rainfall, or by the moderately intense shower which occurred between 6pm and 7pm. Had gritting been carried out between 8pm and 9pm on 23 February 2017 and it did not subsequently rain then, given there is no guarantee that gritting will remove every patch of ice, it necessarily follows that pre-gritting would be no guarantee against icy patches developing. Mr Taggart conceded that pre-gritting provided no guarantee a slip on ice would not occur. The question of whether the defender failed to follow the winter protocol tends to Miss the point. The ultimate question is whether, in what it did, the defender exercised reasonable care.

[73] In relation to the complaint of a failure to grit prior to 5am on 24 February 2017, although it was accepted by the defender's witnesses that the protocol requires on-call staff to be called at 5am where icy conditions develop but that there was provision for staff to be called at any time to grit ice if required, Mr Burns and Mr Davidson explained that there would be no need to call out staff any earlier than 5am because the establishment was locked between 9pm and, except in emergencies, no-one enters or leaves again until around 6.30am. A call out at 5am gave staff sufficient time to arrive and grit the establishment before people

started arriving and leaving. Any ice which came in contact with the salt would have melted before the pursuer slipped. If it did not, this was not foreseeable. Had salt been spread significantly earlier than 6.30am, its effectiveness would be vulnerable to changes in the weather. Further, an earlier call-out would cause undue trouble to the on-call staff. A call-out at 5am was reasonable. An earlier call-out was not reasonably practicable and would not have produced a different result.

[74] In relation to the complaints of a failure to provide designated gritted routes to vehicles and failure to cordon off unsafe areas, the defender was not under any such duties. The car parks and pedestrian areas were thoroughly gritted prior to staff arriving and leaving the establishment in the morning. Accordingly, the entire area was made as safe as was reasonably practicable. It is excessive and unnecessary to then grit individual routes from the entrance of the establishment to each person's vehicle, or to cordon off any area. Further, schedule 1 to the 1999 Regulations provides that collective protective measures should be given priority over individual protective measures.

[75] In relation to the complaint of a failure to warn the pursuer of icy conditions, the pursuer and Mr McSharry were aware of the possibility of ice underfoot. A warning, of any description, would not have produced a different outcome. In any event, the duty to take reasonable care does not extend to the erection of a warning sign warning of the possibility of icy conditions. Its content would in effect be a statement of the obvious: *c.f. Cairns* v *Dundee City Council* 2017 Rep LR 96 (per Lord Woolman at paragraph 21).

Contributory negligence

[76] In the event that liability is established, the pursuer contributed to her own injury to the extent of 50%. The pursuer was wearing trainers, and did not accept that boots were

more appropriate in winter conditions. Mr Clements and Mr Yuile always wore boots when arriving at the establishment in icy conditions and had never slipped. The pursuer ought to have worn boots and, had she done so, the slip might have been avoided. The defender, not being the pursuer's employer and having already sufficiently gritted the car park, was not under any duty to provide the pursuer with appropriate footwear. Furthermore, the fact the pursuer slipped and Mr McSharry did not is evidence that a slip was avoidable.

Concluding submission

[77] The visitor car park was adequately gritted by Mr Clements prior to the pursuer slipping on the morning of 24 February 2017. The pursuer's claim on the basis of vicarious liability therefore must fail. The defender exercised reasonable care in all the circumstances to reduce the likelihood of the slip occurring. It assessed the risk of slips on ice in the visitor car park and implemented a reasonable system to reduce the likelihood of someone slipping on ice. All reasonable steps were taken to reduce the likelihood of someone slipping on ice on the morning of 24 February 2017. In all the circumstances, the defender has discharged its common law duties and its duties in terms of the regulations. The slip was an unfortunate incident, which the defender could not reasonably have prevented.

[78] Authorities cited in support of the defender's submission were: *Cockerill* v *CXK Limited and another* [2018] EWHC 1155 (QB); *Munro* v *Aberdeen City Council* 2009 S.L.T. 964; *Baker* v *Quantum Clothing Group Ltd* [2011] 1 W.L.R. 1003; *Pratt* v *Scottish Ministers* 2013 S.L.T 590; *Morton* v *Dixon* 1909 SC 807; *McKevitt* v *National Trust for Scotland* 2018 Rep. L.R. 76; *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 2; *Uren* v *Corporate Leisure (UK) Ltd* [2011] EWCA Civ 66; *Edwards* v *National Coal Board* [1949] 1 K.B. 704; *Strange* v *Wincanton Logistics Limited* [2011] CSIH 65A; *McCondichie* v *Mains Medical Centre* 2004 Rep LR 4; *McKeown* v

Inverclyde Council 2013 S.L.T 937; *Cairns* v *Dundee City Council* 2017 Rep L.R. 96; *McGahan* v *Greater Glasgow Health Board* 1988 S.L.T 270.

Response for pursuer

[79] In relation to the defender's reliance on what Mr Buonaccorsi said he had been told by Mr McSharry about the car park having been gritted but that there were still some pockets that had remained slippery, the pursuer submitted that very little weight ought to be placed on this evidence on the basis that it had not been put to Mr Buonaccorsi in cross-examination. Generally, the authorities founded on by the defender were fact-specific and, therefore, turn on their own facts. In relation to the submission for the defender about the time, trouble, labour, resources and probable effectiveness of the pre-gritting precaution, the pursuer submitted that human resources were being wasted as they were paid for four hours work but the salting only took about an hour. Sleep disturbance if employees were called out before 5am would be a small price to pay in comparison to the risk of someone slipping on ice. In terms of trouble by way of disrupting the prison regime and the closure of workshops if there was to be salting between 3.30pm and 4pm, Mr Clements had accepted that this had been done previously. No additional effort would require to be made. As to resources, the defender had led no evidence about how much salt cost and any financial implications, or the level of pay in relation to those called out. If staff used the additional three hours of overtime which they were being paid, there would be no additional expense. *McKeown* v *Inverclyde Council* was not in point. In that case, if snow fell and turned to water after gritting had been carried out, it could freeze again. In this case, on the basis of Dr Wild's evidence, there was no measurable rainfall until the afternoon of 24 February and so there would have been no additional moisture for the freezing temperature

forecast for the evening of 23 February into 24 February. The defender appears to accept that, due to the nature of the gritting, areas can be missed and will not be salted. Slipping on these icy patches is therefore foreseeable to the defender. There should therefore have been a post-gritting inspection to ensure that no residual ice remained. If the court did not accept that the risk of slipping on ice should have been eliminated, such a post-gritting inspection would have minimised the risk to the lowest level reasonably practicable. This was not a local authority situation of an uncontrolled environment.

[80] In relation to the defender's submissions about contributory negligence, there was no evidential basis for the contention that boots would have been better for the winter conditions.

The principal areas of fact in dispute

The timing and location of the pursuer's slip

[81] The pursuer's position on record was that, at about 7.15am on 24 February 2017, she slipped on ice as she was making her way to her car in the visitor car park. As to the timing of the accident in her evidence, she could only say that it had occurred at some point between 7am and 8am. However, in her statement given to the defender on 10 March 2017, relatively soon after the accident, she stated that the slip had occurred at about 7.50am and she accepted in evidence that it was possible that this had been correct. Her 12-hour shift had been due to end at 8am. I accepted and agreed with Mr Buonaccorsi that it is more likely that the pursuer slipped at 7.50am than 7.15am bearing in mind that her 12 hour shift was due to end at 8am, with the incoming changeover staff due to come in then. Mr Hardie had mistakenly assumed that her shift had been due to finish at 7am. In all the circumstances, I am satisfied that it is more likely than not that the pursuer slipped at about

7.50am shortly before reaching her car. As to just where the pursuer slipped, the pursuer marked the spot on number 5/12 of process and confirmed in cross-examination that this was a few steps to the right of the zebra crossing on the road of the car park, approximately in front of the second parking bay. However, Mr McSharry was adamant that the pursuer had slipped as soon as she had stepped off the zebra crossing and onto the road of the car park. He marked this as an "x" on number 5/26 of process (which was the same as 5/12 of process). However, it did not seem to me that the difference between them was a material one in the circumstances. Either way, the spot where she slipped was very shortly after she had stepped off the zebra crossing and onto the road there.

The gritting of the visitor car park

[82] The pursuer's primary position on record was that she was making her way to her car in the visitor car park, that the visitor car park had not been gritted, sanded or otherwise treated, that no steps had been taken to remove the ice on the ground of that car park and that she slipped on ice on the road of the car park. Her alternative position was that, *esto* the visitor car park had been gritted at the time of the pursuer's accident (which was denied), the defender's employees did not adequately grit and had "left large areas of the car park not gritted". In her evidence, the pursuer's position was to the effect that both the area leading from the front entrance of the prison to the car park and the car park itself had not been gritted, although in cross-examination she agreed that she had been tired and sleepy at the end of her shift and that, although she could confirm that the area in front of the prison had not been salted, she could not say whether any of the rest of the car park had been salted – but she said that it had "looked slippy". Mr McSharry was firm that there was no salt whatsoever on the ground of the visitor car park, that it was "a sheet of ice" and that it

was "almost like an ice rink" due to heavy rain during the night which had then frozen at about 5am. However, it has to be said that on this issue of heavy rain during the night (of 23 February into 24 February), he was equally firm that there had been heavy rain even although there was no other evidence to this effect, including from Dr Wild. I noted that neither agent invited the court to find that there had been heavy rain during the night. In his evidence, Dr Wild indicated that he would doubt a witness saying it was raining during the night of 23 February and into 24th February when the weather data available to him indicated that it was not. His position was that, if there was any rain during that period, it was not measurable. In the light of this evidence, I think it unlikely that Mr McSharry's recollection about this was correct. I also noted that Mr McSharry's quite dramatic description of the state of the car park and the weather conditions was in marked contrast to the more restrained terms of the account which he gave in the statement to the defender following the accident. In that, he had referred to the pursuer hitting "some black ice", with no mention of the car park being covered in ice and of there being no salt on the ground of the car park. The pursuer had likewise made no mention of the absence of gritting in her earlier written statements in March 2017. Mr McSharry accepted that he too had been tired at the end of his 12-hour shift, but he denied that he was just assuming that, because the pursuer had slipped, there was no salt on the car park road. I would add that the defender confirmed in submissions that it did not dispute that untreated surfaces are a slipping hazard. I noted that the defender did not have a record of anyone else having slipped in the visitor car park on 24 February 2017. If it had been the "sheet of ice" described by Mr McSharry, this might seem surprising.

[83] I have to say that my assessment is that both the pursuer and Mr McSharry were not reliable witnesses in relation to the condition of the car park and the walkway leading to it

from the front of the prison, and that Mr McSharry was in my assessment mistaken in his recollection of there having been heavy rain during the night. I formed the view that the perceptions of both as recalled by each of them in the witness box about the condition of the car park and the walkway leading to it were likely to have been affected by their tiredness at the end of a long shift and by the upsetting trauma of the accident, and that it is likely that they were both assuming that, because the pursuer had slipped on a patch of ice on the road of the car park, the car park – or at least the car park road – had not been salted. In these matters, I am satisfied that both witnesses were mistaken. I have arrived at this view after having heard also from the witnesses led on behalf of the defender including, in particular, Mr Clements and Mr Yuile. Much was made by the pursuer of the fact that there was no CCTV, with no contemporaneous written records of such matters as how, when and where gritting was carried out on 24 February. However, although neither Mr Clements nor Mr Yuile could specifically now remember the precise events of 24 February 2017, it was clearly established to my satisfaction from written records that both had been called out at 5am that day to grit the establishment, that they had been allowed entry to HMP Low Moss at 5.55am, that both had claimed and had been paid overtime payments which fitted with having been called in to grit out-of-hours at 5am for ice. This was coupled with their evidence as to, for example, what they would normally do when called in to grit, which included gritting the car parks at the front of the prison first of all, how long this would take, how Mr Clements would grit the visitor car park, how much salt would be used for this and for gritting the rest of the establishment. It was plain to me that he was called out that morning at 5am to grit and that he had then duly attended and claimed and was paid overtime payments for this. I do not recall it being expressly suggested to him (or to Mr Yuile) that he was being untruthful in indicating to the court that, although he could not

now specifically recall the morning of 24 February 2017, the documentation showed that he was called in to grit and so that is what he would have done. No reason at all was advanced by or on behalf of the pursuer to suggest what else he might have done as an alternative to gritting when called in that morning. As Mr Hardie put it: "why would two long-serving prison officers lie?". The pursuer did not suggest any reason why they should lie, and I am satisfied that they did not. It also has to be said that the logical implication of the pursuer's position is that the claims made by Mr Clements and Mr Yuile for overtime payments for gritting that day would have to have been fraudulently made. This was not expressly asserted on behalf of the pursuer but, for the avoidance of doubt, I am satisfied that this was not what happened on 24 February 2017. Both Mr Clements and Mr Yuile impressed me as being clear and straightforward in their evidence. Each gave his evidence in a careful and measured manner and without exaggeration. I was satisfied that each was a credible and reliable witness.

[84] I am therefore satisfied that Mr Clements and Mr Yuile attended to grit at HPM Low Moss on the morning of 24 February 2017 and that the visitor car park was gritted by Mr Clements at the time, and in the manner, he described and that it had, therefore, been gritted by about 6.30am. This was about one hour and 20 minutes before the pursuer slipped in the car park. The pursuer has, therefore, not proved her primary position on record in relation to the question of gritting. I am also not satisfied that the pursuer has proved, as averred in the alternative, that the defender's employees did not adequately grit the visitor car park and that they had left "large areas" of the car park not gritted. I am only satisfied that it has been proved, on a balance of probabilities, that there was the small patch of ice where the pursuer slipped and that it is likely that this was a small (or "minute" as described by Mr Burns) residual spot, patch or pocket of ice of the nature referred to by

Mr Buonaccorsi (and mentioned in the Defender's Immediate Accident Investigation Report, at number 6/19/2 of process), and that this was in the context of the scattering process used for spreading salt which meant that there was not blanket coverage. Mr Clements described how the salt comes out of the funnel in particles like small stones, "not like paint" but that, if any areas did not have salt covering them – which he thought was unlikely – any such areas would have been a matter of inches.

[85] I agreed with the submission on behalf of the pursuer to the effect that very little weight should be given to Mr Buonaccorsi's evidence about having been told by Mr McSharry about the car park having been gritted but that there were still some pockets that had remained slippery. This was not put to Mr McSharry in cross-examination for his comment. However, if any weight at all fell to be given to it, I would only observe that this might be thought to be more consistent with Mr McSharry having described the pursuer as hitting "some black ice" in his written statement – which might in turn be thought to be consistent with there having been some gritting – rather than the more dramatic description given in his evidence of it having been a sheet of ice.

The law

The regulations and the common law

[86] As I understood it, parties were in effect at one in relation to this, namely that a breach of the regulations does not give rise to a direct cause of action but may found a claim for damages if the breach would also amount to a breach of the duty to take reasonable care at common law, in other words if the breach itself was negligent. I did not understand the defender to take issue with the submission for the pursuer to the effect that the standard of reasonable care is informed by regulations incumbent on the defender.

[87] As to the standard of reasonable care and the test of an employer's liability for common law negligence, I agree with and accept the defender's analysis (summarised at paragraphs [63] to [66] above), no issue having been taken with it by the pursuer. This includes the proposition referred to in *Baker* v *Quantum Clothing Group Ltd, supra,* to the effect that where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, the reasonable and prudent employer is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad.

[88] I am satisfied that regulation 12 of the 1992 Regulations and Regulation 3 of the 1999 Regulations founded upon in the pursuer's statements of fact applied to the factual situation in this case. The defender accepted that it owed duties to the pursuer under these regulations.

[89] As to the employer's duties under regulation 3 of the 1999 Regulations, I understood the parties to be at one that risk assessments are meant to be an exercise by which an employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise or those risks; they are to be a blueprint for action: *Allison* v *London Underground Ltd, supra; Kennedy* v *Cordia (Services) LLP, supra*. I also did not understand the defender's analysis summarised at paragraph [67] above to be disputed. In particular, there was no dispute that any failure to carry out a risk assessment can never be the direct cause of an injury. It can only be indirectly causative if it is shown that a hypothetical suitable and sufficient risk assessment would have resulted in a precaution being taken which would probably have avoided the injury: *Uren* v *Corporate Leisure (UK) Ltd, supra*. I agree with and accept these propositions.

[90] As to the employer's duties under regulation 12 of the 1992 Regulations, both parties founded on the passage in the opinion of Asquith L.J. in *Edwards* v *National Coal Board, supra,* at page 712 (quoted at paragraph [68] above) in relation to the meaning of the words "reasonably practicable". I note, in particular, that "reasonably practicable" is a narrower term than "physically possible" and that the way it was put in *Edwards* was that the balancing exercise fell to be made by the employer at a point in time anterior to the accident – with the onus being on them to do so. In *Strange* v *Wincanton Logistics Limited, supra,* the Inner House held that this balancing exercise was ultimately a forensic one for the court to carry out after the event, not the employer before the event, "albeit that the court must put itself in the position of the employer before the event, informed by such evidence as to risk and sacrifice as the court considers relevant." I have approached matters in this case on this basis.

Analysis

[91] Against this background, the pursuer requires to establish that the defender owed her a duty of care at common law (which the defender accepts) and that, on a balance of probabilities, the defender breached that duty of care by failing to take reasonable care to provide a safe place of work and that this, foreseeably, caused the pursuer's accident. The question, therefore, is whether the defender has demonstrated that it took adequate precautions against the risk of injury and that it was not reasonably practicable to keep the visitor car park "free from ice" or, put another way, whether it would have been incumbent on them to have taken any alternative or additional precautions. The defender maintains that it was not incumbent on it to take any alternative or additional precautions, but the pursuer says that it was.

[92] However, the pursuer's initial contention is that the defender was in breach of regulation 3 of the 1999 Regulations in that it failed to undertake a suitable and sufficient risk assessment. I will, therefore, address this issue first of all below.

Whether the defender's risk assessment was suitable and sufficient?

[93] There was a written risk assessment in the present case. However, the pursuer's position was that it was not a suitable and sufficient one in relation to the risks which icy conditions posed to those working at HMP Low Moss. There was no mention of "ice" in the risk assessment. It failed to identify the hazard and there was no actual evaluation of the risk of that hazard. The pursuer submitted, on the one hand, that in the absence of any analysis of the risk, the risk assessment cannot properly identify suitable and sufficient control measures to eliminate or, if not possible, at the very least, in so far as reasonably practicable, to "minimise" the risk. However, the pursuer also submitted that, if the defender had evaluated the risk of the pursuer slipping on ice, such an assessment would have "ensured" that there was "no" residual ice in the visitor car park. The pursuer placed particular reliance on the evidence of Mr Taggart. Mr Taggart was clearly a knowledgeable and experienced health and safety consultant with much experience of reviewing risk assessments and winter service plans, a winter service plan being the control measure in place to eliminate the risk or reduce it to an acceptable level. His complaint was that there was a control measure in this case (the winter protocol), but not a risk evaluation carried out in the form which he had suggested. At one point, he confirmed that it would be "common practice" for a risk assessment to identify the likelihood and severity of injury occurring. He went on to say that this was a statutory requirement. However, he did not elaborate on this, and I was not pointed to any such statutory requirement in submissions either. Saying that

something is "common practice" is not the same as saying that something is, for some reason, an absolute requirement.

[94] In all the circumstances, I do not accept that it is fair to say that the defender's risk assessment failed to cover the risk of icy conditions. I accept and prefer the submissions on behalf of the defender on this matter. In particular, Mr Burns, who reviewed the risk assessment and winter protocol annually, stated that his annual evaluation of the risk of slipping on ice was considered in the context of the winter protocol being in place. This was against the background that the original risk assessment was carried out in 2012. It has been reviewed annually since then, the approach by the defender being to carry out an annual evaluation based on the control measures in place. This approach to risk assessment is the approach taken by the whole of the Scottish Prison Service (SPS). He is familiar with the other approach (taken by Mr Taggart) of identifying the hazard and evaluating the risks in terms of the likelihood of the risk arising and the severity of that risk to inform the design of the control measure, but he thought that the way the SPS did it was the better way. With the winter protocol in place, the risk was deemed to be adequately controlled. There was no evidence of any other person slipping on ice at any other time at HMP Low Moss. As Mr Burns explained, there had, therefore, not been a need to look into additional control measures. I had no reason to think that Mr Taggart's approach to risk assessment was other than an entirely valid one. However, having considered the evidence of Mr Burns, I am satisfied that his approach – which is that taken by the SPS – is also a valid one. Mr Burns was careful and considered in his evidence and made concessions where it was appropriate to do so. I took the view that his evidence was both credible and reliable.

[95] The regulations do not impose a duty to complete a written risk assessment, still less a duty to complete the risk evaluation in the form suggested by Mr Taggart. In my view, in

the light of the explanations given by Mr Burns, taking the risk assessment and the winter protocol together, the defender considered the risk of icy conditions. I am, therefore, not persuaded that, in the circumstances of this case, there should have been a risk assessment in the form contended for by the pursuer or that the risk assessment in fact carried out was other than suitable and sufficient. I am, therefore, satisfied that the defender complied with the duties incumbent upon it in terms of regulation 3 of the 1999 Regulations.

[96] In any event, before liability for a breach of regulation 3 could arise, it would then have to be proved that a hypothetical suitable and sufficient assessment would have identified a precaution which could reasonably have been taken and that, had it been taken, it would probably have prevented the incident: *Uren* v *Corporate Leisure Ltd, supra*. In the light of the evidence, I am not satisfied that there was a precaution which could reasonably have been taken which, had it been taken, would probably have prevented the accident. This is because, as I conclude below, I am satisfied that it was not incumbent on the defender to have taken any alternative or additional precautions.

Whether the defender took adequate precautions against the risk of injury or whether it would have been incumbent on it to have taken any alternative or additional precautions?

[97] The pursuer's position in a number of parts of her submissions was to the effect that, if the court accepted that she slipped on ice and that the area where she slipped was untreated, that would mean that the defender had failed to institute a safe place of work. However, the formulation thus put did not include the acknowledgment – correctly made – at an earlier part of her submissions that the duty is "to take reasonable care" to provide a safe place of work. I assume, therefore, that the pursuer's overall approach was intended to reflect this, and I approach matters on the basis that the duty is one to take reasonable care.

Under reference to regulation 12(3) of the 1992 Regulations, the pursuer also contended that the defender had failed to demonstrate that it was not reasonably practicable to keep the visitor car park "free from ice" and thus prevent the accident from occurring. She suggested that a number of possible alternative and additional steps ought to have been taken.

[98] However, it is necessary to deal first of all with the nature of the gritting process. The pursuer's position on record was to the effect that the defender ought to have made the gritting "universally effective". In submissions, the pursuer maintained that, if the defender had evaluated the risk of the pursuer slipping on ice, such an assessment would have "ensured" that there was "no" residual ice in the visitor car park. I have already commented on the risk assessment, but I understood this to be what the pursuer meant by making the gritting universally effective. Mr Taggart's position was that it is possible to take certain steps, such as a post-gritting drive-round or walk-round, as control measures to "ensure" that there is "no" residual ice, although he did accept in cross-examination that you could never guarantee that every part of ice is eliminated, and that there would be a possibility that a slip could still occur if a bit is missed in post-gritting inspection. However, Mr Clements and Mr Yuile, both of whom had had extensive experience of gritting the establishment over the years, explained the spreading process involved in gritting with the salt funnel at the back of the tractor. Both had received training from the Institute of Groundmanship on the best way to grit, how to get a general spread of the salt and how to ensure that you have covered all areas. They both impressed me as being straightforward, careful and reliable employees of the defender. Each gave his evidence in an entirely measured manner. I formed a similar favourable impression of the other witnesses led for the defender, namely Mr Burns, Mr Davidson, Mr Hardie and Mr Buonaccorsi. Mr Burns, who carried out the defender's risk assessment process at HMP Low Moss, also gave

evidence about the method of gritting with the salt spinners. It was not suggested by the pursuer that this method of gritting or the rock salt used were inappropriate. As explained by Mr Clements, the salt comes out in particles like small stones, "not like paint". It therefore cannot cover every square inch of ground but it will cover the area. He is inspecting as he goes round gritting which he does twice. He has a panoramic view from the cab. There is no explicit instruction to do this in the winter protocol or elsewhere but he and Mr Yuile do this as a matter of good practice. Any areas missed would be a matter of inches. Mr Burns said that any patches missed would be minute. His position was that the point of the winter protocol was to reduce the risk of slipping on ice; it was absolutely impossible to remove ice 100%. Mr Buonaccorsi was likewise of the view that it was impossible to completely eliminate the risk of a slip; small pockets might be missed. Against the background of this evidence, which I accepted, I am satisfied that it is not possible to completely eliminate the risk of a slip on ice, that the best that can be achieved is reduction of the likelihood of the risk of slipping on ice to an acceptable level by appropriate control measures and that the protocol was devised to do this at HMP Low Moss. And, in this case, the existence of only one such small patch of ice was proved.

[99] That being so, the question then is whether it was incumbent on the defender to take alternative or additional precautions against the risk of injury. The pursuer, on the basis of Mr Taggart's evidence, submitted that it would have been reasonably practicable for the defender to have taken a number of other measures, such as gritting at various times on 23 February or calling out the defender's on-call staff to grit before 5am on 24 February, carrying out a drive-round or walk-round inspection after gritting, cordoning off areas, designating de-iced walkways to vehicles or displaying warning signs.

[100] In relation to gritting on 23 February or before 5am on 24 February, the defender's winter protocol provides that all roads and paths, internal and external, are to be gritted before the end of each shift from 3.30pm to 4pm (Monday to Friday) if frost or snow is expected overnight. The protocol goes on to say that this will limit the call outs required at night with the exception of when rain or snow has occurred after the staff have gritted. During inclement weather when gritting is required, in terms of the protocol, prison staff are typically called at 5am if there are icy conditions or at 4am if there is snow. The protocol also provides that on-call staff can be called out at any time if there is a requirement to grit due to excessive ice conditions. In this case, there was no dispute that frost was forecast overnight from 23 February into 24 February and that a yellow weather warning was issued late afternoon on 23 February stating that icy stretches would be expected on untreated roads and pavements in the post code area for HMP Low Moss that evening and into 24 February. However, the defender did not grit at HMP Low Moss on 23 February in accordance with the protocol. Mr Burns agreed that it would be better to prevent ice forming in the first place rather than allowing it to form and then taking a reactive measure. However, he explained that, as a matter of practice, he and colleagues do not grit in rainy conditions or if rain is forecast. This practice is because their experience is that rain dilutes the salt and makes it ineffective. He therefore prefers to grit when he is going to get maximum effect as opposed to gritting and it then getting washed away. His experience is that even moderate rain makes the salt ineffective and that even light showers dilutes salt. He had checked the forecast on the morning of 23 February which was valid for broadcast between 6am and 6pm that day. He confirmed that this had referred to scattered heavy showers occurring in the evening of 23 February. He was also aware that ice was forecast for the early hours of 24 February. Seeing the ice forecast and the rain forecast, he would not

have gritted before the 5am gritting process which would have picked up any rain that had then frozen on 24 February. He did not consider that there was any need to call out staff to grit any earlier than 5am. This is because there were no staff accessing and egressing the establishment until 7am. 5am would be a sufficient call-in time to allow staff to come and grit the car parks and walkways. The staff car park, visitor car park and access walkways are first order of priority areas.

[101] Mr Davidson, Mr Clements and Mr Yuile gave evidence to a similar effect. Mr Davidson's experience was that calling in the on-call staff at 5am gave sufficient time for them to arrive and grit before staff arrived at 7am. Mr Clements said that, when there was rain of any substance, spreading salt was pretty much pointless. He confirmed that, if they had been called out to salt between 3.30pm and 4pm on 23 February and if there had been further showers between 6pm and 7pm and then sub-zero temperatures, another call-out would have meant another 40 to 50 bags of salt, and each call-out would mean being paid for four hours work. If called out at 5am, he then finishes gritting the whole establishment between 7am and 7.30am. He is then ready to start his shift at 8am. If he was called out at, say, 1am, he would finish by about 3.30am and would then go home again, to get up again at 6am for his shift at 8am. Mr Yuile told the court that, between 3.30pm and 4pm, he would be in the prison workshop. They have three members of staff there for 30 prisoners, the ratio being one to ten. If one member of staff had had to leave, they would have to have sent ten prisoners back to their accommodation and if two members of staff had had to leave, they would have to have sent 20 prisoners back to their accommodation. Returning prisoners to their accommodation would involve "route movements" which would mean that operational staff would have been needed for that. If gritting had been done at 3.30pm to 4pm on 23 February, the same amount of time, and the same number of bags of salt, would

be needed as for gritting after a call-out at 5am. If there had been moderately intense rain between 6pm and 7pm on 23 February, salt spread between 3.30pm and 4pm would have been washed away or dissolved by the rain. He has seen this happening. If it then turns icy, it would be necessary to grit again with the same amount of salt. Every time they are called out, they are paid four hours overtime so, if they are called out twice, they will be paid this overtime twice. If he had been called out in the early hours of the morning on 24 February, he would have gone home after gritting to try to get some sleep before getting up again at 6.30am – 6.45am for his 8am shift, but being called out at 5am meant that he could stay to start his shift after gritting. I have found that between 6pm and 7pm on 23 February there was rain of moderate intensity. And on the question of forecast, Dr Wild agreed in cross-examination that, although the data available to him indicated that it may have stopped raining at around 7pm on 23rd February, a normal person reading the weather forecasts for 4am and 4pm for Strathclyde on 23rd February 2017 would expect there to be rainfall throughout the night at HMP Low Moss.

[102] In the event, I was not asked by either party to make a finding that there had been heavy rain overnight and, in any event, it seems to me that that would not have had much relevance. This is because I have to bear in mind that the balancing exercise (in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk is placed on the other) is a forensic one for the court to carry out after the event in which the court must put itself in the position of the defender before the event, informed by such evidence as to risk and sacrifice as the court considers relevant: *Strange* v *Wincanton Logistics Limited, supra*. Consequently, it is the position of the defender before the event that is relevant and, in the light of Dr Wild's evidence about what a normal person would expect from the weather forecasts for Strathclyde on 23 February, it seems to me that

it would not have been unreasonable for those at HMP Low Moss on behalf of the defender to have had this expectation also.

[103] Mr Taggart accepted that it was possible that any gritting that was done on 23 February would have been rendered ineffective given the forecast of rain or rain actually occurring if it was heavy rain. His view was, though, that salt would only be washed away by heavy rain and that, if grit had been applied and there was then light to moderate rainfall, this would not affect the integrity of the rock salt; the only risk was from heavy rain washing the particles into the gutter. He was not an expert in relation to gritting but he said that he knew this from experience. I took the view that the evidence given on behalf of the defender fell to be preferred on this matter, as also on the speed at which rock salt "melts" ice. The defender's witnesses – and, in particular, Mr Clements and Mr Yuile – have more practical, day-to-day, actual experience of the effect of rain on salt (and the effect of salt on ice). The defender did not follow the written protocol in relation to gritting between 3.30pm and 4pm on 23 February, but I am satisfied that they followed a practice informed by experience and which had a reasoned basis. There was no evidence that this practice had resulted in any mishap. In any event, a failure to adhere to a system will not necessarily, without more, lead to a finding of breach of the general duty of care: *Pratt* v *Scottish Ministers*, *supra*. I also noted that Mr Taggart in any event ultimately expressed the view that the best time to grit in this case would have been at about 8pm or 9pm on 23 February (and, therefore, well after the 3.30pm to 4pm period in the protocol in any event).

[104] Despite expressing the view that salt would only be washed away by heavy rain and that light to moderate rainfall would not affect the integrity of the rock salt, I noted that Mr Taggart nevertheless took the view that the best time to grit would be after rainfall. This is because the purpose of the gritting salt is to stop the rain from freezing. He told the court

that, on the basis of Dr Wild's findings (about light to moderate rain in the early evening), his view was that the best time to grit would have been at about 8pm or 9pm on 23 February. Dr Wild also said that "icy patches" would have started to appear in the post code area for HMP Low Moss on 23 February at around 8pm to 9pm if it was in its natural state without any human influence such as traffic, but said that they would have got going more significantly in the early hours of 24th February 2017 because the temperatures were lower then. However, I was reminded of Mr Davidson's evidence about "human influence" in the form of about 100 people entering and leaving the prison between 8pm and 9pm, with the prison then being locked at 9pm until it opened again the next morning at about 6.15am for the early operational staff in preparation for the prison opening again at 7am for the normal residential staff coming in. Mr Davidson also told the court that he had come on duty at 8.30pm on 23 February and that, if there had been icy conditions then, he would have reported it. He did not accept that ice had started to form that evening. He went on to say that he was patrolling hourly during the night of 23 February into 24 February. If it had been icy, he would have suspended patrols. He confirmed, however, that it must have been icy on the morning of 24 February because he called out the two on-call staff at 5am in terms of the protocol. As to Dr Wild's evidence, he gave his evidence on commission in advance of the proof. I was, therefore, not in a position to assess his credibility and reliability, but there was no suggestion by either party that his evidence was for any reason unacceptable. In the light of the evidence, including that from Dr Wild, I think it likely that the development of some icy patches was delayed as a result of the staff changeover between 8pm and 9pm and that it is likely that they started to develop at HMP Low Moss at some point after 9pm on 23 February but that they did not become significant until the early hours of 24 February.

[105] I also took the view that the evidence given on behalf of the defender fell to be preferred on the question of the speed at which rock salt "melts" ice. Mr Clements' and Mr Yuile's day-to-day, actual experience as to the effect of salt on ice – which I accepted – was to the effect that salt starts to "melt" ice pretty much instantly, within minutes. Mr Taggart expressed the view that the on-call staff should have been called out earlier than 5am on 24 February in any event as a call-out at that time meant that gritting was "extremely close" to the shift changeover at 7am. However, I have found that the pursuer was leaving at 7.50am. Mr Taggart in any event agreed that it would not be unreasonable to expect salt to take effect and melt ice within an hour and 20 minutes.

[106] Turning to the balancing exercise in relation to the pursuer's contention that gritting should have been carried out on 23 February or before 5am on 24 February, the court has to put itself in the position of the defender before the event. This includes taking into account evidence which the court accepts about the defender's knowledge and experience in relation to the nature of the salting process, the absence of evidence of any mishap resulting from the approach taken by the defender, the defender's experience of the effect of rain on the effectiveness of salting (with the potential, therefore, for a need to grit again) and the effect of salt on ice and the weather forecasts and weather warning available to the defender on 23 February. In all the circumstances, and against that background, comparing the risk to persons in the position of the pursuer on the one hand with, on the other hand, the potential consequences for prison staff and the operation of the prison and the resources available (both human and in terms of the potential need for re-gritting), in view of the possibility that any gritting carried out on 23 February or before 5am on 24 February would have been rendered ineffective and that there was in any event no guarantee that every part of ice will be eliminated, I take the view that gritting on 23 February or before 5am on 24 February

would not have been reasonably practicable: *c.f*: *McCondichie* v *Mains Medical Centre, supra*; *McKeown* v *Inverclyde Council, supra*.

[107] The pursuer also averred that the Mr Clements and Mr Yuile should have checked the visitor car park for areas not gritted and gritted those again. The argument was put somewhat differently in submissions in that it was maintained that on-call staff ought to have been instructed by the defender to carry out either a competent drive-round inspection or a competent walk-round inspection after salting. Mr Taggart made the point that the establishment was a controlled environment, a small area within a place which was controlled entirely by the defender and so they had the opportunity to control conditions including checking once gritting is complete to make sure that there is no residual ice. Ice was forecast and opportunity and equipment was there to ensure that the area was gritted and free of ice. By way of contrast, a local authority grit in an uncontrolled environment because they cannot go back and check if they have gritted properly. The defender could have carried out a drive-round after gritting. This should have been part of the winter service protocol. It is a common feature within a winter protocol within a controlled environment. This would have assisted in reducing the likelihood of the pursuer's accident occurring.

[108] As I have already commented, at paragraph [98] above, I am satisfied that it is not possible to completely eliminate the risk of a slip on ice. Mr Clements told the court that he is inspecting as he goes round gritting, which he does twice. He has a panoramic view from the cab. There is no explicit instruction to do this in the winter protocol or elsewhere but he and Mr Yuile do this as a matter of good practice. I accepted his evidence that he does inspect as he is gritting and that he will grit again if any part has been missed. In this connection, I noted that Mr Taggart accepted that it was sufficient for the driver of the

vehicles which had panoramic visibility, when they were gritting, to observe all areas when they are going round more than once. On the proviso that they were able to determine that there is no residual ice, it did not matter whether they went round in a vehicle or on foot. His position was that how that process is carried out is for the defender. As to the question of instruction about checking for areas not gritted as advanced in the pursuer's submissions (summarised at paragraph [53] above), I accept and prefer the defender's submissions (summarised at paragraph [70] above). I am satisfied that Mr Clements in fact inspected as he was gritting. There was no evidence that there had been any mishap with this system: *Baker* v *Quantum Clothing Group Ltd, supra*.

[109] As to the balancing exercise in relation to this, I refer to what I have already said in paragraph [106] above about the court having to put itself in the position of the defender before the event and the factors mentioned there. In addition, in relation to the suggestion that there should be a post-gritting drive-round or walk-round inspection, Mr Burns expressed the view that it would be excessive to then ask staff to walk the whole area which is quite a large area to cover to see if they have missed anything. He accepted though that it was possible that by doing a walk-round it was likely that parts of the car park would not be missed. However, his information from the drivers was that they continually assess as they are gritting. They are not gritting at any speed. Both jobs can be done in tandem. There was no evidence that there had been any mishap with this system. Mr Clements told the court that he uses about two or three funnels of salt (about 25 bags) to salt the entire establishment. He would expect Mr Yuile to use about the same amount. This would make a total of about 50 bags of salt to salt the whole establishment. It takes them both just over an hour to do this. He then starts his day shift at 8am. A walk-round of the entire estate to check after gritting that every area had been gritted would take him and Mr Yuile between

about an hour and an hour and a half. In re-examination, he confirmed that he was due to start his shift at 8am. If he had also had to do a walk-round after gritting of all areas gritted, that would have taken in excess of an hour and could have taken as much as two hours. That could have meant taking until between about 8.30am and 9.30am. This would have meant that he would not have been able to start his shift at 8am. Mr Yuile told the court that he had also been due to start his shift at 8am that day. Between finishing the gritting that day and starting his shift, he would have been cleaning out the vehicle and getting prepared for the start of his shift which included collecting rubbish and getting prepared for the work-shed and security checks. If he and Mr Clements had had to do a walk-round round all the areas they had gritted to inspect all those areas after gritting to ensure that there were no residual patches, this would have taken between one and two hours to do. In my opinion, against the background also that the risk to a person in the position of the pursuer of slipping on ground which had been gritted was, with that control measure having been taken, minor (and, consistent with that, no other slip in the car park that day had been reported to Mr Hardie, the Health & Safety Co-ordinator at HMP Low Moss), the time and labour which would have been involved in such a system of post-gritting inspection leads me to the conclusion that this would not have been reasonably practicable either. Both drivers inspect as they are driving round gritting. Mr Taggart confirmed that it did not matter whether they went round in a vehicle or on foot, and that how that process is carried out was for the defender.

[110] Although the pursuer's averments on record included a claim that was said to be based on the defender's vicarious liability for the actions and omissions of Mr Clements and Mr Yuile (with averments to the effect that they did not adequately grit and left large areas not gritted), I did not understand this to be insisted on in submissions. However, for the

avoidance of doubt, in the light of my conclusions (including those at paragraphs [82] to [85] above under the heading: "The gritting of the visitor car park"), I would not have been satisfied that this case was made out.

[111] The pursuer also averred on record that the defender should have provided the pursuer with a gritted designated traffic route to follow to her vehicle. In submissions, the pursuer also said that the defender should have cordoned off any hazardous areas or provided sanded walkways from the prison entrance to where vehicles were parked or designated de-iced walkways. Mr Burns did not accept that such measures would be reasonably practicable. He explained that, in the morning, the priority is to grit for the staff coming on shift which in turn facilitated the staff going off shift. He did not agree that areas that had been gritted should be cordoned off; that was why the gritting was being done – to remove that hazard. In relation to such complaints, in my view the defender's submissions fall to be preferred. I am satisfied that the steps taken by the defender were reasonable, that it would have been excessive in all the circumstances to expect the defender, in addition to gritting the visitor car park, to take such further steps in addition and that, in all the circumstances, it would not have been reasonably practicable for them to have done so.

[112] The pursuer also averred on record that she should have been told by the defender that the car park had not been gritted. In submissions, it was said that the defender ought to have displayed warning signs. However, as to the probable effectiveness of such a measure (*Strange* v *Wincanton Logistics Ltd, supra* at para 25), the pursuer herself agreed that it was probably fair to say that a warning sign would not have made any difference and that, because she was already aware of the risk, it would have been a statement of the obvious.

[113] There were complaints on record about failure to allow the pursuer to use the staff car park and failure to prioritise gritting of the visitor car park. However, these were not

insisted on in submissions. In any event, it was clear – for example, from the evidence of Mr Burns – that the staff car park, visitor car park and access walkways are first order of priority areas. And, indeed, they were gritted as a priority on the morning of 24 February.

Decision

[114] In all the circumstances, I am satisfied that the defender did demonstrate that it was not reasonably practicable to keep the visitor car park "free from ice" in the particular circumstances of this case, that it took adequate precautions against the risk of injury and thereby took reasonable care to provide the pursuer with a safe place of work, and that it was not incumbent on the defender to have taken any alternative or additional precautions.

[115] For completeness, if I had concluded that the defender had failed in its duties of care to the pursuer and had caused the accident, I would have preferred the pursuer's submissions on the question of whether she took reasonable care for her own safety. I would have had no basis in the evidence for finding that she was at fault to any extent in relation to the circumstances of the accident. In particular, there was no evidence that she had ever been instructed to wear any particular footwear such as boots. I would, therefore, have made no finding of contributory negligence against her.

Effect

[116] The pursuer, therefore, fails in her claim against the defender. Parties were agreed that, in the event of the defender being assoilzied, expenses would follow success.