

JERSEY / JUDGMENT

Mullaney v Brenwal Limited

[2012] JRC 091 (08 May 2012)

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judgment

the commissioner: 1. This is a personal injuries claim brought by the plaintiff in which the defendant has admitted primary liability. The issue before the Court was whether the plaintiff should suffer any deduction from his entitlement to damages on account of his alleged contributory negligence. The quantum of those damages is to be assessed at a separate hearing. 2. We first set out the background and describe the accident from that part of the evidence which is not in dispute. 3. The defendant ("Brenwal") was formed in 2000 by Patrick Thomas Walker ("Mr Walker") and Gerard Brennan ("Mr Brennan") and at the material time was owned by them and their respective wives. Mr Walker had for many years been the general foreman at MJ Gleeson, a substantial building and civil engineering contractor, through which he had met Mr Brennan, who had often been employed as a sub contractor. 4. Brenwal had two sides to its business, the first being infrastructural work such as replacement and repair of sewage pipes, in which Mr Walker was experienced and for which he was responsible, and general building work, in which Mr Brennan was experienced and for which he was responsible. This case is concerned with the side of the business for which Mr Walker was responsible. 5. In 2001, the Public Services Department awarded Brenwal the contract for the first phase of the replacement of the sewage pipe in St Saviour's Hill. That work was undertaken successfully in July and August 2001 and led to Brenwal being awarded the contract for the second phase, which was carried out in July and August 2002. These were the first major contracts for which Brenwal had successfully bid from the Public Services Department and, in the words of Mr Walker, they were very keen to impress, with the men working long hours, sometimes seven days a week. 6. The plaintiff had originally been employed by Brenwal because he was an experienced pipe layer. According to Mr Walker, the plaintiff was appointed to the role of foreman to fulfil a requirement of the Public Services Department in the tendering process, and in the plaintiff's Order of Justice he pleads on the basis that he was employed as the foreman. However, it is a matter of dispute how much responsibility he in fact had, notwithstanding this title. 7. Before coming to the accident itself, it is helpful to set out the method of work which was employed on phase 1 and phase 2 up to the day of the accident. The work was carried out in sections working up the hill from manhole to manhole. These were active sewage pipes and the sewage would first be diverted by being pumped from the upper manhole via a temporary pipe placed upon the pavement to the lower manhole, thus

isolating that section of sewage pipe. The line of the proposed trench (above the position of the old sewage pipe) was then marked out on the road using spray paint and rope. There were two "diggers" on site, both tracked vehicles with rubber treads, one owned by Brenwal and the other hired. The first, owned by Brenwal, was a Kubota, to which could be attached either an excavation bucket or a hydraulic rock breaker device. The Kubota was referred to at the hearing as "the rock-breaker", but as it could also be used as an excavator, the changeover being an operation that took half an hour or so, we shall refer to it as "the Kubota". The second larger machine was a Volvo, which was used for excavation, and was referred to at the hearing as "the excavator". We will refer to it as the Volvo. 8. The Kubota would break up the surface of the road along the lines marked. The road surface consisted of a layer of concrete below that of the tarmac. The Volvo would then remove the debris and ground down to the level of the old sewer. When the old sewer had been installed, it had been bedded in concrete of uneven width and depth and so the Kubota would then be employed to break up both the old sewer pipe and the surrounding concrete. The Volvo would then return to clear and excavate the trench to give a total depth of around 2 metres, or 6½ ft. Men would then get into the trench to level it out. Chippings would be laid to receive the new clay pipe. Further chippings would then be laid and the trench back filled with foam concrete. If at the end of the day, all the pipes in the section had not been laid, then a temporary plastic pipe or "flume" would be connected from the upper manhole to wherever the new pipes had reached in order to allow the sewage to flow by gravity overnight, thus avoiding the use of noisy pumps during the night time. 9. The trench was on the western side of the road about half a metre from the pavement. The depth of the trench is significant, in that pursuant to Regulation 6(1) of the Construction (Safety Provisions)(Jersey) Regulations 1970 ("the Regulations") shoring is required for any trench over 4 ft deep, unless having regard to the nature and slope of the sides and other circumstances, no fall is liable to occur. It was not in dispute that the trench walls, being vertical, required shoring over 4ft. 10. It was a contractual obligation of Brenwal to conform to the Regulations and the method statement number 1 for phase 2, which Mr Walker accepted he would have written, provided that:- "Hydraulic jacks and trench sheets to be in place at all times". 11. It follows that the trench should have been routinely shored once the old sewage pipe had been excavated, in that the trench was over 4ft deep at that point. There was evidence of shoring having been used in phase 1 when a gas main was encountered requiring the trench to be re-routed through rock. Shoring had apparently been requested on that occasion by the Public Services Department. 12. It was on Saturday, 27 th July 2002, three days after the start of the second phase, that the accident took place. There is a dispute as to the precise order of events on that day, but it is agreed that the hydraulic rock-breaker device had broken down in that the hydraulic pipes connecting the device to the Kubota arm had been damaged; it is exposed and clearly prone to damage when in use. The trench had been excavated with the Volvo down to the old sewage pipe along a length of some 12 metres when, instead of using the Kubota to break up the old sewage pipe and attached concrete, a decision was taken to use the Volvo to remove the same in sections. Having removed the old sewage pipe with attached concrete, the bottom of the trench was levelled out and chippings placed in its base when at about 2.30 pm a decision was made to finish for the day. 13. The plaintiff got into the trench near to the lower manhole (which had been excavated to the edge of

the pavement) with Mr Brian Nugent to fit the temporary "flume" so that the sewage could flow overnight. The plaintiff was leaning against the side of the trench closest to the pavement when he felt movement. He warned Mr Nugent, who managed to jump clear, but this part of the trench fell on him and then proceeded to collapse in sections, going up the length of the trench and finally the short section below him leading to the manhole. The weight of the concrete upon him was too much for the men to lift and it was necessary to use the Volvo and strapping under the concrete in order for him to be released. He was seriously injured. 14. Having described the general background and the accident we now turn to the evidence. Evidence 15. We heard evidence from Mr Walker and the plaintiff. It was agreed that the statements given by them to the Employment and Social Security Department ("ESS") in 2002 and the statements made by them in 2011 for the purposes of these proceedings be accepted as their evidence in chief in part. The driver of the excavator, Mr James Durkan, who is still employed by Brenwal, but is engaged in a long-standing contract at Gatwick Airport, was due to give evidence but at the last moment declined to do so. As he was residing in England, he was outwith the jurisdiction of the Court and there was no application for an adjournment for his evidence to be heard. An ESS statement made by him in 2002 and a statement for the purpose of the proceedings in 2011 were admitted under the provisions of the Civil Evidence (Jersey) Law 2003 . By agreement, a number of other statements taken by ESS in 2002 were also admitted. 16. We were conscious that we were hearing evidence about events that took place nearly ten years ago, but we were assisted in our task by the ESS statements which were contemporaneous, albeit taken for the purpose of a prosecution, and certain documentary evidence to which we will come in a moment. We have taken all of the evidence before us into account for the purpose of determining the issues before us, even if we do not make express reference to every part of it. 17. On 21 st February 2003, Brenwal admitted two breaches of Article 21(1) (b) of the Health and Safety at Work (Jersey) Law 1989 ("the Health and Safety at Work Law") and was fined £10,000. The charges related to two aspects of the Regulations:- (i) Pursuant to Regulation 6, the failure to supply and use shoring to which we have referred above and (ii) Pursuant to Regulation 4, the failure to appoint a person experienced in such operations and suitably qualified for the purpose to be specially charged with the duties (a) of advising the employer as to the observance of the requirements for safety or the protection of persons employed and (b) of exercising a general supervision of the observance of the aforesaid requirements and to promote the safe conduct of the works in general. 18. Brenwal had appointed Mr Patrick Aidan Falvey as safety officer for this contract and he was named in the pre-contract meeting but Brenwal accepted, as made clear from Mr Falvey's statement, that he was not suitably qualified or experienced. Although qualified as an engineer, his role was to do the estimating, quantity surveying and accounts for projects and he had no responsibility for any site work. Mr Walker conceded that in practice these duties fell back on him to perform. He further accepted that he was not himself qualified to be safety officer, as that required training which he had not received. He relied on his own experience. Safety came down to common sense, which he expected his men to use. Mr Walker 19. This accident has had a profound effect upon Mr Walker, who deeply regrets what he described as "his inexperience and naivety as a new employer." He had not taken any advice on forming Brenwal and agreed that, with hindsight, he should have looked into the health and safety requirements of an employer. He wanted to make a

good impression upon the Public Services Department and candidly admitted that safety was not high on his list of priorities. He was not aware of the Regulations and particularly the Regulations which Brenwal had breached; paper work was not his forte. At no stage in his evidence did he seek to avoid his responsibilities in this matter and he did not attempt to be defensive in his answers, as many in his position might have been tempted to do. 20. When he had been promoted to foreman at M J Gleesons, he had been sent on health and safety courses and taught how to be a foreman. As foreman, he would be given a programme at the outset and was responsible for most things on site, in particular safety. He had the power to hire and fire (subject to employer sanction). He was a working foreman, who got "stuck in" as well as carrying out his supervisory role. He accepted that no such training had been given to the plaintiff, for which he felt ashamed and guilty. He also accepted that the plaintiff had not been given sight of any contractual documents and in particular had not seen the method statement number 1. 21. Whilst the need for a foreman had been a requirement of the Public Services Department, he felt that the plaintiff was the right person and suitably experienced for that role. He spoke highly of the plaintiff's ability and said that he put his heart and soul into his work and was eager to please. He told us that he (Mr Walker) was on site for around 90% of the time, and took particular responsibility for the machinery and planning for its use. As he said "I was the machinery man". The plaintiff had no experience in machinery. If there was a breakdown, then he (Mr Walker) would be responsible for selecting an alternative use of machinery. 22. He told us that the plaintiff was responsible for the day to day running of the men- "you cannot have two bosses"

- and therefore he did not interfere with the plaintiff much. It was for the plaintiff, not him, to check the condition of the trench from time to time. He was unsure how much experience the plaintiff had of shoring but he had made the plaintiff aware of the indicators to look for, namely movement, cracks in the road, or water. In his view, the plaintiff was very knowledgeable and in certain areas, i.e. pipe-work, knew more than him. In his view the plaintiff should have seen that shoring was required. 23. As to the day of the accident, Mr Walker said he was very much reliant now on the ESS statement made in 2002. He was first on site at about 6.30 am and checked for any overnight vandalism. He had a brief discussion with the plaintiff when he arrived about the programme for the day and agreed that they would work until 6.00 pm. He then went up the road to get the hydraulic rock-breaker device ready. The Kubota had the excavator attached from the day before and that needed to be changed over to the hydraulic rock-breaker device. When he tried to connect the hoses from the device to the machine, he discovered that it had been damaged the day before. He took off the relevant part and left the site to get it mended. He went to several places and ended up getting new hoses and fittings from La Collette Marine, arriving back on site at 10.30 a.m. 24. Apart from general tidying up on the site, he had not expected much to have been done in his absence, but found when he returned that the trench had been excavated and the old sewage pipes removed using the Volvo. Someone had told him that their removal with the Volvo had been easy and he was pleased with the result although seeing the size of the lumps of concrete removed he was worried that his machinery might have been damaged. He did not inspect the trench for stability, but would have expected the others to tell him if

the method that they had used had affected the trench in any way, but no one was concerned and he did not look. 25. The hydraulic rock-breaker device was repaired but he did not know whether the plaintiff and Mr Durkan intended to continue using the Volvo or whether they were going to use the Kubota with the device attached. In his statement, he said he was on site for the rest of the morning, checking the pumps and machines and tidying up. He told us in evidence that he fitted the bucket to the Kubota and started loading a truck with the excavated old sewage pipes and attached concrete to be taken off site. At about 2.00 pm, Mr Brennan came on site and they had a general discussion until the time of the accident. He was sitting on the bonnet of the car with Mr Brennan when he heard the plaintiff scream. He had inspected the trench the next day (Sunday 28 th July

2002) and said that the ground was well compacted and there was no change that he could see in the ground conditions. 26. He was adamant in evidence that he had not played any part in the decision to use the Volvo to remove the old sewage pipes, something he described as "foolhardy". In his view extracting the pipe and concrete in this way would have left voids in the base at the sides of the trench and may have caused damage to the sides of the trench when being lifted out. In some places, the pipes and concrete would have been wider than the trench itself. With the hydraulic rock-breaker device, any concrete on the sides would stay in place unless very small. Also, he felt the downward pressure of the excavator on the trench sides when lifting out the old sewage pipes and concrete could have caused the ground to become unstable. In his opinion the use of the hydraulic rock-breaker device would have substantially decreased the possibility of the accident happening if not completely eliminated that possibility. 27. It was pointed out to him by Miss Dorey that in his ESS statement, he said that before leaving site early that morning the plaintiff had informed him that he was going to remove the old sewage pipes using the Volvo. Faced with this, Mr Walker conceded that his ESS statement was more likely to be correct and conceded that he must have been informed of the method before it was used. 28. Mr Walker accepted that shoring would only have been used in both phases 1 and 2 if there were obvious signs that it was required or as Miss Dorey put it, if "something jumped out at you and stared you in the face". It had been used in phase 1 where rock had been encountered. Using shoring would not, he said, have added materially to the time taken to complete the contract and he rejected the suggestion that shoring had been dispensed with to save money. If anything he said it was down to his ego and wanting to get the respect of the Public Services by getting the job done without delay. He pointed out that with the loss of a week caused by the accident, the contract was still finished ahead of time. 29. The shoring equipment, comprising steel sheets and jacks were, he thought, on site. There was no room for a compound as such and the side of the road was used for storage. On closer questioning and by reference to statements made to the ESS by others working on the site, he agreed that it was more likely that there was no shoring equipment on site, but it was procurable either from his yard or from Gleasons through an arrangement he had with them. The plaintiff 30. The plaintiff left school at fifteen and undertook a variety of jobs before moving into building work. He had been a stonemason, done carpentry work and

been trained in concrete slabbing work for which he attended a course in Oxford. He had previous experience with mainly domestic plastic pipe-work, but also some experience with clay pipes which are used in the roads. Where shoring had been used it would be installed by the men in front excavating the trench and he would follow laying the pipes. Shoring would not be his call. He had come across different ground conditions namely sand, wet clay (known as "cow belly") and rock. He had worked on the construction of the many culverts at the new Marina, for which he had been trained in particular on the dangers of gases and where he had acted as gang leader. With Brenwal he had undertaken a CAT course, which enables you to locate electrical cables underground, but apart from that, he had received no other training in safety, either before or after his employment with Brenwal. 31. He had heard that Mr Walker was looking for a pipe-layer, and had telephoned him. Mr Walker confirmed that he was looking for a pipe-layer able to deal with 6" clay pipes with a laser (for establishing levels) which is something that the plaintiff was doing for Trant (Jsy) Limited. He said that Mr Walker asked no other questions about his previous experience. As Brenwal was a new venture, Mr Walker could not pay the plaintiff the same rate as he was receiving with Trant, but he was happy to accept the lower rate until the company had become more established. As far as he was concerned, he was employed as a pipe-layer. 32. When the contract in St Saviour's Road came up, Mr Walker needed to nominate a foreman and he said it was taken for granted that he would undertake that role, as he was the only candidate in that he had the most experience of pipe laying. There was no training or discussion as to his duties. He had received a small wage increase for agreeing to undertake the completion of the time sheets for the men on site but had not otherwise received a wage increase for acting as foreman. He had never seen the Regulations or their guidelines and had not been shown the method statement. He was therefore unaware that it was a requirement both of the contract and in law for the trenches to be shored over 4ft. Safety was never discussed. He had no overall responsibility for the site or the power to hire and fire. In particular, he had no responsibility for the machinery. In his statement, he put the division of responsibility between him and Mr Walker as follows:- "I tended to deal with the men and Pat Walker tended to deal more with the machines, although he also had overall responsibility and was the boss." 33. Shoring had been used on the first phase, when a gas main was found to be in the wrong place, and they had to deviate through rock. They were told by the Public Services Department to shore. He was not involved in that process as he was engaged in opening up a section of trench above some 30 metres long so as not to delay progress. He assumed that the shoring equipment came from Gleesons as Brenwal did not possess any jacks and there was no shoring equipment on site. 34. Ground that they encountered in both phase 1 and phase 2 (apart from the deviation into rock) was compact and of no concern. The Public Services Department visited regularly and on no occasion did anyone suggest that shoring should be used routinely. 35. They had three weeks and two days to complete phase 2 and Mr Walker was concerned about the services that might be encountered towards the top of the hill. They were under pressure to make good progress therefore. 36. The contract started on Thursday 25 th July 2002. Mr Walker had organised the delivery of materials to the site

for which the plaintiff had no responsibility, although once deliveries of say chippings had commenced, he was able to ask the driver to provide more as the contract progressed. 37. On the day of the accident, he told us he got to the site at 7.00 am. After the usual coffee with the men in the van, he started work on the over piping of the sewage. It was discovered that the hydraulic rock-breaker device was not working. Mr Walker told them that he was going off site to get the part repaired. He and the men had plenty to do in the meantime. At 8.15 am, Mr Peter Wilkinson, a senior engineer with the Public Services Department, came on site. He was concerned at the breakdown of the hydraulic rock-breaker device as it had broken down on the previous Thursday, the day the contract for phase 2 commenced. At about 8.30 am, Mr Falvey arrived to take levels for the manhole. Between 10.00 and 10.30 am, Mr Walker arrived back on site followed some 15 minutes later by the fitter (we presume of the hydraulic rock breaker device). Mr Wilkinson returned to the site at about 11.00 am and the plaintiff told him that the rock-breaker device should be ready by lunch time. The plaintiff was going to excavate the trench (using the Volvo) down to the old sewage pipe in the meantime, and he told Mr Wilkinson that they intended working until 6.00 pm. 38. By 12.30 pm, the trench had been excavated down to the old sewage pipes over some 12 meters and he informed Mr Walker that the hydraulic rock-breaker device was now needed. It wasn't ready. There was a discussion between the plaintiff, Mr Walker and Mr Durkan about the options, but as this concerned the use of machinery, it was not a decision for him. He went to check the pipe-work and on his return found that Mr Durkan had removed one of the old sewage pipes using the Volvo. He assumed that Mr Walker and Mr Durkan had decided to proceed in that manner, but he could see nothing wrong with it. As far as he was concerned there was no set way in which the old sewages pipes had to be extracted. The first 5 metres of old sewage pipe came up easily, but it then became necessary to create a weak point where they wanted the pipe to break (so that it came up in manageable sections), using a jack hammer. Because of the awkward shape of the pipe and its attached concrete, they used a strap which was placed through the old pipe to lift it out, turning the pipe sideways as it was wider than the trench by about 100 - 150 millimetres. Whilst this was going on, Mr Walker sat on the bonnet of a car talking to Mr Falvey, looking directly at them. He seemed happy and in any event the plaintiff assumed he had agreed to this method of extraction. He subsequently saw Mr Walker loading the old sewage pipes with their attached concrete into a truck. 39. When they were ready to lay the new pipes into the trench, Mr Walker decided to call it a day. Accordingly the plaintiff and Mr Nugent then went into the trench to place the "flumes" and this is when the trench collapsed in the manner described above. 40. Mr Mullaney informed us that he had seen two or three wedge shaped voids measuring some 2 - 4 or 5 inches in the last couple of sections where there had been more concrete attached to the pipe, but this was some 5 or 6 metres up from where he and Mr Nugent were working and where the trench first collapsed. Mr Durkan 41. In his ESS statement made in 2002, Mr Durkan said on the Saturday, work commenced on an existing (what we have described as the lower) manhole. This extended to the edge of the pavement, breaking the line of the trench. Above the manhole, the trench was opened for some 12 metres which had been

undertaken on the plaintiff's instructions which he did not question. Because the hydraulic rock-breaker device was not available, the concrete surround and old sewage pipe were lifted out in sections using the Volvo. He said the material forming the sides of the excavation started changing up the hill above the manhole. It looked and felt looser. At about 3.00 pm he was using the Volvo on the trench further up the road when he heard a thump and one of the men screaming. He found the plaintiff trapped in the trench by a piece of tarmac and concrete, the side of the trench having fallen in. A number of them tried to pull it off but could not. They put a strap around it which was attached to the concrete so that it could be lifted off him using the Volvo. 42. In his statement of 24 th May 2011, made for the purposes of these proceedings, Mr Durkan went into greater detail. He specialised, he said, in the driving and operation of machinery such as diggers. He joined Brenwal in May 2002, when the plaintiff was in the position of foreman. He thought the plaintiff was a good foreman. He described him as very experienced with a good knowledge of tools, plant and equipment. He cannot remember shoring ever being discussed or mentioned on the site but in his view the plaintiff should have known about it because of his experience and because he was the foreman. If shoring was necessary, then the plaintiff should have used it. He said the plaintiff gave the impression that he knew about shoring but it was not clear to us from his statement how the plaintiff would have given that impression if the topic was never discussed. 43. As to the accident, he said that with the hydraulic rock-breaker device out of action it was he who came up with the idea of using the excavator on the Volvo which he explained to the plaintiff, who said words to the effect "If it comes out like that we'll carry on" . He says he did not discuss the idea with Mr Walker and did not know if the plaintiff had. The old sewage pipes and concrete were removed using this method in the fairly early morning and the whole process only took some ten minutes. The plaintiff was directing the operation and giving the orders. In his view, there was nothing wrong with using the Volvo in this way. At some point later in the morning, the hydraulic rock-breaker device was repaired but there was no point in using it as the task had been completed. He makes no mention of any change in the ground. 44. None of this evidence could be tested and we will come to the weight to be given to it later. The evidence of the remaining witnesses is taken from their ESS statements given in 2002. Gearoid Edward Nevin 45. Mr Nevin was a labourer employed by Brenwal on this contract. In his ESS statement of 2002, he describes the method used on 26 th July 2002 for lifting out the old sewage pipes and concrete with Mr Durkan operating the excavator and the plaintiff and Mr Nugent helping the removal. He did not know who had decided to remove the pipes in this way and does not say when on the day this operation took place. He said it was probably the deepest trench he had worked in with Brenwal which was not shored. Brenwal usually shored if necessary. The plaintiff or Mr Walker would make the decision, or sometimes the Public Services Department would say they wanted it shored. This had occurred on phase 1 and also on other jobs which had been carried out with the Public Services Department. He said he had been told about the risks of working in excavations by both the plaintiff and Mr Walker. The accident happened just after he left the trench, but he did not see it. Brian Anthony Nugent 46. Mr Nugent had been employed by Brenwal

from April 2001. He again describes the method by which the old sewage pipe and concrete had been lifted out on 26 th July 2002. He gives no timings or assistance as to the order of events. He was in the trench assisting in putting in the temporary pipe or flume when the plaintiff shouted to him to jump because the trench was coming in. No shoring had been used on any of the trenches during this phase of the works and in phase 1 shoring was only used in one section. He was not sure whether it was the plaintiff or Mr Walker who decided whether to shore or not. It might have been the Public Services Department. He said the ground on the kerb side of the trench was softer than on the other side. The distance of the trench from the kerb could vary. He did not make any decisions about how work was to be done and received instructions from both Mr Walker and the plaintiff. Peter Wilkinson 47. As previously mentioned, Mr Wilkinson was employed by the Public Services Department as a senior engineer for drainage contracts. He managed this contract assisted by an engineering technician, Mr David Leonard. Mr Leonard had been involved in phase 1. They were keen for Brenwal to undertake phase 2 because it had completed phase 1 very satisfactorily and was therefore familiar with the scheme. Once the contract had been awarded, the method statement number 1 was developed and provided by Brenwal, which refers to the system of shoring, comprising jacks and trench sheets. This system, he explains, is commonly referred to as "pinchers". Pinchers are intermittent supports at 1, 2, 3 metre intervals or so, as opposed to closed sheeting, which is continuous. His diary for phase 1 makes reference to continuous support being necessary where the trench came close to an existing gas main, in which shoring was carried out. 48. His statement given to Health and Safety in 2002 shows that Mr Wilkinson had visited the site on Thursday, 25 th July (when the contract commenced), Friday and twice on the Saturday, before the accident took place. He produced an incident report on 29 th July 2002, just three days after the accident, which we have found very helpful in clarifying the precise events of that day. The report starts by describing the method of working. Having got to the stage when the old sewage pipe had been extracted and the trench excavated to its full depth, it provides as follows:- "5. At this stage the trench support is installed comprising pinchers at approximately 1 metre centres. 6. The bedding material is spread and levelled, the new pipes are laid and further bedding is added to 150 mm above the top of the new pipe. 7. Support is withdrawn." We highlight this because it seems clear to us that such routine shoring ("pinchers") was never employed by Brenwal in either phase 1 or phase 2. 49. Turning to the events of the day, the report says this:- "On Saturday morning I was informed that the hydraulic breaker was out of action again. This had occurred on the previous Thursday so I visited site at 0815 to find out if this was going to be a long term breakdown that could affect the programme. At this time, the only work going on was the setting up of the overpumping system. The problem with the breaker did not seem to be significant and I was informed that Mr Walker had gone to procure new hydraulic pipes for the breaker and that once fitted the machine would be fixed. I had a brief walk around the site making notes of the previous day's progress. There was nothing untoward in terms of safety that caught my attention. I left site at approximately 0835. I returned to site at 1100, excavation to the top of the existing pipe had progressed, but very little else. The men were

actually departing for breakfast at the time. I had a discussion with Mr Mullaney regarding his intentions for the remainder of the shift. We both spoke to a fitter who was working on the machine fitted with the breaker. The impression I got was that it would be ready by lunch time. Mr Mullaney said that he intended to break out a section of the existing concrete surround and the existing pipework and lay new pipes to chainage 45 (some 30 metres upstream of manhole 26). He said that manhole 26 would be prepared for concrete but that this would be placed on Monday as it could not be obtained over the weekend. I was happy with this proposal and left site. ... Mr Leonard informs me that he paid intermittent visits to site all day, his last inspection being at 1300. Up till then the excavation to remove the existing pipe had not taken place. So between 1300 and 1500, the time of the accident, the trench had been excavated to full depth to chainage 28. It was not apparently intended to lay any more pipes for this shift but to install the flume and to lay pipes starting on Sunday morning. I do not believe that trench support was installed in this section before Mr Mullaney entered the trench to install the flume pipe." Mr David Leonard 50. Mr Leonard was employed by the Public Services Department and administered this contract on a day to day basis. His function on site was to maintain reasonable standards of workmanship and pass on any technical queries and generally to administer the contract to the specification required. For phase 1, he was at the project two or three times a day. Those particular works went very well. In phase 1, there were times when shoring was used when the depth or ground conditions required. The ultimate responsibility for the support of the trench would be down to Brenwal, but he recalled a time asking Brenwal to reduce the distance between the shoring as a precautionary request. He visited the site on Thursday 25 th July, Friday 26 th July and Saturday 27 th July. On the Saturday, his visits were brief as he had another contract where the pipeline was progressing to much deeper level involving heavy clays, and gravels with water within, which in his opinion required more supervision than the St Saviour's Hill project. His last visit to St Saviour's was at approximately 1.00 pm. At no time did he see the existing pipe or concrete surrounding that pipe being removed nor did he see any man entering an unsafe working area. He did not see any shoring in the trench, but cannot say due to his lack of attendance that it was never used. At 1440 hrs he returned to the site and saw a Brenwal employee running up the hill to retrieve what looked like a coat from one of the contractors' vehicles. This seemed strange to him so he walked down to investigate. On the working area becoming visible, he noticed an ambulance just pulling up to the side of the trench. The order of events 51. As can be seen, there is considerable divergence between the evidence of Mr Walker and Mr Durkan on the one hand and the plaintiff on the other as to when the old sewage pipes and concrete were removed. It is not surprising that this should be the case, when dealing with events so long ago, but the incident report of Mr Wilkinson and the contemporaneous statement of Mr Leonard support the evidence of the plaintiff and have enabled us to make the following findings:- (i) When Mr Walker left the site early in the morning to have the part repaired, there had been no discussion about the use of the Volvo to remove the old sewage pipes and concrete. (ii) The only relevant work that was undertaken in his absence from the site was the excavation of the trench down to

the level of the old sewage pipe using the Volvo, as confirmed by Mr Wilkinson when he visited at 11.00 am. Accordingly, both Mr Walker and Mr Durkan are mistaken in their recollection that the old sewage pipes were removed that morning. In particular, Mr Walker is mistaken in saying that on his return to the site at 10.30 he found the work had been completed. (iii) The excavation of the trench down to the level of the old sewage pipes was completed some time around 12.30 am, at which point the hydraulic rock-breaker device would ordinarily have been used. At that time, Mr Walker was on site and was in charge of its repair. (iv) The removal of the old sewage pipes and concrete took place sometime after 1.00 pm as confirmed by Mr Leonard, and therefore a decision was taken between 12.30 and 1.00 pm (or shortly thereafter) not to use the hydraulic rock-breaker device because its repair had not been completed. (v) Mr Walker used the Kubota with an excavator bucket attached at the bottom of the site to load surplus materials including the excavated sewage pipes and concrete. (vi) Mr Walker met Mr Falvey at around 1.30 pm at the top of the site for 20 minutes, some 50 metres from the trench. He went down again to see Mr Brennan at the bottom of the site, and therefore passed close to the trench at least twice when the work of removing the old sewage pipes using the Volvo must have been taking place. The pleaded case 52. In its amended answer, Brenwal pleaded that the accident was caused or contributed to by the negligence of the plaintiff and give the following particulars:- "PARTICULARS OF NEGLIGENCE

- 1) Failing to devise a safe system of work as required in his role of foreman;
- 2) Failing to perform any, or any adequate, risk assessment as he was required to in his role of foreman;
- 3) Failing to utilise the most appropriate plant, equipment, tackle or appliances despite such being made available to him;
- 4) Failing to shore the trench as appropriate despite shoring materials and equipment being made available to him;
- 5) Failing to assess the risk of leaving voids under the trench when removing the old pipe and concrete;
- 6) Stepping into a trench without ensuring that it was safe to do so;
- 7) Devising an unsafe system of work in breach of his responsibilities as foreman;
- 8) Causing and/or permitting an unsafe system of work to be implemented in breach of his responsibilities as foreman;
- 9) Otherwise failing in the circumstances to take reasonable care for his safety." 53. When reduced to the facts, Mr Benest argued that the issue for the Court was simple. What should a reasonably competent foreman presented with the following facts have done? (i) A change of method from an established method of breaking concrete from the bottom of the trench to an untested system of using the bucket to lift out the pipe with the concrete surround in

situ . (ii) The use of a heavy excavator having to move up and down the trench with its tracks on or in the region of a 0.5 metre wide ledge. (iii) The need to use a jackhammer in the trench in order to break the pipe. (iv) The presence of voids in parts of the exposed trench caused by having to pull out the concrete surround whole. (v) The presence of an increased hole in the trench caused by the removal of a manhole and (vi) The presence of an increased length of trench. 54. The plaintiff, he argued, knew that there was an established method of work and that this presented a significant deviation. The inescapable conclusion is that a foreman faced with those particular facts as the plaintiff was on this occasion would have realised that there was an increased risk of collapse of the trench walls. The plaintiff should have:- (i) Devised a safe system of work when he knew that the established system of work could not be followed. As foreman, he was specifically responsible for devising a safe system of work and he consented to an improvised system which carried with it an intrinsic increased risk of causing the trench to collapse. (ii) Performed an informal risk assessment. He failed to assess or inspect the trench prior to allowing himself and Mr Nugent to work in it, despite the obvious increased risk factors. (iii) Utilised the hydraulic rock-breaker device. The use of the bucket was inappropriate for the reasons set out above and the plaintiff could and should have waited for it to be fixed and asked for it to be used once it was fixed. (iv) Assessed the risk of leaving voids under the trench or within the trench walls. The plaintiff did not, in his evidence, refer to assessing the integrity of the trench walls at all or even consider the need to shore. (v) Instructed his work force to shore the trench. The law 55. Article 4(1) of the Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 ("the 1960 Law") provides as follows:- "Where any person suffers damage as the result partly of the person's own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." 56. For a plaintiff's acts or omissions to entitle the Court to make a reduction, those acts or omissions must have been part of the cause of the damage. A plaintiff's careless or unlawful behaviour, however reckless, which does not cause the damage claimed for, cannot be the basis for a reduction in damages. There is, thus, effectively an obligation on the defendant to prove that the damage suffered by the plaintiff was caused at least in part by the plaintiff's own fault. 57. Article 4(9) of the 1960 Law defines 'fault' to mean any:- "...wrongful act (faute), negligence (négligence), lack of skill (impéritie), breach of statutory duty or other act or omission which gives rise to liability in damages or would, apart from this Article, give rise to the defence of contributory negligence." 58. In *Hacquoil v Troy & Sons and Harbours and Airport Committee*

(1970) JJ 1305 the Court referred (at 1333-1334) to Halsbury's Laws of England , (Third Edition) to define the test to be applied:- "... the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish a plea of contributory negligence is to

prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. ... The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself." 59. In *Jones v Livox Quarries*

(1952) 2 QB 608, it was established that contributory negligence does not require a plaintiff to reasonably foresee the particular risk to which he succumbs but only that a plaintiff should foresee the general risk. Further in *Louis v Troy Limited and others*

(1970) JJ 1371 (at 1400) it was stated that:- "Knowledge by the plaintiff of an existing danger or of the defendant's negligence may be an important element in determining whether or not he has been guilty of contributory negligence. The question is not whether the plaintiff realised the danger but whether the facts which he knew would have caused a reasonable person in his position to realise the danger. It is a question of fact in each case whether the knowledge by the plaintiff in the particular circumstances made it so unreasonable for him to do what he did as to constitute contributory negligence." 60. The Court confirmed (at 1403) that the plaintiff must be judged by the standards of conduct of "the reasonable man" and further held ((at 1404) that the reduction in damages is made in proportion to the degree of responsibility for the accident:- "...and the Court may take into account not only the share of each party in causing the accident, but also the degree of blameworthiness." 61. Brenwal accepts that where contributory negligence is alleged the burden is upon it to prove that the plaintiff's fault contributed to the injury (*Flower v Ebbw Vale Steel Iron & Coal Co. Limited*

(1936) AC 206). 62. The Court of Appeal in *Jersey Post v Chartier*

[2007] JLR 187 (at 196) has held that:- "It is obviously logically impossible for the court making the deduction to do so with mathematical precision. In truth, it is really a matter of impression, the court looking at the conduct of the claimant and of the other person or persons and doing the best it can to be fair. The phrase "just and equitable" is suggestive of discretion and, as in the case of the exercise of a discretion vested in a lower court, an appellate court should be slow to interfere." 63. In this case, Brenwal submits that the plaintiff should be found to be contributory negligent to the extent of 40%. Brenwal is not seeking, therefore, to escape its breach of statutory duty. In the House of Lords decision of *Boyle v Kodak Limited*

(1969) 2 AER 439, the House of Lords held that to escape a breach of statutory duty, the defendant had to establish that the claimant was wholly to blame or that the defendant had done all that was reasonable to ensure compliance. The case is authority for the high standard required to shift the statutory duty from the defendant to the claimant and that, where such a shift was achieved, there was no question of contributory negligence because there was no blame on the defendant to be apportioned. 64. Both counsel referred us to

Munkman on Employer's Liability , 15 th Edition, Jersey law looking to English law in this field, where at paragraph 6.30 it observes that the position of such a high standard reflects the decision to impose such a duty in the first place. In such a breach of statutory case the Court has to have very clearly in mind the reasons why the duties that go beyond best endeavours are provided in the particular statute. 65. Looking to the reasons for requiring shoring over 4ft, we were referred by Miss Dorey to the following passages in the guidance contained in the HSE document "Be safe and shore" :- "Digging foundations and trenches for drains is one of the first jobs carried out on a construction site, and unhappily for some it is the last that they carry out. Workers with many years experience of excavation work are often deceived by the appearance of ground which they are convinced will stand with little or no support, for as long as they have to work in it. There is almost no ground which can be relied upon to stand unsupported in all circumstances. Every year too many construction workers are killed and maimed when part of inadequately supported excavations, in which they are working, collapse. The risk is self-evident when you consider that one cubic metre of soil can weigh as much as one tonne, and it is quite common for that volume of soil to collapse into an unsupported excavation. ... Many ground types are self-supporting to some extent, but a collapse can occur without warning, resulting in a person being buried, trapped, crushed, or struck by a heavy mass of spoil or rock. Never underestimate the risks involved in working in excavations. Over the years, many deaths have occurred in both shallow and deep excavations." 66. In our view, the Regulations have imposed a duty to shore in depths of over 4 ft. precisely because unsupported ground is unpredictable and collapse can occur without warning in excavations in which workers with many years' experience can be deceived by the appearance of the ground. 67. An employee is normally entitled to assume that his employer has complied with the relevant statutory duties (see *Westwood v Post Office*

(1974) AC 1) and as a result, where there has been a breach of such duties, it is important to ensure that the statutory requirement placed on the employer is not emasculated by a willingness on the part of the courts to find that an employee has been guilty of contributory negligence. 68. As Keene LJ stated in *Cooper v Carillion*

(2003) EWCA Civ 1811 , [2003] All ER (d) 31 (Dec): "It is very easy for a judge with the advantage of hindsight to identify some act on the part of the employee which would have avoided the accident occurring. That in itself does not demonstrate negligence on the part of the employee. As Lord Tucker put it in *Staveley Iron & Chemical Co Ltd v Jones*

[1956] AC 627 at 648, one must avoid treating every risky act by an employee due to familiarity with the work or some inattention resulting from noise or strain as contributory negligence." 69. English case law (to which Jersey law looks in this field) has recognised that the employee is not placed in the same circumstances as the employer. That principle was articulated by Lord Oaksey in *General Cleaning Contractors Limited v Christmas*

- (1953) AC 180 at 189-190:- "Employers are not exempted from this duty by the fact that the men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a boardroom with the advice of experts. They have to make their decisions on narrow sills and other places of danger and in circumstances where the dangers are obscured by repetition." 70. As Munkman observes at paragraph 6.64, it has to be recognised that the employer creates the circumstances and environment in which the employee has to take decisions as to precise modes of carrying out his duties and the Court should be slow to be overly critical (Cross v UGC Limited (t/a Oxford Automotive)
- [2001] EWCA Civ 685). 71. Munkman goes on to say at paragraph 6.65 that it is also not necessarily negligent for a worker to follow the method of work accepted by the employer, even if it involves obvious risk. It is not the duty of a worker to break away from the employer's methods and devise a safer system, although he may have as much skill and experience as the employer. In Ireland the Supreme Court in *Stewart v Killeen Paper Mills Ltd*
- [1959] IR 436 has held that where the injury could not have occurred but for the breach of statutory duty on the part of the employer the court, according to *Kingsmill Moore J* at 449:- "...is entitled to take into account that the action was taken by the workman in furtherance of the interest of his master and that zeal may have dulled the edge of caution: that the action was one undertaken to meet a situation where if anything was to be done it had to be rapidly and without deliberation: and that, if the act was one which was customarily performed, the master ought to have been aware of the practice and its danger, and ought to have taken steps to forbid it. Where it can be shown that a regular practice exists unchecked it is difficult to convict of contributory negligence a workman who follows such practice..." 72. Mr Benest warned against falling into the trap of making no finding of contributory negligence where, as here, there has been a clear breach of statutory duty. He referred us to the English Court of Appeal decision of *Sherlock v Chester City Council*
- (2004) EWCA Civ 2001, which was considering the issue of contributory negligence in a claim relating to a workplace accident, where an employee lost a finger as a result of using an unguarded circular saw and portable bench. Latham LJ said the following, when dealing with the issue of contributory negligence:- "31. The question then arises as to the apportionment of liability. In *Toole v Bolton Metropolitan Borough Council* [2002] EWCA Civ 588, Buxton LJ said:- 'It is not usual for there to be marked findings of contributory negligence in a breach of statutory duty case.' 32. There may well be some justification for that view in cases of momentary inattention by an employee. But where a risk has been consciously accepted by an employee, it seems to me that different considerations may arise. That is particularly so where the employee is skilled and the precaution in question is neither esoteric nor one which he could not take himself. In the present case he could

have made himself a run-off bench, or ensured that Mr Webb was there when he cut the relevant fascia board. In those circumstances, it seems to me that the appellant can properly be required to bear the greater responsibility. I would assess his responsibility for the accident at 60%. Accordingly he is entitled to 40% of whatever damages are ultimately considered to be appropriate for the dreadful injury he suffered to his hand."

73. We accept that in the case before us we are not dealing with momentary inadvertence on the part of the plaintiff and that breach of the Regulations is not a bar to a finding of contributory negligence. It is but one factor to be taken into account and weighed in the balance particularly where, as alleged here, a risk has been consciously accepted by a skilled employee. 74. Munkman concludes his review of the English case law at paragraph 6.74 with the following:- "(e) In a case involving a breach of statutory duty case close consideration should be given to the correctness of any assessment under 20% or significantly over 50%. If under 20%, regard should be given to the *raison d'être* of the relevant statutory duty: and that momentary inadvertence should not ordinarily result in a deduction for contributory fault. If over 50%, a long-standing conventional limit in case of breach of a duty, a *fortiori* over 75% regard should be had to whether, having regard to the nature and extent of the relevant duty upon the employer and its causative effect and whether the accident was entirely due to the fault of the claimant." Decision 75. The plaintiff was taken on by Brenwal, a new company, as an experienced pipe layer. There was no written contract. Although he had previously acted as a gang leader, he had never acted as a foreman. The catalyst for his appointment as foreman was the requirement of the Public Services Department for there to be a foreman for the St Saviour's Hill contract, as made clear by Mr Walker. He was nominated by Mr Walker because he was the most experienced of Brenwal's employees, but it is clear that the appointment was made verbally. There is no documentary evidence of the appointment. There was no discussion as to his duties and responsibilities and significantly, no training of any kind as to the role of a foreman and this in contrast to the experience of Mr Walker at Gleasons, where he did receive training on how to be a foreman. 76. Brenwal cannot point to any specific date for the plaintiff's appointment as foreman or to any pay rise that coincided with that appointment. There is a note in the plaintiff's pay records of his receiving half an hour extra per day for preparing time sheets for the men and his pay increased from an initial rate of £9.10 per hour (according to the records from February 2000) to £12 per hour at the time of the accident. As previously mentioned, the plaintiff informed us that when he was taken on by Brenwal he accepted a lower pay than he had previously been receiving, because it was a new company on the basis that his rate would be increased as the company became more established. He puts the pay increases down to that process, not to any promotion as foreman and we accept his evidence. 77. The word "foreman" according to the Oxford English Dictionary simply means principal workman or one who both supervises others and works himself. The case against the plaintiff in contributory negligence is premised upon breaches of his duties as foreman and it is necessary for us to determine what those duties were. There was nothing in writing from Brenwal prior to the accident to assist us and there is no evidence of any verbal instructions having been

given to him as to his duties as foreman. 78. In his statement of 2011, the plaintiff described himself as "the de facto foreman on the job" and at one stage in his cross examination he appeared to resist the suggestion that he had any formal responsibility for the supervision of Brenwal's employees. We think this arises out of the lack of formality in the working arrangements and the fact that he had never been told formally that he had responsibility for anyone. He did accept in evidence however that in practice he did supervise the men in the pipe laying. We think there is much in his suggestion that the division of responsibility depended upon experience. He was the experienced pipe layer and therefore supervised the men in that operation. This was after all a contract for the laying of pipes. Mr Walker was in overall charge and had responsibility for the machinery, something of which the plaintiff had little experience. It was as he put it in his statement which we repeat:- "I tended to deal with the men and Pat Walker tended to deal more with the machines, although he also had overall responsibility and was the boss." 79. Mr Walker was a "hands on" man and was on site 90% of the time. He was "the boss" and we find that he did have overall responsibility for the site and the supply of labour, materials and machinery to it. It was not in dispute that the plaintiff played no role in the tendering process or in the contract. He was not shown any of the tendering or contractual documentation. In particular, he was not shown the method statement which contained the requirement for shoring. 80. We note that paragraph 120 of the HSE guide "Be safe and shore" contains this advice:- "Management of work Work should not commence until a risk assessment has been made and a method statement agreed. Such documents need not be lengthy and can usefully be supplemented by simple drawings. An effective method statement can be one of the best ways to ensure that hazards and control measures are identified, those doing the work are properly instructed, and that the work is effectively supervised." 81. It goes on to say at paragraph 122:- "As work proceeds, supervisors need to check regularly to see that the method statement is followed and that specified precautions are taken. Where site conditions are such that modification of the planned method of work is needed, any changes should be made only after consultation with the person who produced the method statement. A copy of the method statement should be kept on site." 82. Whilst a method statement was agreed between Brenwal and the Public Services Department, the evidence shows and we find that:- (i) The plaintiff was not shown the method statement or instructed in any way as to its contents. Specifically, he was not told about the requirement for shoring. (ii) There is no evidence that the method statement was kept on site. (iii) The only persons capable of ensuring that the method statement was followed were Mr Walker and Mr Falvey, the safety officer, because they were the only persons that knew of it. Neither of them did so. Mr Falvey was named safety officer because there was a contractual and regulatory requirement from the Public Services Department for such a person to be appointed, but as already stated in his statement to Health and Safety in 2002, he makes it clear that in practice he had no responsibility for any site work. 83. It is of course a requirement of the Regulations for employers to provide and use shoring for excavations over 4 ft. We accept the plaintiff's evidence that he was unaware of this obligation upon Brenwal either under the

Regulations or under the contract. Furthermore, we accept his evidence that he received no safety training whatsoever and Brenwal did not assert to the contrary. Specifically, he received no training on safety in excavation work. We were shown the guidance issued on the Regulations, which Miss Dorey pointed out had been in existence for some 30 years prior to the accident, which has the following foreword:- "The object of this guidance is to assist all persons engaged on work in the Construction Industry, by explaining as simply as possible the requirements of the Constructions (Safety Provisions)(Jersey) Regulations, 1970. These Regulations came into force on the 1st August, 1970, and have since been amended in 1973, 1979 and 1996. The Employment and Social Security Committee's objectives in publishing this guide has been to treat the subject in such a way so as to make it easier for contractors and employers of workmen to choose and adopt the right course which will enable them to ensure a reasonable standard of compliance with the Regulations." 84. The plaintiff had never seen this guidance or been trained in it. 85. Some assistance as to the duties and responsibilities of a foreman working for Brenwal in 2002 can be gleaned from the Health and Safety Policy adopted by Brenwal in August 2002, following the accident, because it gives an indication as to how Brenwal at that time viewed those duties and responsibilities. Its organisational chart provides for the role of a "site manager" and below that "the foreman" followed by "the operatives." The site manager's duties and responsibilities include the following:- " - Understand the Company safety Policy for Health and Safety and ensure that it is brought to the notice of all employees, particularly new starters. Carry out all work in accordance with its requirements and bring to the notice of the Contracts Manager any improvements or additions which are felt necessary.

- Organise sites so that work is carried out to the required standard with minimum risk to employees, other contractors, the public, the equipment or materials.
- Where necessary issue written instructions setting out the method of work. Check that sub-contractors engaged in high risk activities are working in accordance with their agreed Method Statement (Asbestos removal, Demolition, Steel Erection, Roofing etc.) and that details of other relevant risk assessments are available.
- Know the requirements of the Construction Regulations and other relevant legislation and ensure that they are observed on site.
- Ensure that the "competent person" appointed to make necessary inspections of scaffolding, excavations, plant, etc. has sufficient knowledge and experience to evaluate all aspects of safety relating to the item being inspected.
- Ensure that supervisors and operatives under your control are aware of their responsibilities for safe working and that they are not required or permitted to take unnecessary risks.
- Examine drawing and soil investigation reports to determine excavation support requirements in advance and provide in accordance with Company Policy." 86. In our view, Mr Walker was in the position of site manager on the St Saviour's Hill contract. He was a

hands on type of man who was there 90% of the time. He was "the boss" and as he conceded assumed all of the responsibilities of the safety officer. Leaving aside the fact that Brenwal had no Health and Safety Policy at the time of the accident, he failed to discharge his duties and responsibilities to:- (i) Issue any instructions written or verbal as to the method statement or to have it on site. (ii) Ensure that the method statement was adhered to. (iii) Ensure that the foreman as the next competent person had sufficient knowledge and experience to evaluate all aspects of safety and was aware of his responsibilities for safe working. 87. The duties and responsibilities of the foreman are set out as follows:- "DUTIES AND RESPONSIBILITIES OF SITE SUPERVISOR/FOREMAN Main responsibilities are to:

- Read and understand the Company's Health and Safety Policy and ensure that it is brought to the notice of operatives under their control. Carry out all work in accordance with its requirements.
- Know the construction regulations applicable to the work on which operatives are engaged and insist that these regulations are observed.
- Incorporate safety instructions in routine orders and that they are obeyed.
- Do not allow operatives to take unnecessary risks.
- Ensure that new employees, particularly apprentices and young people are shown the correct method of working and all safety precautions. Provide induction training when appropriate.
- Ensure that young employees (under 18 years) do not drive any item of plant or operate any type of tool or equipment except under direct supervision.
- Commend operatives who, by action or initiative, eliminate hazards.
- Do not allow horseplay or dangerous practical jokes and reprimand those who consistently fail to consider their own safety or that of others around them.
- Report immediately any defects of plant or equipment to the Contracts Manager immediately.
- Report any accident, however minor, to the Contracts Manager.
- Set a personal example by wearing protective clothing and by carrying out your own work in a safe manner.
- Look for and suggest ways of eliminating hazards. Bring to the notice of the Contracts Manager improvements or additions to the Company Safety Policy which you feel should be made." 88. Again leaving aside the lack of a company Health and Safety Policy, the plaintiff had no training in or knowledge of the construction regulations, so was incapable of fulfilling the first two requirements. He could incorporate safety instructions in routine orders and prevent operatives from taking unnecessary risks, but only to the extent of the knowledge he had of safety matters in which he had received no training at all. He could not

ensure the correct method of working was used as he had not been shown and had no knowledge of the method statement. He had no responsibility for the machinery as that lay with Mr Walker. 89. We find that the plaintiff's ignorance of the method statement, his lack of training both as to the duties of foreman and in safety matters and the low priority given by Brenwal to safety generally severely limited and compromised his ability to act as foreman on the St Saviour's Hill contract. 90. The failure of Brenwal to inform the plaintiff of the method statement and the requirement for shoring "at all times" was exacerbated by the Public Services department. It is clear to us, and we find, that far from being routine, shoring was the exception. If it had been routine, there would have been shoring equipment on site and we find that there was none. Brenwal had some equipment in its yard, but in the main Mr Walker was reliant on an arrangement to obtain shoring equipment from Gleesons if it was necessary. It only became necessary once in phase 1 when rock was encountered. Apart from that, we find there was no routine shoring on phase 1 or phase 2 up to the point of the accident. 91. This was an important contract for the Public Services Department, involving as it did a major road, giving access to both Government House and at that time the Royal Court. The minutes of the pre-contract meeting held on 16 th July 2002 show that there was some pressure to get the contract completed before judging commenced on 14 th August 2002 for the "Britain in Bloom" contest in which the Parish of St Saviour had entered. They therefore took a close interest in it. 92. Although their statements do not cover phase 1 in any detail, it is clear to us that the Public Services Department closely monitored both phases. In phase two they both visited the site daily, sometimes more than that. In our view, they must have been aware that contrary to the method statement and to the Regulations, shoring was not being used routinely i.e. when the old sewage pipes were removed and the trench extended down some 6 ft. The plaintiff told us, and we accept, that at no time did anyone from the Public Services Department ever suggest to him that shoring should have been used. 93. This is important in our view in that from the plaintiff's perspective he was following a method of working which did not provide for routine shoring of the trench, a method held out by both Brenwal and the Public Services Department as safe, and we reject the suggestion that it was his duty to break away from that method and devise a safer system, i.e.. to insist upon routine shoring, particularly having regard to his ignorance of the method statement and of the Regulations and his singular lack of safety training. 94. The question then arises as to whether anything had happened on the day of the accident that should have caused a reasonable person in the plaintiff's position (i.e. with his knowledge, experience and training) to have foreseen the danger of the trench collapsing. 95. Brenwal's case is premised upon the assertion that it was the plaintiff, as foreman, who decided to change the system of work that day to one which was unsafe, creating obvious risk factors. In particular, Brenwal says those risk factors were:- (i) The implementation of an alternative and unsafe alternative system of work, being the use of the excavator to remove the pipe while it was still encased in concrete. (ii) The obvious risk that removal by this means would affect the integrity of the trench walls by impact or creation of voids. (iii) The excessive length of the trench. (iv) The proximity of the area where the manhole had been removed. 96. Brenwal claims that the system implemented by the foreman was not tried and tested.

Despite the obvious additional risk factors, the plaintiff did not inspect the trench and did not even consider shoring it. His decision in placing himself and another worker in the trench without considering the obvious risks involved fell well short of the standard expected of an experienced and competent foreman. 97. Brenwal's assertion that it was the plaintiff's decision to change the system of work is based on the statements of both Mr Walker and Mr Durkan, to the effect that the decision was taken and implemented early in the morning in the absence of Mr Walker, who returned at approximately 10.30 am to find the work had been done. 98. We have found above that this cannot have been the case. In doing so, we do not wish to imply that Mr Walker has been untruthful in his evidence to us. He was badly affected by this accident and in our view, is simply confused about the order of events and his involvement. He was, in fact, on site at about 12.30 when the trench had been excavated using the Volvo down to the old sewage pipe and the hydraulic rock-breaker device was needed. He was in charge of the device and attending to its repair. The plaintiff was expecting to use the device and indeed had told Mr Wilkinson so. It was supposed to have been ready by lunch time but clearly wasn't. 99. Mr Durkan's recollection of events could not be tested in cross examination and little weight therefore can be placed on his 2011 statement. In his ESS statement, he makes no reference to Mr Walker being off site, as to who took the decision and as to the timing of events. He simply says:- "Because the breaker was not available, the concrete surround and pipes in the trench were lifted by the 360 machine [the Volvo]. They came up in sections." 100. As Mr Walker said in his ESS statement, the system of work used was usually a joint decision taken between him and the plaintiff and we accept the plaintiff's recollection that there was a joint discussion involving Mr Walker, Mr Durkan and the plaintiff. Various options were discussed. The plaintiff told us that he went to check the pipe-work and returned to find that Mr Durkan had already pulled out one section of the old sewage pipe using the Volvo. He saw nothing wrong with it and assisted in the process. 101. It is difficult in a busy working environment such as this for the Court to determine who precisely was responsible for the decision to use the Volvo, but we find as follows:- (i) It was not a decision taken by the plaintiff alone as foreman. (ii) Whoever made the decision, neither Mr Walker nor the plaintiff raised any objection to it. 102. We received no expert evidence as to the cause of the trench collapsing and whether this change in the system of work was in any way causative of it. A number of suggestions have been put forward in statements and in evidence as to why the trench may have collapsed:- (i) The trench was close to the lower manhole which had been excavated back to the pavement. This may have weakened the half metre of road between the pavement and the trench. However, the plaintiff told us that it was this section of the trench close to the manhole that collapsed last. (ii) The trench sides might have been weakened by voids created by the removal of the old sewage pipes in sections with its concrete attached. The only evidence we had of voids was from the plaintiff. He told us that the first sections of pipe came away very easily and it was only in the later sections further up the trench that some two or three small voids had been created. It was the lower section of the trench that started collapsing, not the section where the voids had been created. (iii) Jack hammers (which were in general use on site) had been used to create breaking points in the sewage pipe so that they could be broken

into lengths suitable for removal. These might, through their vibration, have weakened the trench. However, we can see that the hydraulic rock-breaker device is a very powerful and substantial piece of equipment and, in our lay view, would presumably cause just as much if not more vibration. (iv) The trench was longer than usual- some 12 metres - and that may have been a factor. However, we heard evidence that longer trenches had been excavated before - in one section of phase 1 a trench of some 30 metres had been excavated. (v) The Volvo is a heavier machine than the Kubota and this may have been a factor. Both machines were tracked vehicles which operated astride the trench, so to speak, in order to work in it. However, in the normal system of work both the Volvo and the Kubota had to track up and down the trench in order to carry out their roles - in the case of the Kubota breaking up the old sewage pipe and concrete and in the case of the Volvo excavating the debris and lowering the trench. (vi) There was reference in the statement of Mr Durkan and Mr Nugent of some change in the ground conditions. Mr Walker and the plaintiff said that they had not detected any change. To them the ground appeared well compacted and we accept their evidence. 103. It could have been none of these factors. As the HSE publication "Be safe and shore" makes clear, ground can collapse without warning, even ground that appears stable to experienced workers; hence the mandatory requirement for shoring. 104. There is no evidence before us upon which we can find that the system of pulling out the old sewage pipes in sections using the Volvo was causative of the trench collapsing or was any less safe than the system using both the Kubota to break up the pipes and the concrete and the Volvo to remove them. What is unsafe is working in or over a trench over 4 ft deep which is not shored. Brenwal had created an inherently unsafe situation by not ensuring that the trench was shored, whatever method was used to extract the old and insert new sewage pipes. It did so not to save money but for the reasons put forward by Mr Walker in his evidence and as summarised above. 105. Given the plaintiff's lack of knowledge, experience and training, we do not think that anything happened that day which should have caused the plaintiff to foresee the danger of the trench collapsing. He was working in an environment in which Brenwal and the Public Services Department had held out the trench as being a safe place in which to work. It would be different if the plaintiff had been properly trained or had been given the method statement so that he knew of the requirement for shoring. 106. Mr Benest submitted that the case comes down to one common sense question, namely "Put yourself in the plaintiff's position with his knowledge and experience

- would you have got into that trench?" Each member of the Court has answered yes to that question. 107. The central point here is that trenches are capable of collapse without warning or obvious cause and it is for that reason that the Regulations brought into force as long ago as 1970 require shoring over 4 ft. It was Brenwal's failure to shore the trench that was the cause of this accident. 108. We dismiss the claim for contributory negligence. Authorities Construction (Safety Provisions)(Jersey) Regulations 1970. Civil Evidence (Jersey) Law 2003. Health and Safety at Work (Jersey) Law 1989. Law Reform (Miscellaneous Provisions)(Jersey) Law 1960. Hacquoil v Troy & Sons and Harbours and Airport Committee

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- (1970) JJ 1305 . Halsbury's Laws of England, (Third Edition). Jones v Livox Quarries
- (1952) 2 QB 608 . Louis v Troy Limited and others
- (1970) JJ 1371 . Flower v Ebbw Vale Steel Iron & Coal Co. Limited (1936) AC 206. Jersey Post v Chartier
- [2007] JLR 187 . Boyle v Kodak Limited (1969) 2 AER 439. Munkman on Employer's Liability, 15 th Edition. Westwood v Post Office (1974) AC 1. Cooper v Carillion
- (2003) EWCA Civ 1811 . Cooper v Carillion [2003] All ER (d) 31. General Cleaning Contractors Limited v Christmas (1953) AC 180. Cross v UGC Limited (t/a Oxford Automotive)
- [2001] EWCA Civ 685 . Stewart v Killeen Paper Mills Ltd
- [1959] IR 436. Sherlock v Chester City Council
- (2004) EWCA Civ 2001. Page Last Updated: 13 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
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