

**THE HIGH COURT****2010 5979 P****Between:****Patrick Donnelly****Plaintiff****And****LPB Building Services Limited and Bernard Tansey****Defendants****Judgment of Mr Justice Michael Peart delivered on the 20th day of January 2012:**

1. On the 13th August 2009, the plaintiff sustained a serious injury to his right eye as he was dismantling a wire fence in his back garden. He was using a small wire cutter tool to cut a horizontal support wire which was assisting to hold the wire fence in situ, with a view to eventually removing the fencing in question when all support wires had been removed.
2. According to his evidence, he had with some difficulty, given the age and type of wire cutter being used, cut through this particular wire when it immediately sprung back and struck his right eye, causing a full thickness corneal laceration injury which, though repaired by surgery, has left him with visual impairment, an increased risk of developing a cataract and also leaves him more prone to eye infections into the future.
3. In these proceedings, he alleges that on the date of this accident and for a short time previously he was in the employment of the defendants or either of them, and that he had been instructed by the second named defendant to dismantle the fence in question, and that he was not provided with a safe system of work, a safe place of work. He claims also that he was not provided with goggles, training in how to perform the task, or any supervision, and also that the defendants caused him or allowed him to undertake this task when they ought to have known that it was dangerous.
4. The defendants plead that the plaintiff was never employed by them, and that the task being carried out by the plaintiff when this injury was sustained was one being carried out by him for his own benefit and in his own time and without any instruction having been given to him by them. They plead also that in any event the injury was caused by the plaintiff's own negligence and they have particularised these allegations in their Defence, stating that he failed to have any regard for his own safety, having failed to wear any eye protection when cutting the wire in question and that he is in effect the author of his own misfortune.
5. The first issue for determination is whether or not the plaintiff was in the employment of the defendants or either of them on the date of this injury. If he was not, then the plaintiff's claim must fail for obvious reasons.
6. It appears that the first named defendant submitted a tender to Ballina Town Council for the work of carrying out renovation work to 16 local authority houses at Bunree Road and at Healy Terrace, Ballina, Co. Mayo. Their tender for these works was accepted by letter dated 30th June 2009. The planned date for commencement was stated to be the 4th August 2009, some nine days prior to the date of the plaintiff's injury.

**Plaintiff's evidence:**

7. The plaintiff who lives in one of the houses which was part of this renovation programme, namely No. 20 Bunree Road, says that around the time the work commenced he approached the second named defendant whom he met in a lane at the back of his house and asked if there was any chance that he might get some work. He says that he was told that the works would be commencing shortly. He met him again, he says, some days later when he was told that the work was commencing and "to come along". The plaintiff has stated that he started to do some general labouring work for the defendants thereafter. No wage was agreed according to the plaintiff, and that it was just a "gentleman's agreement". Nevertheless, he has stated that he started doing work such as taking down ceilings at house number 24 Bunree Road. He says that he took the windows out of another house, and was also involved in getting house number 22 ready for demolition as it had to come down. He says that he was working with a sledge-hammer, while the second named defendant was working with a machine. He says that he erected some scaffolding to protect an adjoining house, and did work to protect number 23 from being damaged by rubble by covering the roof with planking. He described having done other work of this kind in order to get the houses ready for renovation. In his evidence he described quite a lot of general labouring work which he was asked to do during these couple of weeks on various houses on the road, including the insulation of an attic in either number 23 or 24 on the road.
8. The plaintiff says that he was working for three weeks in this way, and that he was paid cash by the second named defendant for each week worked. He says that he received €60 for the first week, €80 for the second week, and €150 for the third week, but that there was no discussion about PAYE or PRSI deductions, and that he believed at the time that his work would continue for perhaps two years.
9. He also stated that the second named defendant had asked him if he could store some tools and machinery in the plaintiff's garden shed at the rear of his garden and that he agreed to that.
10. The plaintiff has stated that part of the work to be done to his own house by the Town Council was to level his back garden and lay concrete over it, and that it was so that this work could be done that the second named defendant instructed him to dismantle the fence if he wanted to keep it. This is not accepted by Mr Tansey, who says that this work in the plaintiff's back garden was not part of the works tendered for by him, and that the plaintiff simply asked him if he would do that work as an extra. Mr Tansey in his evidence has produced a method statement for the work to be undertaken in the plaintiff's house and points to the fact that there is no reference whatsoever to any work being undertaken in the plaintiff's back garden. It is clear from that document that this is correct.

11. As far as the day of the accident is concerned the plaintiff has stated that when he was talking to the second named defendant that morning he was given some instructions as to what he was to do that day, and that the second named defendant told him in relation to his own house and garden that if he wanted to keep the wire fencing that was in his back garden he should take it down as a machine had to get into the garden if the extra work which the plaintiff wanted to have done in his garden was to be carried out.
12. It was also necessary to do some work at the front of his house in order to allow a machine pass over a low wall at the front of it. At any rate, the plaintiff says that on this morning he worked on Coen's house removing rubble, rubbish and a fireplace. He said that there were other men working on that house as well. He then started to work at his own house in order to get it ready for work to be done. He himself set about dismantling the wire fence in the back garden. In order to perform that task, he apparently went out to the defendant's truck on the road and took a small wire cutter or 'snips' out of the back of the truck. He accepted that the second named defendant had not given him this 'snips' personally, though under cross-examination he stated that Mr Tansey had told him that if he looked in the truck he would find a 'snips'.
13. I note in an engineer's report on behalf of the plaintiff which was prepared following a visit to the plaintiff's house a month after this accident, and after he had been to see his solicitor, that the plaintiff is noted as having told the engineer that he had been instructed by Mr Tansey to remove the fence and that he was supplied with a 'snips' with which to cut the supporting wires. The engineer noted at this visit that some of the defendant's equipment was being stored in the plaintiff's shed at the rear of his garden. Mr Tansey denies these matters and I will come to that.
14. At any rate, on the date of this accident, the plaintiff started to cut the strain wires on the fence, starting with the one closest to the ground, and succeeded in cutting that wire without incident. He then set about cutting the top wire which caused him more difficulty, but eventually he succeeded in doing so, but the wire snapped back because of the tension and struck him in his right eye. His eye was immediately sore and he knew that he had injured it. Nobody else was with him at this time as the others were working two houses away. But a neighbour, Mrs Delaney was in her garden and she apparently took a look at his eye and said there was some fluid oozing from his eye and recommended that he go to a doctor.
15. He eventually went to a chemist and asked for some drops, but the chemist apparently refused to do that and said that he should go to a doctor. But another person working in the chemist apparently gave him the drops he wanted. He says that he went straight back to work and completed the dismantling of his fence. He did not meet the second named defendant. Later that evening he went to a doctor who said he should go to hospital, but he did not do so. Instead he returned to work, and did the best he could with one good eye.
16. He says that he met the second named defendant that afternoon and asked him for some goggles as there was a lot of dust around but was told that there were none, and told also that he had to work on taking down a ceiling. Under cross-examination he said that he had not shown his injured eye to the second named defendant. He was unable to explain why he had not done so, but when pressed, stated that it "was not much of his business really". It was put to him that in fact he had shown the second named defendant his injured eye and had in fact said to the second named defendant that he had hurt his eye but had said also that it was nothing to do with the second named defendant. However, the plaintiff said that he had no recollection of saying that to the second named defendant.
17. An issue which arose during cross-examination was when the work on this renovation project actually commenced. The plaintiff has said that up to the date of this accident he had been working for about three weeks, which would mean that the plaintiff started working on about the 27th July 2009. However, an AF 2 Form signed on the 29th July 2009 and which issued by Ballina Town Council for Health and Safety purposes was produced to the plaintiff and this notice indicates that the start date for the project was the 4th August 2009 and it was put to the plaintiff that he could not be correct in stating that he had been working on this job during the week prior to the start date. The plaintiff was adamant that he was working for three weeks prior to the accident.
18. He says that on the following day he continued working with a crowbar helping to take down the ceiling in question. He says that he tried his best to keep working but that he was unable to do so due to the injury to his eye. So he went home.
19. During his evidence he also stated that he had met an electrical contractor, Mr Fleming, at the site around the time the job commenced. Mr Fleming apparently asked what was going on and that he was looking for some work. The plaintiff apparently said he would have a word with the second named defendant and mention his name. Apparently Mr Fleming was successful in getting some of the electrical work involved in the renovation project.
20. Under cross-examination the plaintiff was questioned at some length about the work which the plaintiff alleged he had been doing as part of his employment with the defendants. There is considerable controversy about all of that, as the evidence of Mr Tansey demonstrates, and I will come to that evidence. But there is some independent evidence that the plaintiff was actually doing work of various kinds during the first couple of weeks of August 2009, though Mr Tansey denies that he was ever asked to carry out any such work.
21. In that regard, Elizabeth Delaney, a neighbour of the plaintiff, has stated the plaintiff put up scaffolding in order to protect her property while work was going on. She saw him using a sledge hammer, and going in and out of houses on the road which were being renovated, but could not recall the dates on which she had seen him. She stated also that he had broken down a wall beside her kitchen too. She also recalled him knocking down a low wall at the front of his house in order to allow a machine in so that work could be done at the back of his house. She also met the plaintiff just after he had injured his eye. She apparently has some nursing training, and having seen the injury she told him that he should go to a doctor.
22. David Egan, a man who lives in number 16, Bunree Road also gave evidence. His uncle who was ill at the time lived in number 23 Bunree Road, which was one of the houses being renovated, and Mr Egan recalled visiting his uncle around this time, and being told that the plaintiff and another man were in his uncle's attic putting in some insulation. He was certain that this was before the plaintiff had injured his eye, but could not recall the precise date. He did not see the plaintiff in his uncle's house, but recalls being told he was in the attic. He also stated that Mr Tansey had given him the job of painting the interior of his uncle's house and paid him €150 cash per week for doing that work, even though he had no 'safe pass'. The reference to not having a safe pass is relevant since Mr Tansey has stated in his evidence that he could not have employed the plaintiff since he had no safe pass and that it was a requirement of the Ballina Town Council that all personnel working on this renovation project had to have a safe pass. Mr Egan also stated that he and his uncle had seen the plaintiff working with a sledge hammer on a wall at the back of number 22 Bunree Road knocking down an extension, and recalls this being the subject of some amusement between him and his uncle, because the plaintiff was seen standing on the top of the very wall that he was knocking down. Again, he stated that this was before the date on which the plaintiff suffered the injury to his eye, though Mr Tansey's evidence is that work on that house did not commence until after the

13th August 2009. He also says that he saw the plaintiff working in another house (Coens) when he was removing some partitions before the date of the injury, though Mr Tansey's evidence was that the work on that house did not commence until after the date of the injury. Mr Egan could not be certain of the dates on which he saw the plaintiff doing the work he has described.

23. Des Fleming, an electrician also gave evidence. He stated that in the last week of July 2009 he spoke to the second named defendant at Bunree Road, hoping to get some of the electrical work on this project. He has stated that when he called to Bunree Road at that time, he met the plaintiff, whom he had not previously known, in a laneway at the back of the houses. According to Mr Fleming the plaintiff stated that he was working there at the time. Mr Fleming asked him if the second named defendant was about, and was told by the plaintiff that Mr Tansey was working on a machine nearby.

24. He went to speak to him, and, according to his evidence, they discussed the electrical works involved and in due course Mr Fleming prepared an estimate for electrical works to numbers 22 and 24 Bunree Road. Indeed, Mr Fleming is listed in the Method Statement signed by Mr Tansey and the Town Council on the 1st August 2009, which seems to conform that Mr Fleming had met with Mr Tansey before the end of July. The significance of that is that the defendants contend in these proceedings that the plaintiff is incorrect when he states that prior to the date of this accident he had been working on the site for about three weeks, and they have relied upon the fact that they commenced work only on the week commencing 4th August 2009 which is the start date specified in the AF2 Form already referred to. In so far as the plaintiff has stated that he was working for three weeks prior to the 13th August 2009, Mr Fleming's evidence of having met the plaintiff there towards the end of July 2009 is clearly corroborative of what the plaintiff has stated in that regard. Mr Fleming raised an invoice for first fix work on the 20th August 2009 and that has been produced to the court. He says that there was about two weeks' work involved before that invoice could be raised, which means that he would have commenced the first fix work around the 4th August 2009. He is certain that when he was starting his work which involved killing the power supply to those houses and setting up a temporary supply, he saw the plaintiff working around the site, tidying and sweeping and so forth. In fact, he has stated that this disconnection and temporary supply was done a couple of days before he actually commenced the electrical work itself, which would mean that Mr Fleming may have seen the plaintiff around the place at the end of July 2009. That is consistent with what the plaintiff has said.

#### **The defendants' evidence:**

25. Mr Tansey gave evidence of having tendered for this renovation project in June 2009 and his tender was accepted on foot of which he signed a contract with the Town Council on the 29th July 2009. He had done other work for the Town Council prior to this contract, and has been in business for about 40 years. He has operated under the name of the first named defendant for about 15 years. He has stated that he first went onto the site on the 4th August 2009 which is the commencement date according to the AF2 Form referred to. He disagrees that Mr Fleming, the electrician, was on site prior to the 4th August 2009, which was the Tuesday after the August bank holiday weekend. He is certain that Mr Fleming did not disconnect the mains supply and the set up of a temporary supply before the 4th August 2009. He believes that the reason why Mr Fleming is named on the Method Statement as the electrical contractor is that he was to be the electrical contractor if they could agree on a price for that work. He said that in due course a verbal agreement was reached as to that price. He went on to describe what work was carried out during the first couple of weeks of this project. He described works done at number 24 in order to clear out rubbish and debris from the garden which they accessed from an adjoining laneway. He described how one of his employees, Mr McAndrew was taking away debris and rubbish to an off-site dumping facility. He described also the digging out of foundations for a new block wall at number 24 and the pouring of concrete for those foundations during the 5th, 6th and 7th August 2009. He says that there was nobody else on the site during this time. He accepts that he saw the plaintiff around the site during this time. He also stated that the plaintiff had come to him and stated that if Mr Tansey wanted to store his equipment in his shed, he was happy that he should do so. Mr Tansey took him up on this offer, but says that there was no money discussed for that facility. He described also work done on houses 23 and 24 over the following couple of days. Scaffolding was erected by his son and another man at number 24 as there was work to be done on the roof of that house the following week. He described foundation and concrete work at 23 and 24, and also some clearing out work at number 23 where a lot of rubbish had to be cleared from the garden there which was very overgrown. The garden at number 22 was also cleared out on the 12th August 2009. He described also work done on the 12th August 2009 in order to demolish a two storey extension at number 22 which was derelict. He says that the roof was taken off on the 12th August 2009. They used ladders to get to the roof. He said also that it was necessary to protect Mrs Delaney's fuel tank beside her house, and that scaffolding and planks were erected for that purpose.

26. Mr Tansey emphatically denies ever employing the plaintiff. He accepts that he was hanging around the site during this time, but denies that he was working there. He also says that he saw the plaintiff up on the wall between number 22 and number 23 with a sledge hammer. He described that as foolhardy and he was not surprised that it was a source of amusement to people who had seen him there. He goes on to say that he told the plaintiff to come down, and that he did so. He denies also that the plaintiff was involved in pulling down the ceilings in numbers 22 and 24.

27. Mr Tansey has stated that the plaintiff did come to him and ask if he would concrete over the rare part of his garden where he keeps his dogs, and that he replied that he would see what he would do when they were there. He knew that the plaintiff had little money and he knew that if that work was to be done it would do no charge. He agreed also that he had stored some of his equipment in the plaintiff's shed after the plaintiff had offered him that facility. He could not recall what if any money he had given the plaintiff, but stated that if he gave him any cash, he did so only as a gesture of goodwill for being allowed to store his equipment in the plaintiff's shed. He denied absolutely that any such cash was for any labour or employment of the plaintiff. He denied that he ever gave him a job.

28. As for the day of the accident, the 13th August 2009, Mr Tansey stated that he had met the plaintiff at about 2pm that day, and that the plaintiff had his hand over his right eye, and that when he asked the plaintiff what had happened the plaintiff had stated that he had hurt his eye but that it was nothing to do with Mr Tansey. He had suggested to the plaintiff that he should get it attended to. He denied that the plaintiff had been involved in taking down ceilings on that or any other day. He stated also that there could have been no question of him employing the plaintiff as he did not have a 'safe pass' and this was a requirement of the Town Council under his contract. All personnel working on the site were required to have such a pass. In so far as there was evidence given that the plaintiff was believed to have been in the attic of one of these houses doing insulation work there, Mr Tansey stated that any such work would have been done by a firm of roofing contractors, Pdraig Kiernan Associates, and that none of his men would have been involved in that work.

29. Mr Tansey accepted that he may have agreed that David Egan could do some painting in the latter's uncle's house and that he would pay him €150 for doing so, but that was in September 2009 apparently, according to Mr Tansey's evidence.

30. Mr Tansey also stated that in so far as Mr Fleming, the electrician is concerned, his work started on number 24 only on the 5th August 2009, and not before. He believes that Mr Fleming would not have started any work on number 22 until September 2009.

31. Mr Tansey stated that the plaintiff must have taken the 'snips' out of the truck on the road. He is certain that he did not himself give the snips to the plaintiff. He said it was not a wire cutter as such, and that it was a tool which a plasterer might use in order to cut away wire mesh around a window. He remembered saying to the plaintiff that if he wanted to keep the wire fencing he had better take it down, and that he should keep safe anything else he wanted to keep from his rare garden, before it was cleared out, but that it was not said as part of any employment as such, but simply as something which the plaintiff should do ahead of any renovation and clearing work to be done at his house in due course. He stated that the taking down of the fence in question was not part of any work which was the subject of the contract with the Town Council.

32. Under cross-examination, Mr Tansey stated that he could not have started work to be done under the contract before the signing of that contract as he would not be insured to do so. He stated that nobody would have had any permission to enter upon the sites for this renovation contract before the contract was signed, and that if Mr Fleming had done so, it was not by any permission from Mr Tansey.

33. In so far as the plaintiff has given evidence of having done various works as part of his employment by the defendants, Mr Tansey has stated categorically that he never employed the plaintiff and never instructed him to do any work whatsoever, in spite of the various jobs which the plaintiff has stated he did for the defendants. He denies that the plaintiff did any work in relation to the clearing out of houses 22, 23, and 24. He denies that he had any involvement in the taking down of ceilings, or the pulling down of the extension at number 22. He states that it was himself and Mr McAndrew who did the necessary work to protect Mrs Delaney's fuel tank. He denied ever asking the plaintiff to take out a fireplace and remove rubbish from number 22. In so far as the plaintiff was seen up on the extension wall knocking it with a sledgehammer, Mr Tansey says he never asked the plaintiff to do so, and has surmised that perhaps Mrs Delaney may have asked him to do so, presuming that the plaintiff was working for the defendants, but has stated that he was not so employed at all.

34. Mr Tansey also gave evidence that he would keep a site diary in order to keep a record of who was working on the site on any particular day so that he could give necessary information to his employee, Bernice McDonnell, who organised the wages to be paid. He would also note important information as to any accidents on the site and any injuries sustained by his employees or a member of the public. He would give all that information to Ms. McDonnell also. He stated that if any employee suffered any injury during the course of their work, he would telephone her to inform her. He did not note the plaintiff's injury or inform Ms. McDonnell of it as the plaintiff was not an employee, and neither did he regard him as a member of the public as he was simply doing something for himself in his won garden, and there would be no public liability as such for insurance purposes.

35. Mr McAndrew gave evidence also. He confirmed that the first day he worked on the site was the 4th August 2009. He says that he and Mr Tansey took a look around the site on that first day and planned how the job would proceed thereafter. He described the work which he did. He says that he met the plaintiff for the first time on the 7th August 2009, which was the Friday of the first week. He recalled some discussion about the storage of equipment in the plaintiff's shed at the reere of his garden. He described the work he was engaged in during the first and second weeks of this project and stated that the plaintiff was never involved in any of that work, even though he would have seen him around the place generally as he lived in one of the houses on the road. But he met him on the 13th August 2009 after the plaintiff had sustained the injury to his eye. He told him he should get it seen to, but says that the plaintiff did not actually tell him how it had happened.

36. Bernice McDonnell also gave evidence. She works in the offices of the first named defendant and has done so for some time. She looks after the office side of the business and among her duties is the payment of wages. She keeps a careful diary of what work is being done at any time and what men are engaged on such work. She produced to the court her diary record of these matters, and I had an opportunity of seeing the diary records for July and August 2009. This diary makes it clear that work was not commenced on this project until 4th August 2009. There is no note of any work on this site during the last week or even two weeks of July 2009. It records on a daily basis what men were working on the site during the first two week of August 2009. She stated that Mr Tansey would inform her of what work was being done and who was working and for how many hours, so that she can work out what wages need to be paid to each such worker. She also stated that Mr Tansey would tell her if there were any accidents. There is no record of the plaintiff being taken on as an employee. When she is told that a person is being taken on as an employee she is required to get all their tax details so that she can deduct PAYE/PRSI as would be normal and necessary. She was never told about the plaintiff, even in relation to the equipment being stored in his shed. She struck me as a very diligent and careful member of the defendant's staff whose records can be relied upon as being correct and accurate.

### **37. Conclusions:**

38. Essentially, what has to be resolved for the purposes of the plaintiff's claim herein is whether on the 13th August 2009 the plaintiff was an employee of the defendants, and if so, whether the injury sustained by him on that date was sustained during the course of that employment. There is a conflict of evidence in that regard. I must reach my conclusions on the basis of the balance of probabilities.

39. In the face of Mr Tansey's evidence that he never employed the plaintiff in any capacity and that he never instructed him to do any work in connection with any part of the contract between him and the Town Council for the renovation of these houses on Bunree Road, is the plaintiff's evidence that he was carrying out work on the houses in question during the first three weeks of the project, and in particular that he was instructed by Mr Tansey to take down the wire fence in his own back garden ahead of works being carried out on his property, and that he sustained his injury while carrying out those instructions and during the course of his employment.

40. There is no doubt that the plaintiff was seen working around the general area of these houses. I accept for example that he was seen on top of the wall described, working with a sledge hammer on the dismantling of the wall which I have described. He was seen sweeping and tidying generally. Mr Tansey and Mr McAndrew have said that he was present around the place. But Mr Tansey has said that he never gave him a job, and that if he had done so he would have told Bernice McDonnell so that she could make arrangements for him to be paid. But the plaintiff has stated also that wages were never discussed and that it was simply a gentleman's agreement that he would be paid something, and that in fact he was paid something, namely €60 for the first week, €80 for the second week, and €150 for the third week, all payments being cash from Mr Tansey. I have no doubt that the records kept by Ms. McDonnell are reliable and therefore that Mr Tansey never told her that he had taken on the plaintiff prior to the 13th August 2009. It is probable therefore that the evidence of Mr Tansey is correct, namely that in so far as he may have given some cash to the plaintiff, he did so as a matter of goodwill in exchange for being permitted to keep his equipment in the plaintiff's shed. If this was intended to be wages in return for employment there is no reason why Mr Tansey would not have put it through the books in the normal way rather than pay it out of his own pocket, so to speak. It would also not be likely that Mr Tansey would not inform Ms. McDonnell of the plaintiff's employment, as for insurance purposes this would be necessary so that the plaintiff was recorded as being an employee for insurance purposes. It is also highly likely that Mr Tansey would not have employed the plaintiff as it would have constituted a breach of his contract with the Town Council, as he was required by that contract to employ only persons who have a safe pass. Indeed, Mr

Tansey's reaction to the plaintiff being on top of the wall as described, wielding a sledgehammer in order to demolish the very wall he was standing upon is consistent with the plaintiff not being employed by Mr Tansey. The fact that the plaintiff may have taken it upon himself to do various jobs about the place is insufficient to establish an employee relationship.

41. However, even if the plaintiff was employed by Mr Tansey to do odd jobs about the place, it does not follow that the taking down of the plaintiff's own wire fence in his own garden was something done in the course of that employment. I am satisfied that it is probable that when the plaintiff asked if Mr Tansey would do some concreting of the plaintiff's back garden, this was not something which was part of the contract with the Town Council and that if it was to be done at all, it was outside that contract and done only because the plaintiff asked him if he would do it for him as a favour.

42. I accept the evidence of Mr Tansey that he said to the plaintiff that if he wanted to keep anything in his back garden, including the wire fence he should remove whatever he wanted to keep before any work on his premises commenced. I am satisfied that the plaintiff removed the wire fence in that context and not as part of any employment, even if one could stretch a point and conclude that in some indirect way, Mr Tansey had engaged the plaintiff to do odd jobs about the place. However, my principal conclusion is that the relationship of employer/employee was never created. If it had been, the office records would show that.

43. But even if it was, which I do not believe, the job of taking down this wire fence was not within any such engagement. It was something which the plaintiff did for his own benefit and on his own account, and I am satisfied that he was never instructed as such to do so as part of any master/servant relationship. The plaintiff was not given the tool with which to do so by Mr Tansey. He simply went to the defendant's truck and took whatever implement seemed to him to be suitable to perform the task. There is no question of this injury having been sustained during the course of any employment, or as the result of any negligence on the part of the defendants.

44. In these circumstances I must dismiss the plaintiff's claim, and I will so order.