

throwing down the tool, without first being sure that every man to whom the warning is being given has heard the warning and is in a position of safety, cannot be sufficient. There was a duty upon the defendant to take care to avoid the very thing which happened here. There was no evidence to support the defence of contributory negligence, nor was it suggested that the plaintiff knew anything about the risk, so that it could not be said that he was volens.

The defendant relied upon sec. 9 of the Workmen's Compensation Act, 4 Geo. V. ch. 25, as in effect barring an injured person from setting up any further claim if he elects to claim compensation from the Board or from his employer. So far as this defendant was concerned, the question was settled by *Hutton v. Toronto R.W. Co.* (1919), 45 O.L.R. 550; S.C. in the Supreme Court of Canada, sub nom. *Toronto R.W. Co. v. Hutton* (1919), 59 Can. S.C.R. 413. The making of a claim for compensation is in itself an election to claim compensation, so far as the Board is concerned. Counsel for the plaintiff conceded that the Board was entitled to the benefit of any judgment which the plaintiff might recover against the defendant, and that any moneys payable thereunder should be payable to the Board, in accordance with sec. 9 (3) of the Act. Before the judgment in this action is entered, notice should be given to the Board so that it may either adopt the judgment or take such other course as it may be advised.

Upon consideration of the evidence, the learned Judge assessed the plaintiff's damages at \$1,000, and directed judgment to be entered for him for that amount and the costs of the action; with a declaration that the judgment shall enure to the benefit of the Workmen's Compensation Board, and that the moneys shall be payable to the Board, to be dealt with under the provisions of sec. 9 of the Act, that is, first in recouping the Board the sums of \$256.47 and \$72.50 already paid for compensation and medical services; and, secondly, by applying the surplus as the Act directs.

The entry of the judgment will, however, be stayed in order that notice thereof may be given to the Board. If, after such notice, the Board, within 14 days, either states that it is willing to adopt the judgment, or does not take steps to intervene for the purpose of asserting its position, then the judgment will be entered as directed.