

Mark Olson v. Patrick Saville
2024 DJDAR 558

Doctrine of primary assumption of the risk barred liability for injuries caused by a negligent surfer to a fellow surfer.

FACTS/PROCEDURE

Mark Olson and Patrick Saville were surfing in a group at Miramar Beach in Montecito. Saville was riding a custom longboard without a leash. Olson caught a wave and Saville then “appeared out of nowhere” and “dropped in” on the wave without looking in Olson’s direction. Somehow Saville’s board propelled backward and struck Olson’s torso and back. Olson sued for negligence and Saville eventually moved for summary judgment on the ground that Olson’s cause of action was barred under the primary assumption of risk doctrine. The trial court granted the motion finding “the inherent risks of the sport of surfing including surfers ‘dropping in’ on other surfers, not wearing leashes while riding longboards of the type used by respondent, and using surfboards that have sharp fins.” Plaintiff Olson appealed contending that summary judgement is not proper because triable issues of material fact exist as to whether respondent acted recklessly or increased the sport’s inherent risks.

HOLDING/DISCUSSION

Holding: Affirmed. The primary assumption of risk doctrine “precludes liability for injuries arising from those risks deemed inherent in a sport.” It operates on the premises that imposing such a legal duty would work a basic alteration or cause abandonment of the activity. The doctrine applies to both sports and recreational activities involving inherent risk of injury to voluntary participants where the risk cannot be eliminated without altering the fundamental nature of the activity. Defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport.

Determining the nature of a defendant’s legal duty and the inherent risks that flow from the activity depends heavily on the nature of the sport itself. Here, first the Court analogized surfing to snow skiing in which the doctrine of primary assumption of risk has been applied. The Court then relied on expert declarations from two purported surfing experts to determine the inherent risks in surfing. Ian Cairns, a champion surfer and coach, submitted a declaration on behalf of Respondent Saville. He opined that surfing is an extreme sport with many inherent risks. He further stated that it was extremely common for surfers to wipe out or collide with another surfer. Cairns also described surfing rules of etiquette but noted that they are commonly broken by other surfers. Appellant’s expert did not oppose the core components of Cairn’s opinion. Thus, the Court found that there are inherent risks in surfing and appellant’s injuries resulted from these risks. Further, the Court held that there is no evidence respondent acted recklessly or increased the inherent risks of surfing despite appellant’s argument that Saville violated the Surfers Code and Rules of Etiquette. Thus, no trier of fact could reasonably find that respondent’s conduct fell outside the protection of the primary assumption of risk doctrine. Vigorous participation in surfing would likely be chilled if legal liability were to be imposed in these circumstances.