

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Cite as: Crowe v. Adams, 2010 NSSM 3

BETWEEN:

DONALD CROWE

Claimant

-and-

JEFFREY ADAMS

Defendant

ORDER

Adjudicator: David T.R. Parker

Heard: November 10, 2009

Decision: January 19, 2010

Counsel

**David S. Green represented the Claimant
The Defendant Jeffrey D. Adams was self-represented**

Parker:- This case came before the Small Claims Court of Nova Scotia at Halifax on November 10, 2009.

Pleadings:

1. The Claim

The Claimant's claim was for \$1,130.00 representing the cost of replacing a brand new surfboard significantly damaged by the Defendant.

The Claimant stated the Defendant failed to comply with the well recognized and accepted surfing practices of not paddling into the breaking part of the wave while the Claimant was riding the wave. By paddling into the breaking point of the wave the Defendant caused a collision with the Claimant significantly damaging the Claimant's brand new surfboard.

2. The Defence

The Defendant in addition to a general denial stated:

"The rule referred to by the Claimant is simply a matter of courtesy and depends entirely on circumstances.

The Claimant was on a wave crest that the Defendant was paddling out and that it must have been clear to the Claimant that unless he took avoiding action a collision would occur and the Claimant took no action to avoid the collision although he had ample time.

The Claimant voluntarily assumed the risk of such damage occurring by participating in a dangerous sport such as surfing and the Claimant not the Defendant is responsible for the damages.

The damages claimed are excessive as the board can be repaired by the Claimant."

Donald Crowe

The Claimant's surf name was Buck and he was 39 years of age and had been surfing for 26 years. He learned his skills as a surfer in Hawaii where he surfed for 10 years. He also lived in Mexico for 1 ½ years where he surfed. He characterized himself as "expert experienced level." The Claimant decided to move to Nova Scotia for opportunities and to continue surfing in the "breakers" coming in from the Atlantic Ocean.

The Claimant knew the Defendant for 4 or 5 year and as the Defendant was a beginner

he gave the Defendant surfing tips over the years until this incident. The Claimant said he paddled out as all conditions looked good. He said he had a totally clear path and the wave “was firing” and he “hit the lip.” He said he was doing a Pete Devrie trick which was described as a Frontside off the lip. It involves hitting the lip and kicking your tail out the back of the wave to release your fins. The literature provided by the Claimant outlined the key components of the manoeuvre taken by the Claimant.

- Power through your bottom turn straight up towards a throwing lip.
- The shoulders are rotated into the turn and you use your bodies’ extension to spring off the lip.
- You kick your fins out when your board is half way over the lip

You extend your back leg while keeping your front leg bent and the lip between your legs.

The Claimant described where the Defendant was, before he commenced the manoeuvre, and at the time the Claimant said he had a clear and safe passage. He said the manoeuvre occurs within seconds and he said the Defendant attempted to paddle for the shoulder of the wave instead of paddling for the white water and as a result he was in the path of the Claimant and according to the Claimant caused the collision which gouged out a large section of the Claimant’s board.

According to the Claimant he asked the Defendant “what did he do that for and I was told to ‘suck it.’” The Claimant said normally there would be physical confrontation but instead he said he would take it to Court and told the Defendant this.

Keegan Kelvin Day

Mr. Day was there at the time of the incident. He has been surfing for 7 years and he gives surfing lessons. He did not see the collision. He said a person should be paddling towards white water unless you know you have time to paddle over the shoulder of the wave. Mr. Day classified himself as an intermediate level surfer.

Yassine Ouhilac

Mr. Ouhilac is a surf photographer and has been surfing for 16 years. He travels the world photographing surfing. He was surfing near the collision but did not see the actual collision. He said, "I saw Buck taking off on a wave. I saw the damage on Buck's board, Buck understandably was not happy." He said, "I think the guys could have worked it out."

Jeffrey Daniel Adams

Mr. Adams said he and Mike Lewis were out surfing. He said he was on a small board and most of the time there were bigger waves. He said upon the Claimant entering the water he noticed a larger set of waves.

Analysis

Surfing not only has its own language, handles or nicknames for surfers like "surfer Joe", a 65 year old Nova Scotian, who takes to the Atlantic Ocean on a regular basis but also has rules of etiquette. Surf etiquette rules were provided by David S. Green, Counsel for the Claimant, in the form of several exhibits which he obtained while surfing on the net. Mr. Green was obviously well versed in this area being a former surfer himself, which he pointed out to the Court and attempted to show how the Defendant had transgressed the fundamental rules of Surfing. One of the exhibits refers to "interference" wherein it is stated as follows:

"try not to paddle across or in front of, any surfer who is up and riding on the wave. Paddling across someone can not only ruin the surfers ride but also put you both at risk of injury. If you paddle for the shoulder and don't make it - you could end up being run over and injured by the nose or fins of the other surfboard. Equally your own board could injure either party. Stop and wait for the surfer riding to pass by and duck dive the white water. Paddle towards the shore. Paddle in the opposite direction to the rider...It is your duty as a surfer not to disrupt the rider and to take any punishment that the wave dishes out."

The evidence was that there are three methods of avoiding collision if you're paddling out towards the waves or a surfer is coming towards you while riding a wave. One is to paddle towards the white water and allow the surer to go by, if

you do not have time you should duck under the wave and avoid the surfer if you do have time you could paddle over the shoulder of the wave.

I agree with the Defendant that these rules of etiquette are not binding in law on this Court. A breach of the rules of etiquette is not in and of itself a confirmation that there is negligence. However it can be an indicator that there may have been negligence.

In this particular case, the Defendant and inexperienced surfer and who as he indicated may have been encouraged by his friends to increase his level of competency headed out towards larger waves, in this case, 5 to 7 foot breakers. The Defendant attempted to the best of his ability to paddle over the shoulder of the wave. This clearly indicates that he was not planning to ride this particular wave but rather to get out of the way. The Defendant indicated that he was not that intelligent nor did he read surfer magazines or publications on surfing however he did present himself as very knowledgeable on what he should or should not do and he did realize that he did not have that much ability as a surfer. I would have to conclude on the evidence before me that he breached the standard of care required in this situation. If he had done or taken other action this may have been avoided.

I have also considered the Defendant's defence of *volanti*, that is surfing is a dangerous sport and the parties participating, accept the risks. That does not override negligence in this situation. Driving a vehicle on the highway as we all know can be dangerous but the defence *Volanti* does not always exist. I also considered the contributory negligence as a factor. I accept the Claimant's testimony that the Defendant was out of the way when The Claimant began his manoeuvre however by the time he was into his manoeuvre and began riding the wave, the Defendant's actions put the Defendant in a collision course with the Claimant. As a result the Claimant was unable to avoid the Defendant. I have not therefore considered this to be appropriate matter for contributory negligence.

In terms of assessing damages, the Claimant brought forward an invoice for his surfboard of US\$750. There was no indication of what the exchange rate was at the time and therefore I shall allow \$750.00 to stand in Canadian dollars. The court costs I will allow \$89.68 and other costs I have not been provided.

IT IS THEREFORE ORDERED that the Defendant pay the Claimant the following sums:

\$750.00
89.68 Costs
\$839.68

Dated at Halifax, this 19 day of January, 2010.

David T.R. Parker,
Small Claims Court Adjudicator