WELCOME TO THE JUNGLE:
IS THERE AN UNWARRANTED FEAR OF LIABILITY FOR MOSHING, CROWD SURFING AND STAGE DIVING?

Ben Challis JP FRSA LLB(Hons) MA MA(Law) Barrister
Visiting professor of law at Buckinghamshire New University

February 2010

When I was a teenage punk rocker in the late seventies, one of the joys of going to gigs was being able to pogo in some venues – bounce around with wanton abandon and then immediately as the music stopped, look down to see what badges you could collect – to replace the ones that had fallen off in the heat of the moment. Then along came grunge and the word ‘mosh pit’ was coined and groups of (mostly) male fans would indulge in often physical, aggressive and violent mass dancing (see Upton, 2004 and Marshall, 2004). In the nineties promoters, venues, event organisers and show security all had to get used to crowd surfing and stage diving – as well as moshing - and face up to the fact that at some events the audience and sometimes the performers voluntarily took part in potentially dangerous – if not lethal – activities. Unsurprisingly this is when the law suits began and the ‘no win no fee’ lawyers arrived …..

One of the most widely reported tragedies is the death of Australian Jessica Michalik who was crushed to death at 2001 Big Day Out Festival in Sydney during a performance by Limp Bizkit. The Coroner’s Court of New South Wales criticised the crowd control measures in use at the time, and also criticised Limp Bizkit lead singer Fred Durst for “alarming and inflammatory” comments during the rescue effort. Durst defended the band saying that he had warned event organisers against minimal security, adding in answer to claims that the band had provoked the incident that after the incident DJ Lethal played a quiet computer-generated loop which had a soothing effect on the crowd. On balance the Coroner held that whilst the band “could’ve been more helpful in efforts to aid the girl” the security practices employed by the festival organisers bore the brunt of the blame. Anyone who has seen the footage of the band at Woodstock ‘99 will see the effect they can have on an audience.

In 2002 The Seattle Times reported on the injuries suffered by the then 14 year old Scott Stone in a mosh pit at an all-ages show by the California band Rage Against the Machine. “Leaving his seat to join the fans packed in front of the stage, the then 14-year-old suddenly found himself hoisted up in the arms of strangers, being passed back, over the heads of other concertgoers, until there was no one left to catch him. His fall to Mercer Arena’s cement floor left him with permanent brain damage. Stone’s parents reached an out-of-court settlement with the band, the City of Seattle which owns the Mercer Arena, the concert promoter and the security company contracted for the September 1996 event. The City’s share of the settlement, covered under the security company’s insurance policy, was $400,000, according to a City attorney (Green, 2002).

In 2006 the Leeds Coroner recorded a verdict of accidental death after the inquest into the tragic death of Patrick Sherry, the 29 year old frontman of Bad Beat Revue and a married father of two who died after diving from a stage, hitting a wooden floor. An eye witness described the tragedy saying “He put the microphone down and crouched before leaping off the stage, which was about a metre high, and trying to grab the rig. I don’t know whether he caught it or not, but his momentum carried him forward. He went upside down and hit the floor head-first. The whole thing lasted about five seconds. It was horrendous”. A year later a fan died at a Smashing Pumpkins gig in Vancouver, Canada after being involved in what police described as a “mosh pit or crowd-surfing incident” in an “out of control mosh pit”. The man was removed unconscious from the crowd inside the PNE Forum venue and first aid specialists failed to revive him before he was transferred to a nearby hospital where he died. Most recently in December 2009 sixteen year old Jamie Craig went into cardiac arrest after being hit in the chest during a concert at Blacktown Masonic Hall in Sydney. The mosh pit incident lead to the teenager being hospitalised on life support for eight days.
So where does this leave the live events industry? Well some argue that it should take far greater care of the audience – and should ban mosh pits, stage diving and crowd surfing altogether. The Seattle Times reports that after the 2002 Stone incident a handful of U.S. cities and some bands decided to “ban crowd surfing and stage diving” but pointed out that “there are no national standards for concert safety, and no one has exact numbers on how many people are injured in mosh pits every year. One survey cites at least 10 deaths and more than 1,000 injuries resulting from just 15 U.S. concerts last year.” Conversely, some argue that music events are meant to be fun and no-one can protect against every risk, especially those which are voluntarily assumed by some members of the audience.

So which is right? We invite our young people to our shows and venues. We sell alcohol. We book bands to play loud and exciting music. And we allow fans to indulge in potentially life threatening but ‘cool’ activities - which we should protect them against. Correct? Or is it that audiences come to exciting shows and want to enjoy themselves, and a small minority enjoy potentially dangerous activities, which they willingly indulge in at their own risk. Is that right? Or is it somewhere in between?

The website Safe Concerts accurately describes the tension: For some people crowd surfing, stage diving and moshing are part of a cultural ‘norm’ and seen as a natural part of the whole music scene, the risk of injury is accepted and they have a sort of informal ‘code of conduct’. For others these activities are seen as totally anti social spoiling the event, some people are deterred from attending. Opponents of these activities (crowd surfing in particular) point out serious problems in that injuries often occur when a surfer is dropped by the crowd from a height of several feet injuring the innocent concert goers below as well as themselves, these injuries can be serious, lead to disability and in some cases prove fatal.

No one knows if Scott Stone “purposely thrust himself into the arms of the crowd or was forced up by older youths” who, according to witnesses, “were throwing smaller kids and girls up onto the crowd, forcing them to crowd surf against their will”. The City’s assistant attorney said “It was the City’s position that Scott Stone attended concerts before, he crowd surfed before, he’d been warned not to do it by his father and he chose to do it repeatedly — so we believe Mr. Stone assumed the risk when he chose to crowd surf,” adding “In my judgment, 14-year-olds are perfectly capable of understanding ‘What goes up must come down ’.

Paul Wertheimer, who founded Crowd Management Strategies, says “The fact is, entertainers, venue operator and promoter, as well as hired security, have as their legal responsibility, the establishment and preservation of a safe environment for patrons who attend their events”. I will turn to the latest developments in the law later but there certainly are some practical steps venues, event organisers, bands and security companies can take to minimise risk. Ron Webb, Stone’s attorney at the time said that the settlement was a strong message to concert organisers of their responsibility to provide a safe environment saying “The concert industry is now on notice that these kinds of actions are unreasonably dangerous” referring to crowd surfing and stage diving. Webb said concert organisers “have a duty to warn of danger and take reasonable measures to correct that danger”.

Wertheimer believes mosh pits can be safe, citing the opening of Seattle’s Experience Music Project, where organisers limited the number of people allowed into the pit. But Wertheimer has long warned of the dangers of mosh pits and frustrated by the lack of movement introduced “mosher-friendly” safety guidelines They include making safety announcements before a show, liaising with performers, restricting access to mosh pits, allowing over 18s in only, padding barricades, providing free water, banning cigarettes and alcohol in mosh pits, banning crowd surfing, stage diving and steel-toecap-boot-wearing fans and providing specialist first aid and security personnel. The United Kingdom based Safe Concerts website (www.safeconcerts.com), which advocates “music not mayhem”, also has an excellent section on moshing, crowd surfing and stage diving again with some clear suggestions on improving crowd safety in mosh pits. The suggestions include a designated and sectioned off area for moshing with cushioned barriers at the front, well publicised moshing etiquette, experienced and proactive security staff, tighter control over the use over drugs and alcohol and banning troublemakers. Artists can do their bit too “the bands themselves often set the mood; while one may invite concertgoers to leap into the crowd from the stage, another will remind people to be safe and look out for their neighbor”.
One area of controversy is banning crowd surfing and stage diving completely, as suggested by Stone’s attorney. Many fans clearly enjoy both activities and some artists actively encourage crowd surfing and even stage diving. Clearly there are inherent risks to participants, and indeed to others in their proximity, but the live events industry takes differing views on how to deal with this, no doubt reflecting the tension between those at one end of the spectrum who want to ensure health and safety above all else, even if it neuters rock and roll and takes the ‘fun’ away, and those at the other end who see unfettered enjoyment as their only goal, accepting some risk of injury as ‘inevitable’ (see Marshall, 2004). Some venues have banned stage diving and crowd surfing at all events. Some have even banned fans sitting on other’s shoulders. Some use a three ‘three strikes and you’re out’ policy which Safe Concerts explain as “the first time you get put back, the second you get a warning, the third you’re out”. Some rely on audience common sense, warnings and disclaimers. But the fact remains that when fans voluntarily indulge in dangerous behaviour they, and sometimes other members of the audience, face injury from their actions – and these are sometimes fatal. And where there is personal injury and/or fatality, a law suit usually follows.

In both UK and US law a claim for negligence or occupiers liability would usually only succeed if there is some fault – some blame - in legal terms, the breach of a duty of care by another. In 2006 The Forum venue in Tunbridge Wells won a legal battle after a judge threw out a ‘no win no fee’ claim brought on behalf of a member of the audience who was injured whilst ‘moshing’ at a Raging Speedhorn concert. A venue spokesman said that the Forum successfully argued that the venue had a disclaimer about mosh pits printed on their tickets and on the venue walls. In 2003 the Manhattan Supreme Court held that a promoter was not liable for the alleged damaged hearing of the plaintiff (a lawyer!) who should have realised that loud music was played at rock concerts. Judge Martin Schoenfeld dismissed the claim that John Fogerty's music damaged a fan’s hearing saying “if you don’t like loud music, don’t go to rock concerts” adding “Nobody is forced to attend rock ‘n’ roll concerts” (Challis, 2005). The judge found that nothing pointed to the music being unreasonably loud and that “the doctrine of primary assumption of risk bars the instant action”. More recently a lawsuit that blamed Apple's iPod music player for causing hearing loss failed before the Ninth Circuit Court of Appeals which upheld an earlier 2008 San Francisco District Court judgment that Apple was not liable for hearing damage saying a reasonable person could easily avoid hearing loss by turning the volume down - and that the iPod did come with a warning.

The leading case on occupiers’ liability in the United Kingdom is the Supreme Court decision in Tomlinson v. Congleton Borough Council. In this case a young man dived into a park lake where swimming was banned – his head hit the bottom, he broke his fifth vertebrae and is now a tetraplegic. The claim under the Occupiers Liability Act failed in the House of Lords with Lord Hoffman saying “the law provides compensation only when the injury was someone else’s fault”. Lord Hoffman went further and confirmed that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state. Lord Hoffman said “Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute his dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity. In the present case, Mr Tomlinson knew the lake well and even if he had not, the judge's finding was that it contained no dangers which one would not have expected. So the only risk arose out of what he chose to do and not out of the state of the premises ….. It follows that in my opinion, there was no risk to Mr Tomlinson due to the state of the premises or anything done or omitted upon the premises. That means that there was no risk of a kind which gave rise to a duty under the 1957 or 1984 [Occupiers Liability] Acts. Finally Lord Hoffman put a brake on the growing compensation culture in the UK by saying that what the court had to do was to look at the “balance of risk, gravity of injury, cost and social value …….. it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land. If people want to climb mountains, go hang gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so. ….. there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches...
should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them.

Lord Hobhouse was equally forthright saying “the fact [is] that it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require that the coast line and other beauty spots be lined with warning notices? Does the law require that attractive water side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no”. So in both the USA and UK liability in negligence and occupiers liability is based on the breach of a duty of care – and liability will not generally lie where the claimant has voluntarily assumed risk.

Now a New York appellate court has, for the first time, applied the doctrine of primary assumption of the risk to a claim of injury sustained in or in the vicinity of a mosh pit. In Schoneboom v. BB King Blues Club the Appellate Division, First Department held that a club patron was barred by the doctrine of primary assumption of the risk from seeking damages for injuries suffered when an identified person in a group of slam dancers slammed into him. The First Department decision affirmed the order of Justice Marcy Friedman, sitting in Supreme Court, New York County, granting summary judgment. Justice Friedman had noted that the 36-year-old plaintiff testified that he was standing in the vicinity of “a lot of people bouncing around, bouncing off each other,” but that he did not participate in the fun. Notwithstanding the claim, Justice Friedman held that the plaintiff, an experienced concertgoer, assumed the risk of being struck by a fellow concertgoer when, although conscious that an aggressive type of moshing was in progress, he deliberately placed himself in proximity to it. Justice Friedman had also rejected the plaintiff’s contention that he did not consent to the risk because he did not actually participate in moshing, stating that “[i]t is well settled that ‘a spectator generally will be held to have assumed the risks inherent in the game, including the specific risk of being struck.” Justice Friedman also rejected the plaintiff’s contention that he did not assume the risk of an assault or that a triable issue of fact existed as to whether he was assaulted, noting that the plaintiff and his friends, all of whom submitted affidavits in opposition to the motion, did not claim that they made any complaint to security about “assaultive behaviour.” In any event, Justice Friedman held that even assuming arguendo that club owners BB King had a duty to impose reasonable security measures to minimise danger, there was no evidence that it breached any such duty (Rosenfeld 2009).

So it seems courts on both sides of the Atlantic will not automatically hold venues, promoters, artists and security companies liable for injuries caused by voluntary audience activities such as moshing. But they still may find liability in certain circumstances and this is clearly what worries some venues and promoters and indeed it seems to be is what prompts no win no fee lawyers to take on cases - in some instances leading to decisions which to some look like “health and safety gone mad” (remember the school that banned conkers!). As ever it is a balancing act.

Both the court in Schoneboom and the County Court in the UK accepted that on the facts of those cases the promoters and venues owed no immediate liability to moshers. With crowd surfing and stage diving I have to say as a personal opinion that whilst I do find stage diving dangerous, perhaps I find it most worrying because of the risk of injury to other audience members – to the extent that event organisers should always consider a ban. Some have introduced a ‘three strikes’ policy to overcome the potential risk of legal liability although I have to say that in my personal opinion I cannot see how this actually restricts organiser’s liability. A total ban on mosh pits seems an extreme reaction and the sensible guidelines already available can substantially reduce the risk of injury to perhaps that already inherent in any mass gathering of people. A couple of years ago I went to a ‘Straight Edge’ metal concert at the Camden Underworld – it was well organised with a clear ‘moshing’ area – and even though I was in the audience I never felt threatened by the moshers. The audience was almost one hundred percent teetotal (and plenty of free water was provided) and clearly the fans had their own etiquette - the moshing was frantic, aggressive and looked violent but I saw no signs of any serious injuries. But equally the Stone settlement and the recently reported settlements from the Great White disaster (Challis 2009) mean that that clearly some involved in the organisation of events will take a cautious line and restrict audience activities.
The fact remains that the law says that where someone voluntarily accepts risk then usually they would not have a claim against another who is not at fault, even if they are injured. Otherwise surely we would have no boxing, no skiing, no horse riding, no American football and no rugby, let alone any motor racing or snow boarding! So why do live event organisers in the music industry still ban crowd surfing and mosh pits? Well, whatever the law says, personal injury claims are still frequently brought and a great many are settled even before a court hearing. It seems as if the threat or fear of a lawsuit is the problem, not the law itself. The organiser of the Forum concert reportedly had to stop his insurance company settling the claim in advance of the court action – and action which he went on to successfully defend. In reality, ‘no win no fee’ lawyers have created such a fear of liability (or even a fear of legal action and associated costs) that promoters, venues, artists and security companies must consider the fact that where the audience moshes, skanks, pogos, crowd surfs and stage dives they will always face the potential risk of a law suit, who ever is to ‘blame’. But whether that warrants a total ban on what are clearly enjoyable audience activities for many is a different question. Do we really want a ban on fun?

References


Limp Bizkit – Break Stuff (Woodstock ’99) http://www.youtube.com/watch?v=ywuYC0n5cNg


Birdsong et al. v. Apple Inc. (2010) U.S. Court of Appeals for the Ninth Circuit, No. 08-18841

Tomlinson v. Congleton Borough Council and others [2003] UKHL 47
**Schoneboom v. BB King Blues Club**, 2009 NY Slip Op 08160


**APPENDIX**

Definition of certain concert activities. From [www.safeconcerts.com](http://www.safeconcerts.com)


**Crowd Surfing**

Individuals are lifted above the crowd and moved horizontally rolling their bodies above the heads of other crowd members, the actual intention is to move toward the stage in order to perform a 'stage dive' Said by some to present a high risk of injury both to the crowd surfer and also to the audience around

**Diving**

As the name implies this is where here a performer or fan dives from the stage into the crowd. The intention is then that the crowd will support that person above their heads while they crowd surf. Nowadays this is much more difficult for fans to accomplish given the presence of security and stage barriers; some now resort to finding other places within the venue high enough to dive from. Many musicians have made stage diving a part of their stage act. It represents an exciting act of audience participation and musicians have found that it can make an ideal climax to a show. Stage diving has caused some serious injuries and has resulted in death when the stage diver has not been caught by the audience below therefore hitting the floor with some force, sometimes head first. On 20th July 2005 Patrick Sherry front man from Bad beat Review died following a stage dive which went badly wrong.

**Moshing**

A term used to describe what seventies Punk Rock culture called *slam dancing*. An intense ritualised form of dance where people literally slam into each other. Although moshing looks extremely violent it is said that it is not intended to be. Moshing usually takes place in what is known as the 'mosh pit' A mosh pit can start spontaneously anywhere in the crowd and as such is an activity as opposed to a place. Many supporters of moshing view it as a kind of extreme sport. Violence is usually directed against others in the pit, and often only escalates when it is badly received by someone who is outside or not used to the pit.

**Skanking**

In its original form Skanking was also a term for slam dancing, the it's now more likely to be used to describe a type of mosh pit activity, often referred to as the 'circle pit' where a circle forms within a crowd leaving space in the center. This part of the crowd then moves and rotates in a circular route whilst simultaneously slamming into each other. The spectacle resembles a North American Indian war dance, or when done to extreme it looks like a heaving whirlpool. The size and duration of this undulating, rotating circle depends on the number of people that are drawn into it. Some say that this activity actually incites or condones violence and it's obviously true to say that violence on the concert floor will inevitably lead to injuries.

**Pogoing**

This activity originated in the seventies during the punk era, it's basically a dance ritual characterised by people literally jumped up and down on the spot as high as they can, often giving a gladiatorial type of salutes whilst slamming into others. The activity is still popular with a range of rock culture crowds and can happen anywhere in the crowd. There are even tougher versions of the pogo, for example the "pig pogo", where people kick and lay about, the risk of injury in this is higher, although...
you are not supposed to hurt others deliberately.