Mosh Pits or Liability Pits: Criminal and Tortious Liability at Concerts

Thomas Charles Surmanski[1]

Our enemies have beat us to the pit.
It is more worthy to leap in ourselves,
Than tarry till they push us.
(*Julius Caesar* 5.5.27-29)

1. Introduction

In an American case, a mosh pit patron, Kimberly Myers, was assaulted by the band itself.[2] Myers attended a Fishbone ska-punk concert in 2010. During the concert, Fishbone's lead singer Angelo 'Dr. Madd Vibe' Moore, dove from the stage crushing her. She suffered a broken skull and collarbone.[3] Following the incident, and Myers losing consciousness, Fishbone 'continued to perform as if nothing had happened.'[4] The defendant showed no real remorse for the incident and stated that he gives no warning before stage diving as it would ruin the 'theatrics' of his performance.[5] Moore added that '[p]eople want to be on the edge when they go to a Fishbone show.'[6] U.S. District Judge Jan DuBois rejected this excuse and ordered Moore and bassist John Norwood to pay $1.1 million dollars in compensatory damages and an additional $250,000 in punitive damages.[7]

This article seeks to examine the criminal and tortious liability arising from mosh pits at concerts and the potential defendants named in such an action under

[1] J.D. candidate, Queen's University, Canada. I would like to thank Lynne Hanson of Queen's University Faculty of Law for her guidance and insights and for encouraging my passion for tort law. Thanks to everyone in the pit who has moshed with me and brought joy and excitement into my life.

[2] Jon Campisi, 'Concert-goer injured during Fishbone stage dive awarded $1.4 million' (*The Pennsylvania Record*, 19 February 2014) http://pennrecord.com/news/12870-concert-goer-injured-during-fishbone-stage-dive-awarded-1-4-million> accessed 19 July 2016.

[3] Kyle McGovern 'Fishbone Owe $1.4 Million for Stage-Diving on Fan' (*Spin*, 14 February 2014) <http://www.spin.com/articles/fishbone-stage-dive-lawsuit> accessed 18 July 2016.

[4] ibid.

[5] ibid.

[6] ibid.

[7] ibid.

Canadian law. These defendants can include the owner of a stadium or club where the event takes place, the event coordinator who is occupying the venue, the security, and the patrons themselves. First, this article briefly outlines the evolution and significance of the practice of moshing at concerts. Second, this article will analyse the legality of moshing under American and Canadian law. Third, this article will then identify the potential tortious defendants in an action arising out of a mosh pit incident, how tort law applies to each defendant, and what defences, if any, can be raised. Finally, this article investigates who is liable under Canadian law in a mosh pit incident. The short answer to this question is 'everyone'.

A. What is Moshing?

Moshing is a term used in the punk and metal communities that became synonymous with the frenzied collective form of dancing often seen at concerts. The practice evolved from the 1970's practices of slam dancing that reflected the punk community's message of 'stay away.'[8] The term 'moshing' was not coined to describe the practice until the Washington, D.C., band, Bad Brains, started using 'mash' or 'mash it up' in their lyrics and stage shows. Due to the thick Jamaican accent of vocalist Paul Hudson, the crowd misheard the word 'mash' as 'mosh'.[9] Moshing has been aptly described by one sociologist as 'a huge group fight, except no one's fighting.'[10]

Moshing became an integral part of the concert experience as it allowed bucking social norms, through the release of pent-up frustrations, and the fuelling of a strong communal tradition within a socially acceptable level of violence.[11] Dr. Thomas Hawley, a professor at Eastern Washington University, describes moshing as an outlet for the desire of the will's struggle against what opposes it, in this case dissonance or mental conflict. He says that this state *requires* an outlet such as physical movements of the body. He goes further to say that this struggle against dissonance is not merely a musical phenomenon but rather '…an ontological and phenomenological experience, an explicit and abusive confrontation with all that is terrible in existence.'[12] In short, moshing cannot simply be dismissed as chaotic dancing; for some it is a therapeutic and life affirming exercise.[13]

[8] Joe Ambrose, *Moshpit*: *The Violent World of Mosh Pit Culture* (Omnibus Press 2001) 1.

[9] Gabrielle Riches, 'Embracing the Chaos: Mosh Pits, Extreme Metal Music and Liminality' (2011) 15 For Cultural Research 315.

[10] Craig T. Palmer, 'Mummers and Moshers: Two Rituals of Trust in Changing Social Environments' (2005) 44 Ethnology 147, 154.

[11] Riches (n 9) 316.

[12] Thomas Hawley, 'Dionysus in the Mosh Pit: Nietzschean Reflections on the Role of Music in Recovering the Tragic Disposition' (Paper delivered at the Annual Meeting of the Western Political Science Association, San Francisco, CA, 1-3 April 2010), <https://www.researchgate.net/publication/228277848_Dionysus_ in_the_Mosh_Pit_ Nietzschean_Reflections_on_the _Role_of_Music_in_Recovering_the_Tragic_Disposition>, 33.

[13] ibid 34.

Moshing usually takes place in the semi-circular space in front of the stage but can often extend to the entire arena or standing area where the event is held.[14] A mosh pit can also quickly change to a 'circle pit' as the song or speed of the set changes. A circle pit is comprised of a large number of people running in a circle, sometimes holding onto one another to maintain balance. As the music speeds up so do the participants. Circle pits are generally a good humoured and joyful alternative for when things become too aggressive or heated in the pit.[15]

Depending on the community or 'scene', there are varying levels, or common codes, of conduct shared by participants, known as 'Pit Etiquette'. For instance, consensual jostling and good humoured horseplay is not forbidden but sexual harassment and trampling of fallen members is forbidden.[16] Even with these rules in place, however, mosh pits have grown to as large as 50,000 people at one time and accidents do happen. Minor injuries such as broken noses or sprained ankles are the norm. To treat this, some cities, such as San Francisco, boast a 'Rock Medicine' programme devoted entirely to dealing with mosh-based injuries.[17] Not everyone escapes the pit relatively unscathed, however. In 1994, a 21 year old died from injuries sustained at a Motörhead show in London and 2 participants at a Sepultura and Pantera concert became paraplegics as a result of a mosh pit incident.[18] In June 2000, 9 youths died at the Roskilde Festival in Denmark and in 1999 alone it is estimated that 5,691 concert attendees were injured.[19] Many participants' response to these injuries was a simple message that reinforces the consensual nature of moshing: '[i]f you don't want to get injured, don't go in the pit.'[20]

There is currently no Canadian tort law that responds directly to the practice of moshing. There is, however, a line of cases from the United States, concerning a variety of defendants, that address injuries sustained in mosh pit incidents. A brief examination of American legal response and the limited Canadian criminal law response to moshing gives an outline to the currently somewhat barren legal landscape. This examination finds that moshing is not *prima facie* criminal in the appropriate circumstances. This article then outlines the occupier's statutory duties, under the *Occupiers' Liability Act* and the *Liquor Licence Act*, and the duty of care owed by the occupier/venue/organiser to patrons under the law of negligence. This article analyses the defence of *volenti non fit injuria* to a claim in negligence.

This article then addresses the potential liability of the security at an event where the security is independently contracted. Patrons' liability in battery,

[14] Ambrose (n 8) 2.
[15] ibid 2–3.
[16] ibid 3.
[17] ibid 4.
[18] ibid.
[19] Cecily Lynn Betz, 'The Dangers of Rock Concerts' (2000) 15 Intl J for Pediatric Nurses & Professionals 341.
[20] Ambrose (n 8) 4.

negligence, and negligent battery are then addressed in turn. This article then discusses the defence of contributory negligence. Finally, this article concludes by broadly outlining the potential liability of all parties that arises from injuries sustained in mosh pits at concerts.

2. Moshing: The American Response

While there is very little Canadian case law relating to moshing, the American legal position towards moshing has developed quickly in recent years. To discourage incidents like the aforementioned story of Kimberly Myers, some American cities, such as Boston, have formally banned moshing and slam-dancing, arguing that it is 'dangerous behaviour' that constitutes a 'public safety hazard.'[21] The House of Blues was cited by police when their security did not break up a mosh pit at a Flogging Molly concert.[22] The major music tour known as 'Warped Tour' has done the same by hanging explicit banners that read 'You Mosh, You Crowd Surf, You Get Hurt, We Get Sued, No More Warped Tour'.[23] It is unknown if this has any deterrent effect.

Americans have also taken the unprecedented step to sue not only the location, event organisation, and the security, but to sue the band members themselves for unintentional torts.[24] In *Adams v Metallica*, a plaintiff, Adams, sustained chest trauma inflicted by violent fans in a mosh pit that he voluntarily joined.[25] His claim against the heavy metal band Metallica rested upon a claim of negligent supervision and a failure to warn. He argued that Metallica incited the crowd to mosh and should have anticipated how fans would react to the music of the opening act, 'Suicidal Tendencies'. Based upon this, he tried unsuccessfully to be joined as an intervenor on a similar lawsuit to avoid duplicate discoveries.[26] The main action he sought to join was between a plaintiff named Keith 'Crazy Indian' Philips and Metallica.[27] While within the crowd, Philips volunteered to be launched into the air and then caught by a group of thirty people multiple times. He was intoxicated and acted erratically after drinking from a blue bottle containing unknown contents.[28] Imitating another participant, Philips started spinning while airborne above the crowd. The crowd below him panicked and scattered fearing for their own safety.

[21] Natalie Musumeci 'Boston Police Crackdown on Mosh Pits' (*NBC Bay Area*, 16 March 2012) <http://www.nbcbayarea.com/news/weird/NATL-Boston-Police-Crackdown-On-Mosh-Pits--142945935.html> accessed 23 April 2015.

[22] ibid.

[23] Jason MacNeil 'Warped Tour Tries To Ban Moshing, Crowd Surfing (Which Is Not Very Punk Of Them)' (*Huffington Post*, 21 June 2014) http://www.huffingtonpost.ca/2014/06/21/warped-tour-bans-moshing-crowd-surfing_n_5516336.html accessed 19 July 2016.

[24] *Adams v. Metallica*, 143 Ohio App (3d) 483 (1st App Dist 2001).

[25] ibid 486.

[26] ibid 492.

[27] ibid 485.

[28] ibid.

Philips fell headfirst into the ground, damaging his spine and rendering him a paraplegic.[29] The action was later settled.[30]

Currently there are not Canadian decisions that parallel the legal approach developed in American courts. There is, however, a Canadian legal framework in place that this article applies to provide possible outcomes and obstacles from a Canadian legal perspective. While it does not mirror the American approach, it does provide some parallels in tort liability.

3. Is Moshing Criminal?

There is no Canadian legislation or common law that addresses the legality of mosh pits. The legality of moshing was indirectly addressed in *R. v J.D.C.*, a case concerning the wilful obstruction of an officer in the execution their duty following an altercation in a mosh pit at a concert concerning the defendant.[31] One of the issues in the case was whether the accused's behaviour in the mosh pit amounted to a disturbance under s. 175(1) of the *Criminal Code of Canada*.[32] Section 175(1) of the *Criminal Code* states:

> Every one who *(a)* not being in a dwelling-house, causes a disturbance in or near a public place,
> (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language
> (ii) by being drunk, or
> (iii) by impeding or molesting other persons,
> (*b*) openly exposes or exhibits an indecent exhibition in a public place,
> (*c*) loiters in a public place and in any way obstructs persons who are in that place…
> is guilty of an offence punishable on summary conviction.[33]

In *R. v J.D.C.*, the accused entered a mosh pit at a concert and was punched in the face. The accused returned a blow and was placed under arrest for causing a disturbance.[34] In considering whether the accused's actions amounted to

[29] ibid.
[30] ibid.
[31] *R v J.D.C.*, 2009 ABPC 346, [2009] AJ No. 1273 (QL).
[32] ibid [39]–[49].
[33] Criminal Code, RSC 1985, c C-46, s 175(1).
[34] *R v J.D.C.* (n 32) [13].

a disturbance under s. 175(1) of the *Criminal Code*, Judge Redman adopted the following dicta of Allen J. in *R v Edwards*:

> 'The public has a collective right to peace and tranquillity in a public place. This right must be balanced against the right of the individual to express himself or herself. Some disruption of the peace and tranquillity of a public place must be tolerated. A determination whether the public right to peace and tranquillity has been disturbed is a factual determination to be made by the trier of fact recognizing the competing interests. The disturbance is of the public's use of a public place and not the disturbance of an individual's mind. The intensity of the activity and its effect on the degree and nature of the peace that is expected to prevail at the particular time must be considered. The trier of fact must find that there is an externally manifested disturbance of the public peace in the sense of interference with the ordinary and customary use of a public place. The disturbance may consist of the impugned act itself or a consequence of the impugned act.'[35]

Judge Redman concluded that '[t]he mere act of moshing aggressively does not seem to me to be causing a disturbance in the context of a mosh pit at a rock concert where the music is loud, the bodies are close and people are flinging themselves around at each other.'[36] Judge Redman found that the officer had no reasonable and probable grounds to believe the accused was causing a disturbance within the meaning of s. 175(1) and the accused was acquitted of all charges.[37]

While mosh pits have not been the subject of much criminal litigation in Canada, injuries sustained in a mosh pit may be the result of other offences under the *Criminal Code*, such as assault.[38] Section 265(1) of the *Criminal Code* states that a person commits an assault when:

a. without the consent of another person, he applies force intentionally to that other person directly or indirectly
b. he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that person to believe on reasonable grounds that he has, present ability to effect his purpose; or
c. while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

What might otherwise be considered an assault will not be considered a criminal assault for the purposes of s. 265(1) where there is a 'social utility', as

[35] *R v Edwards*, 2004 ABPC 14 [89].
[36] *R v J.D.C.* (n 32) [49].
[37] ibid [49], [84].
[38] s. 265, Criminal Code.

discussed in *R. v Jobidon*.[39] In *Jobidon*, the Court recognised that exceptions were created for assaults that have a 'social utility' but failed to define what 'social utility' means. This 'social utility' test was echoed in *R v Adamiec*, where it was held that a sport – in this case, ice hockey – has a 'social utility in providing exercise and entertainment' and plays an important of Canadian identity and culture.[40] Following this admittedly uncertain criteria for the 'social utility' test and the dicta of Allen J. in *Edwards*, it is fair to say that if moshing were not in an appropriate location or if the intensity of moshing was too extreme, moshing and injuries sustained as a result of moshing may result in criminal liability.

4. Moshing and Occupier's Liability

In Canada, the occupier's duties are addressed both by legislation as well as by the common law. This Section will specifically address liability arising under legislation in Ontario, namely the *Occupiers' Liability Act* and the *Liquor Licence Act*, as well as *Regulation 719 Licences to Sell Liquor*.

A. Occupiers' Liability Act

The *Occupiers' Liability Act* outlines the occupier's duty in section 3(1):

> An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.[41]

The duty of care applies to both the premises themselves and any activities carried out on the premises.[42] Section 4(1) of the *Occupiers' Liability Act* narrows the duty of care to exclude 'risks willingly assumed':

> The duty of care provided for in subsection 3(1) does not apply in respect of risks willingly assumed by the person who enters on the premises, but in that case the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to the person or his property and to not act with reckless disregard of the presence of the person or his property.[43]

[39] *R v Jobidon* [1991] 2 SCR 741.
[40] *R v Adamiec* 2013 MBQB 246, [24]–[25].
[41] Occupiers' Liability Act, RSO 1990, c O2, s 3(1) [Occupiers' Liability Act].
[42] ibid s 3(2).
[43] Occupiers' Liability Act 1990, s 4(1).

The duty of care owed by an occupier under section 3(1) and section 4(1) of the Ontario *Occupiers' Liability Act* was discussed in *Waldick v Malcolm*.[44] Blair J.A. noted that the duty under section 3(1) is not absolute and that occupiers are not insurers liable for any damages suffered by persons entering their premises.[45] Blair J.A. further noted that trier of fact must determine what standard of care is reasonable and whether it has been met.[46] When discussing the duty of care arising under section 4(1), Blair J.A. found that section 4(1) required not only knowledge of the risk but also physical and legal acceptance of the risk by the visitor or patron.[47] In other words, this supports a codification of the *volenti* doctrine in Canada,[48] discussed in greater detail in Section 6 of this Article. Unless mosh pit participants are proven to be knowledgeable and accepting of the risks of entering the mosh pit on the occupier's premises, there may therefore be a duty owed on the part of the arena or stadium owner or occupier.

Occupiers' liability can potentially also extend to anyone who rents out the premises. In *Jacobson v Kinsmen Club of Nanaimo*, the defendant society rented out a curling club to hold a beer garden.[49] The roof of the club was supported by a series of I-beams which were accessible from the ground. The plaintiffs entered, consumed alcohol, and then began climbing the I-beams to the amusement of the other patrons. One patron lost his grip on the I-beam and fell thirty feet onto an unsuspecting patron, injuring him.[50] The defendant society was found to be a liable occupier under the British Columbian *Occupiers' Liability Act*.[51] Under the British Columbian *Occupiers' Liability Act*, liability extends to an event organiser or coordinator who rents out the stadium or arena and controls the premises for the purposes of a concert.[52] Failure to meet this duty of care can lead to a finding of negligence.

B. Liquor Licence Act

Where a venue which hosts musical acts serves alcohol, the *Liquor Licence Act* imposes additional duties for the occupier towards persons on the premises.[53] Section 39 of the Act outlines the civil liability of the occupier as an alcohol vendor and extends occupiers' liability to all the occupier's agents or employees if their sale of

[44] *Waldick v Malcolm* [1989] OJ No. 1970.
[45] ibid [18].
[46] ibid.
[47] ibid [32]–[40].
[48] ibid [32].
[49] *Jacobson v Kinsmen Club of Nanaimo*, (1977) 71 DLR (3d) 227 (QL).
[50] ibid [9].
[51] Occupiers Liability Act (British Columbia) 1990, s 1(b).
[52] ibid.
[53] Liquor Licence Act, RSO 1990, c. L. 19 [Liquor Licence Act].

alcohol results in a level of intoxication that makes a person a danger to others or themselves.[54]

Under section 39, the licence holder can be liable for the injuries caused by drunk mosh pit participants to each other. This section cannot be invoked, however, if the plaintiff is blameworthy, thus limiting its application.[55] The Court in *Sambell v Hudago Enterprises* added that '[this] duty on tavern owners is not absolute or unbounded but they must act reasonably to protect against the risk apprehended. What is reasonable depends on the circumstances and the magnitude of the risk.'[56] This position was later complicated by *Hague v Billings*, which states that if the requirements of section 39 of the Act are met, absolute liability is imposed and the issue of causation becomes irrelevant.[57] Somers J subsequently addressed *Hague v Billings* in a motion for summary dismissal.[58] He muddied the waters by stating that 'the principles respecting liability based on s. 39 of the [Act] are not entirely settled.'[59] The court went on to infer that the tort requirement of causality does apply in the traditional manner.[60] Due to this disagreement on the bench, it is somewhat unclear which analysis section 39 requires.

C. Regulation 719 Licences to Sell Liquor

The licence holder— usually the occupier—is also bound by *Regulation 719 Licences to Sell Liquor*. Section 45 of this regulation states:

> The licence holder shall not permit drunkenness, unlawful gambling or riotous, quarrelsome, violent or disorderly conduct to occur on the premises or in the adjacent washrooms, liquor and food preparation areas and storage areas under the exclusive control of the licence holder.[61]

This section appears to impose an obligation upon the occupier to deter moshing in a place where alcohol is sold. Alternatively, the licence holder would bear the onus to prove that moshing is not violent or disorderly conduct. The common law has injected a level of reasonableness into this section. Section 45 must be interpreted 'reasonably in accordance with its plain language and the practicalities of the context in which it is applied.'[62] With this added gloss of reasonableness,

[54] Liquor Licence Act, s. 39.
[55] *Menow v Honsberger* [1974] SCR 239, [11]–[12].
[56] *Sambell v Hudago Enterprises Ltd* [1990] OJ No. 2494, [45].
[57] *Hague v Billings* [1993] OJ No. 945, [15].
[58] *Haughton v Burden* [2001] OJ No. 4704 [24].
[59] ibid.
[60] ibid [25]–[26].
[61] Liquor Licence Act RRO 1990, Reg 719, s 45 (Reg 719).
[62] *Horseshoe Valley Resort Ltd v Ontario (Alcohol & Gaming Commission)* [2005] OJ No. 5895, [14].

the occupier's duty owed to the moshing patron is ambiguous at best. Nevertheless, it important to recognise that, ambiguous though it may be, there is a duty of care owed by an occupier to a moshing patron that, if breached, can lead to a finding of negligence.

5. Moshing: An Action in Negligence?

Would it be possible to for an injured party sue the venue, security, or patrons for failing to prevent injury in a mosh pit? In answering this question, this Section will next focus on the duty of care, the standard of breach, and causation.[63] This Section will next turn to the liability in negligence of the venue specifically.

A. Duty of Care

In order to be found liable, the defendant must firstly owe a duty of care to the patrons. The test for the existence of a duty of care in the tort of negligence is the two-stage *Anns* test, as endorsed by the Supreme Court of Canada in *Cooper v Hobart*.[64] At the first branch of the test, two questions arise:

> (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognised here?[65]

The proximity analysis focuses on factors arising from the relationship between the plaintiff and the defendant[66]—in this case, between the injured patron and the venue owner or occupier—looking to their interests while participating within the mosh pit, including expectations, representations, or reliance.[67] For example, depending on the patrons' state of mind and knowledge of mosh pits and the venue, patrons may or may not have expectations, reasonable or otherwise, that they will not be injured or jostled. Once foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises.[68] The second stage of the *Anns* test is concerned with whether there are any residual policy considerations outside the relationship of the parties which ought to negate or limit the scope of the duty, the class of persons to whom the duty is *prima facie* owed, or indeterminate damages

[63] This article does not examine the requirement 'proximate cause' since it will almost always be met in the setting of a mosh pit.
[64] *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.
[65] ibid [30].
[66] ibid.
[67] ibid [33].
[68] ibid.

which may result.[69] The second stage is generally only applied if the situation is novel.[70]

B. Standard of Care

The second requirement for a finding of negligence is the breach of the standard of care. All parties are held to a *standard* of care if a duty of care is established. In assessing the standard of care, the starting point is a legal fiction known as the 'reasonable man'. The reasonable man is a 'mythical creature' who sets the appropriate level of conduct of all other persons.[71] He possesses no superhuman traits, skills or intelligence, rather he is a 'reasonable and prudent man.'[72] Once the correct standard is ascertained, the defendant's actions are compared to it. If the defendant fails to meet the standard of care by their actions, it will constitute a breach of the standard.[73] For example, if the security team ignored an injured patron in a mosh pit and failed to remove them or provide them with medical attention because they were having a beer or watching the band, the security team would have breached the standard of care expected of a reasonable security worker. Similarly, if the occupier failed to ensure the area was clean of broken glass or other debris that could harm a patron, the occupier would also breach the standard of care.

C. Causation

The third requirement is causation. The tort of negligence can be caused by the actions of one or of a group of tortfeasors. The test for establishing causation is the 'but for' test.[74] The test places the burden upon the plaintiff to demonstrate that, on a balance of probabilities, but for the negligent act or omission of the defendant(s), the plaintiff would not have been injured.[75] The 'but for' test requires a 'substantial connection between the injury and the defendant's conduct' to shield innocent defendants from unconnected causes.[76]

If an injury were sustained in a mosh pit and the injured person was seeking to sue a particular party, the causation requirement would be established if *but for* the actions of the defendant, the injury would not have occurred. If the security had acted swiftly or effectively would there be an injury? What if the occupier had cleared the area of spilled beer or ice? If the purported act or omission is integral

[69] ibid [37]–[38].
[70] ibid [39].
[71] *Arland and Arland v Taylor*, [1955] OR 131 [29].
[72] ibid.
[73] *Clements v Clements*, [2012] 2 SCR 181, 2012 SCC 32, [6].
[74] *Resurfice Corp v Hanke*, [2007] 1 SCR 333, 2007 SCC 7, [18]–[21] [*Hanke*].
[75] *Blackwater v Plint*, [2005] 3 SCR, 2005 SCC 58 [78].
[76] *Hanke* (n 75) [23].

to the chain of causation and its removal might, on the balance of probabilities, have prevented the damage, then the causation requirement is met. If there is a relationship of proximity sufficient to attract liability and the harm was reasonably foreseable, then the defendant—be it the venue owner or occupier, security, or patrons—can be found liable under the law of negligence for the injury sustained.

D. The Venue's Liability in Negligence

In addition to any statutory obligations,[77] there is a common law duty created by the 'special relationship' between patrons and venues/organisers, the breach of which may result in the venue being found liable in negligence. This common law duty has evolved through a series of cases which will be discussed in this Section.

In *Hessie v Laurie*, the plaintiff, a patron, was assaulted by a second patron after coming to the aid of an employee who was attempting to remove a violent and intoxicated patron.[78] The plaintiff sought to hold both the intoxicated patron and the tavern liable for his injuries. He argued that the establishment owed him and the other patrons reasonable care in protecting them from other patrons. Riley J described the elevated standard of care for patrons who are served alcohol as 'anxious care', a standard that is subjective to the locale, the type and character of its usual patrons, the size of its operations, and what occurrences ought reasonably to be anticipated and guarded against.[79]

In *Crocker v Sundance Northwest Resorts Ltd.*, the Supreme Court of Canada stated that '[t]he common thread running through [the case law] is that one is under a duty not to place another person in a position where it is foreseeable that the person could suffer injury.'[80] In *Crocker*, a ski resort was found liable for the neck injury rendering the plaintiff a qaudriplegic because the resort allowed a patron to participate in a tubing competition after serving him to the point of intoxication.[81] The Supreme Court noted that it was relevant to 'relate the probability and gravity of injury to the burden that would be imposed upon the prospective defendant in taking measures.'[82] The Court found the nexus between Sundance Resort and Crocker too close for Sundance to be a 'stranger to Crocker's misfortune.'[83] Sundance had a responsibility to prevent intoxicated persons from participating in a dangerous sport.[84] The Supreme Court employed the same reasoning in *Stewart v Pettie* and clarified that, even with the existence of a 'special relationship',

[77] See section 4A–4C.
[78] *Hessie v Laurie* (1962), 35 DLR (2d) 413 [22].
[79] ibid [26].
[80] *Crocker v Sundance Northwest Resorts Ltd*, [1988] 1 SCR 1186, [21].
[81] ibid [39].
[82] ibid [20].
[83] ibid [23].
[84] ibid [24].

there is no positive duty on the operator unless there is a foreseeable risk.[85] An occupier's failure to meet this duty of care can lead to a finding of negligence, but a relationship between parties alone is not sufficient.

The Supreme Court restated this duty in 2006 in *Childs v. Desormeaux*.[86] The Court found that the commercial relationship between patron and tavern creates a duty of care for three reasons. Firstly, commercial hosts are trained and expected to monitor alcohol consumption.[87] Secondly, the sale and consumption of alcohol is strictly regulated by legislatures.[88] Third, there is an incentive to overserve in hopes of maximising profit: 'the benefits of over-consumption go to the tavern keeper alone, who enjoys large profit margins from customers whose judgment becomes more impaired the more they consume. This perverse incentive supports the imposition of a duty to monitor alcohol consumption in the interests of the general public.'[89] The duty of a venue to protect a patrons is thus established where there is foreseeability of harm *and* a 'nexus' or 'special relationship'—usually a commercial relationship—between the venue and patron.[90]

On this analysis, a venue serving alcohol at a concert that is known to have mosh pits is not only likely to have the requisite 'nexus' but is also likely to owe a duty of care to its patrons. If the venue serving alcohol and hosting the event were the same entity, the scenario would closely mirror that of *Crocker*. If it is foreseeable that there will be a mosh pit at the concert, the venue operator may have to guard against a mosh pit; the probability and gravity of injury are both very real and may elevate the standard of care owed by the venue to the patron.

How far does the duty to protect against injury extend? A patron who is reasonably served may still be injured in a mosh pit due to slightly diminished response times. The plaintiff in *Crocker* was clearly drunk, but what happens where a patron is served only one or two drinks? If the patron is able to make informed decisions, will the duty to protect still be established if a mosh pit suddenly becomes rambunctious? Will an injury sustained in a mosh pit always be a foreseeable harm due to a mosh pit's inherently dangerous nature? While *Crocker* and *Childs* propose a useful framework where a patron is blatantly overserved and then courts danger, they fail to provide guidance for the grey areas between the extremes.

6. Volenti

Volenti is a defence to negligence based on the maxim '*volenti non fit injuria*' which means that a person cannot complain of harm consented to within his knowledge and free will. The defence of *volenti* applies where parties give express or implied

[85] *Stewart v Pettie*, [1995] 1 SCR 131, [48]–[50].
[86] *Childs v Desormeaux*, [2006] 1 SCR 643, 2006 SCC 18.
[87] ibid [18].
[88] ibid [19].
[89] ibid [22].
[90] ibid [31]–[34].

consent to assume risks without compensation. In *Dubé v Labar*, Estey J set the bar relatively high for invoking the defence of *volenti*, stating:

> [*V*]*olenti* will arise only where the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, in essence bargained away his right to sue for injuries incurred as a result of any negligence on the defendant's part. The acceptance of risk may be express or may arise by necessary implication from the conduct of the parties, but it will arise, in cases such as the present, only where there can truly be said to be an understanding on the part of both parties that the defendant assumed no responsibility to take due care for the safety of the plaintiff, and that the plaintiff did not expect him to.[91]

Under the doctrine of *volenti*, it may be possible for a venue or an organiser to release itself from liability where patrons sign a binding document prior to the concert or where the patrons agree to terms and conditions upon purchasing their tickets. In *Dimopoulos v Thiessen*, the defendant negligently crosschecked the plaintiff in the mouth during a ball hockey game.[92] The court found that the plaintiff assumed the risk when he registered his team and signed the 'sign up sheet' which contained a release and waiver.[93]

This precept that consensual injuries are not actionable often applies to blows given or injuries received in fair play and not maliciously. In *Agar v Canning*, the Court drew a sharp division between a blow struck in the course of sport, which it found to be acceptable, and a blow struck in anger or maliciously, which it found to be a battery.[94] The court held that what a player does in the heat of sport should not be 'judged by standards suited to polite social intercourse.'[95] This defence extends, however, beyond organised sport. In *Wright v McLean*, four young boys threws balls of mud or clay at each other for sport.[96] One of the boys accidentally threw a stone mistaking it for mud and injured the plaintiff. The presiding judge found no civil liability, relying on consent to justify his finding.

On this analysis, could moshing be included under the wide umbrella of sport? Moshing is at the very least dancing, which is often described as a sport or at least grouped with sport.[97] It provides the participants with exercise and entertainment and holds cultural value for many subcultures. The venue, the occupier, or the organiser can similarly invoke the defence of *volenti* in the same fashion of a release

[91] *Dubé v Labar*, [1986] 1 SCR 649 [6].
[92] *Dimopoulos v Thiessen Signing Doc*, 2009 BCPC 140 [3].
[93] ibid [16].
[94] *Agar v Canning*, [1965] 54 WWR 302, [3]–[4].
[95] ibid [7].
[96] *Wright v McLean* [1956] WWR 305 [1].
[97] *Bonenfant v Campagna*, [1977]16 NBR (2d) 544, [1].

and waiver. There are, however, exceptions whereby a venue or an organiser will not be able to invoke the defence of *volenti*, even where a release and waiver has been signed.

These exceptions were outlined by McLachlin J in *Karroll v Silver Star Mountain Resorts Ltd.*[98] The defendant ski resort was sued for negligently failing to ensure that the course was empty of other skiers when the plaintiff descended.[99] The plaintiff relied on the defendant's assurance and subsequently collided with another skier.[100] The resort relied upon a release and indemnity which the plaintiff signed prior to participating.[101] The court outlined three circumstances in which a defendant cannot rely upon a written agreement of this kind: first, where the contract is signed by mistake;[102] second, where the signing is induced by fraud or misrepresentation,[103] and; third, where the provider of the contract is aware that it is misunderstood or mistaken by the signor.[104]

An occupier can, in theory, waive their occupier's liability but the occupier has to do so carefully in a way that all participants understand and acknowledge that the occupier is waiving its liability for any injuries sustained. For example, a waiver might be digitally signed by a patron upon purchase of tickets to an event. This waiver might then serve as evidence for raising the defence of *volenti* to a claim in negligence against the venue or the organiser. The venue or organiser will still be vulnerable however, to the three exceptions enunciated in *Karroll v Silver Star.*

7. Security's Liability

Many venues employ some level of security, such as 'bouncers', to control the premises and to protect the patrons from acts of aggression or danger. If the security are employees of the occupier, they are generally shielded by vicarious liability; it is the occupier, and not the employees, who will be held vicariously liable. The security workers can be held liable, however, where they are independently contracted for the event.

[98] *Karroll v Silver Star Mountain Resorts Ltd* [1988] 33 BCLR (2d) 160, 1988 CanLII 3094 (BS SC).
[99] ibid.
[100] ibid.
[101] ibid.
[102] ibid.
[103] ibid.
[104] ibid.

Where security workers are independently contracted, their liability is severed from the occupier, assuming that the occupier acted reasonably. Security workers will owe a duty to patrons, the breach of which can lead to a claim of negligence by the patrons that they were employed to protect:

> Where damage to any person or his or her property is caused by the negligence of an independent contractor employed by the occupier, the occupier is not on that account liable if in all the circumstances the occupier had acted reasonably in entrusting the work to the independent contractor, if the occupier had taken such steps, if any, as the occupier reasonably ought in order to be satisfied that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.[105]

The duty and standard of care owed by security to those they are hired to protect was addressed by Cromwell J in *Fullowka v Pinkertons of Canada Ltd*.[106] In *Fullowka*, during a mine strike, a disgruntled striker evaded security and set a bomb that resulted in the death of nine miners.[107] Cromwell J outlined the test for foreseeability as 'whether the harm would be viewed by a reasonable person as being very likely to occur'.[108] He then examined the proximity between the security and the miners to see if there had a positive duty to act. Cromwell J, citing *Childs*,[109] noted that there were at least three factors which may identify a positive duty to act:

> The first is that the defendant is materially implicated in the creation of the risk or has control of the risk to which others have been invited. The second is the concern for the autonomy of the persons affected by the positive action proposed. As the Chief Justice put it: 'The law ... accepts that competent people have the right to engage in risky activities ... [and] permits third parties witnessing risk to decide not to become rescuers or otherwise intervene.' The third is whether the plaintiff reasonably relied on the defendant to avoid and minimize risk and whether the defendant, in turn, would reasonably expect such reliance.[110]

[105] Occupiers' Liability Act (n 42) s 6(1).
[106] *Fullowka v Pinkerton's of Canada Ltd*, [2010] 1 SCR 132, 2010 SCC 5.
[107] ibid [4]–[9].
[108] ibid 21.
[109] *Childs* (n 87) [31]–[46].
[110] *Fullowka* (n 107) [27].

This analysis can be applied to a security team at a concert with mosh pits. In establishing whether a *prima facie* duty of care exists between the security and patrons, there is sufficient foreseeability as harm could be 'viewed by a reasonable person as being very likely to occur.'[111] Due to the inherently dangerous nature of mosh pits, this is easily met. Additionally, proximity may also be met following an application of the three factors. First, the security are not materially implicated in the creation of the risk but their sole purpose is control of the venue and the risk contained within. Second, the patrons are involved in risky activities, which are not excluded nor do they require third parties to intervene. Third, the patrons could reasonably rely on security for their safety as this is the purpose of their employment. On this analysis, it is possible that the security will owe a duty of care towards the patrons of an event but the existence of the duty will most likely depend on the time and place of the event. In *Fullowka*, Pinkertons did not breach their standard of care as they were understaffed (against their own urges) and unable to meet the appropriate standard of care through no fault of their own.[112] In a mosh pit scenario, a properly staffed security team which fail to discharge the proper standard of care to patrons may be held liable for injuries sustained by patrons.

8. Patrons' Liability

A patron injured at a concert could seek to sue other patrons for the injuries sustained. The patrons who enter the mosh pit hold the lion's share of responsibility for their conduct. Patrons can be held liable in negligence, but it is more likely that they will be sued in a tort that has an element of intention. There are three torts that can lead to patron liability: battery, negligence, and negligent battery.

A. Battery

While American case law uses battery and assault separately, *Gambriell v Caparelli*, established that the distinction between assault and battery have been blurred in criminal matters and eliminated in civil matters.[113] For this reason, there is no need to address these two torts separately.

Bettel v Yim defined battery as 'the intentional infliction upon the body of another of a harmful or offensive contact.'[114] In *Bettel v Yim*, the plaintiff started a small fire in the defendant's store. The defendant tried to coerce a confession from the plaintiff and shook him two or three times.[115] During this shaking, the plaintiff's

[111] ibid [21].
[112] ibid [80].
[113] *Gambriell v Caparelli* (1974) 7 OR (2d) 205, 54 DLR (3d) 661 [13].
[114] *Bettel Et Al v Yim*, [1978] DLR (3d) 543.
[115] ibid [6].

nose accidentally struck the defendant's head causing his nose to bleed.[116] The defendant was found liable for the plaintiff's injuries despite the fact the injuries were not intended; the damages were a result of the defendant's intentional touching, resulting in the defendant's responsibility.[117]

A battery-free mosh pit is somewhat of an oxymoron due to the slam dancing that occurs in a mosh pit, similar to checking in an ice hockey game. If any patron in a mosh pit intentionally touches another patron and the contact resuls in harm, it may amount to battery. Even if a patron simply intends to bump and jostle with others harmlessly, but misjudges their strength and injures another patron, they could be liable for battery.

B. Negligent Battery

Mosh pits are generally not a place of calculated movement so there is a strong possibility of negligent battery. In both *J.A.S. v Gross*[118] and *Non-Marine Underwriters, Lloyd's London v Scalera*,[119] the Supreme Court of Canada deferred to Lewis Klar's definition of negligent battery:

> A negligent battery exists when the defendant causes a direct, offensive, physical contact with the plaintiff as a result of negligent conduct. The defendant's negligence consists of unreasonably disregarding a foreseeable risk of contact, even though the contact was neither desired nor substantially certain to occur.[120]

Negligent battery is not often pleaded but it does still survive as a cause of action, as seen in *Kinkade*, a case in which a patron at a club was shot in the leg by a club employee following an altercation.[121] The claim of negligent battery was not directly addressed since it was subsumed into the claim for negligence.[122] Negligent battery could, however, still be pleaded by an injured patron for injuries suffered in a mosh pit depending on the circumstances.

In the chaos of a mosh pit, a negligent battery is entirely possible, if not more likely than anywhere else. The Court in *Gross* states that negligent battery requires harm as a result of disregarding a 'foreseeable risk of physical contact'.[123] All that is required in a mosh pit is for a patron to throw their body and limbs in close contact

[116] ibid [7].
[117] ibid [37].
[118] *J.A.S. v Gross*, 2002 ABCA 36.
[119] *Non-Marine Underwriters, Llyod's of London v Scalera* [2000] 1 SCR 551, 200 SCC 24.
[120] Lewis Klar, *Tort Law*, (2nd edn Carswell, 1996) 47.
[121] *Kinkade v 947014 Ontario Inc c.o.b. as The Silver Dollar*, 2014 ONSC 1599.
[122] ibid [47]–[48].
[123] *J.A.S. v Gross* (n 119).

knowing but disregarding the risk this contact poses to other patrons. Similar to battery, negligent battery is arguably unavoidable in a mosh pit since it goes to the very nature of the activity.

C. Contributory Negligence

Contributory negligence is a defence to a claim in negligence that depends on the negligence of a party, usually the plaintiff, authoring their own injury.[124] A plaintiff always owes a duty to care of themselves and all that is necessary to raise it as a defence is 'that the injured party did not take reasonable care of himself and contributed, by this want of care, to his own injuries.'[125] For example, in *Glanville v Moberg*, a plaintiff became intoxicated and failed to wear a seatbelt when he was involved in a motor vehicle accident.[126] The plaintiff's failure to wear a seatbealt was found to have contributed to a 'substantial portion of the fault' and his liability was assessed at thirty percent.[127]

Where the plaintiff is found to have contributed to the injury or damage caused, the question of apportionment of damages inevitably arises. Section 3 of the *Negligence Act* states that where 'negligence is found on the part of the plaintiff that contributed to the damages, the Court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.'[128] The apportionment of damages is therefore made on the basis of the degree of *fault* found against the parties and *not* causation.[129] The measurement is a question of how far each person deviated from the standard of care, not how much damage they caused.[130] Where it is impractical to determine the measurement of deviation from the standard of care, the parties are found to be equally at fault.[131]

In the case of injuries sustained in a mosh pit, contributory negligence could arise in a variety of permutations between the venue, multiple patrons, and security. For example, patron A is overserved by the establishment at a concert and throws himself recklessly into a mosh pit. Patron A falls causing Patron B to trip, resulting in both Patron A and Patron B being trampled upon in the mosh pit. This incident goes unnoticed by Security Guard C, who is tired and 'resting his eyes' and ought to have prevented the incident in the mosh pit by keeping drunk patrons, such as Patron A, away from the mosh pit.

The liability of each party in the above example will depend on the extent to which each party deviates from their individual standard of care. Security Guard

[124] *Fraser v Ortman*, [1980] AJ No. 629 [9].
[125] ibid.
[126] *Glanville v Moberg*, 2014 BCSC 1336, [12].
[127] ibid [122].
[128] Negligence Act, RSO 1990, c N1.
[129] *Cempel v Harrison Hot Springs Hotel Ltd.*, 1997 CanLII 2374 (BC CA), [1998] 6 WWR 233 [19].
[130] ibid.
[131] Negligence Act, s 4.

C and the venue can both be held partially liable for the injuries of Patron A and Patron B since both deviated from the required standard of care as established in *Crocker* and *Fullowka* respectively.[132] Patron A might be found negligent and to have contributed to his own injuries or damage for drinking too much, recklessly throwing himself into the mosh pit, and failing to assess the situation before acting. If Patron A is found negligent, he will be liable for a portion of his injuries as well as those of Patron B.

9. Conclusion

Moshing is not *prima facie* criminal. In the appropriate setting and with the appropriate intensity of force and supervision, moshing may even be protected by the right to freedom of expression if it takes in an appropriate public place.[133] Moshing is not, however, without its dangers and may, where damage occurs, result in liability of various parties for the damage caused for failure to uphold requisite obligations or standard of care.

The venue and/or event organiser bear(s) a variety of different obligations to patrons. The venue has a statutory duty to keep patrons 'reasonably safe' while they are on the premises pursuant to the *Occupiers' Liability Act*. Where alcohol is sold at the event, the *Liqour Licence Act* saddles the occupiers with an additional level of responsibility.[134] *Regulation 719 Licences to Sell Liquor* ensures that the venue discourages patrons' 'violent or disorderly conduct' but, since it requires a contextual application, it falls short of providing a concrete example. Where the security at the event is independently contracted, there may be a duty owed by the security to the patrons depending on the control of the risk, balanced with autonomy of the person, and reliance upon their intervention.[135] It is possible that patrons may also be liable for injuries sustained by other patrons under the law of battery, negligent battery, or ngliegence, depending on their behaviour in the mosh pit. If the plaintiff consents to the harm, the defendant may be absolved of liability if the activity provides a 'social utility', though it is yet to be determined whether moshing falls under the 'social utility' exception. Similarly, contributory negligence could divide or diminish the liability of all the parties involved depending on the scenario.

The simple answer to the question posed by this article, who can be held liable for injuries sustained in a mosh pit at concert, is 'everyone'.

[132] *Crocker* (n 84); *Fullowka* (n 107).
[133] *Edwards* (n 36) 89.
[134] *Haughton* (n 59) [24]–[26].
[135] *Fullowka* (n 107).