EXIT STAGE ... RIGHT?
PART ONE

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In this article the author examines where liability lies for injuries caused by 'stage-diving' and 'crowd-surfing' at live music events and festivals amid increasing litigation in this area. Part One looks at the potential causes of action open to an injured crowd member and considers the personal liability of those who engage in stage-diving and crowd-surfing. Part Two considers the potential liability of organisers and occupiers, and the extent to which the wider societal benefits from live music events can shape the appropriate standard of care.

The summer festival season is drawing to a close, when many people have attended the ever-increasing number of open-air music festivals, of all shapes, sizes and niche interests. According to a recent report by UK Music, an umbrella organisation representing UK commercial music industry interests, there were some 18.6 million visits to concerts, music festivals and music attractions in the UK in 2009. It is not surprising that reports of compensation claims following injuries sustained at live music events, particularly those involving performances by well-known musicians, continue to attract press interest. Current statistics are difficult to source, but one survey suggested that from 1992-2002 there were 232 fatalities from failures in crowd safety worldwide, and over 65,000 injuries.

Compensation claims involving performances by well-known musicians continue to attract press interest

The phenomenon is not limited to the United Kingdom. Whilst headline news reports from incidents, settlements and awards in the United States attract attention, the last decade has seen an increase in the number of music festivals in continental Europe marketed for UK festival-goers to visit, sometimes on packaged excursions, and which bring additional complications (including those of jurisdiction and applicable standards).

Evidently, injuries to people attending a live music event may arise in many different ways. Two closely-related mechanisms which raise interesting questions of liability are 'stage-diving' and 'crowd-surfing'.

Stage-diving and crowd-surfing: some definitions

Stage-diving, perhaps unsurprisingly, is the act of leaping from a stage, ahead and onto the crowd below, with the intention that the crowd support the weight of the stage-diver. The stage-diver is often one of the live music performers, and the dive is undertaken either from the raised stage in front of the crowd or, in more substantial events, where the stage is separated from the crowd by a security corridor, from the stage-side of a crowd barrier. It is usually completed instantaneously, albeit sometimes with an indication being given by the performer, and the distance travelled may be relatively short: usually a few metres.

Crowd-surfing, equally unsurprisingly, is a process in which a person is lifted from the

crowd (or perhaps stage-dives into the crowd) and travels over the crowd, being passed between members of the crowd, above head height, and with their weight being distributed between supporters. The crowd-surfer may be a performer, perhaps seeking to travel out over the crowd and then back onto the stage area, to entertain, or a member of the crowd, usually seeking to travel over the crowd towards the stage. The distance travelled may vary: it could be as far as tens of metres.

Inevitably, both stage-diving and crowd-surfing present a significant risk of danger to participants, both willing and unwilling, although some subtle differences remain between the two. Typically, other crowd members may sustain injuries to their heads, necks and upper torsos as a result of unexpected impacts (from ahead, in the case of stage-divers, and often from behind or from the sides, in the case of crowd-surfers) of full body weights and flailing limbs, and from collapses due to being unable to support the unexpected body weights involved. Injuries are often mild but can be serious.

Some issues of liability

Stage-diving and crowd-surfing present a significant risk of danger to participants

Who is potentially liable for injuries to crowd members caused by 'stage-diving' and 'crowd-surfing' at events? What are the relevant causes of action? Does the participant bear sole responsibility, or can liability extend to occupiers, organisers, promoters and stewards? What of the personal autonomy of audience members who encourage these dangerous activities or willingly put themselves in a position of danger? What of the social usefulness and economic benefits involved in live events?

A sensible starting point is to consider the appropriate cause of action open to a crowd member injured by stage-diving or crowd-surfing. The possibilities include actions against:

(1) the primary wrongdoer (i.e. the stage-diver or crowd-surfer, as the case may be), in trespass to the person (and more particularly in battery and/or assault);

(2) the primary wrongdoer in negligence;

(3) a secondary wrongdoer (such as the organiser) for breaching a duty of care to protect the injured person from the actions of the primary wrongdoer;

(4) a secondary wrongdoer (such as the organiser) for breaching a duty of care owed directly to the injured person in respect of the secondary wrongdoer's own actions; and

(5) a secondary wrongdoer (such as an occupier) for breaching a duty of care owed to the injured person in relation to the state of the premises at which the event is held.

The first two are probably mutually exclusive, and depend on whether the act was 'intentional' (*Letang v Cooper* [1965] QB 232). The latter two have their own separate complexities, discussed later. The different potential causes of action are interlinked, however, since the extent of any personal responsibility of the participant may well be relevant to an appropriate allocation of any liability between the primary and secondary wrongdoers pursuant to the Civil Liability (Contribution) Act 1978 in the event that they are found to have breached a duty to the claimant.

Could there be an actionable battery by the stage-diver or crowd-surfer?

A crowd member who is injured when a stage-diver or crowd-surfer falls onto them may be able to establish a battery: the intentional and direct application of immediate unlawful force (*Collins v Wilcock* [1984] 1 WLR 1172).

The *motive* of the stage-diver or crowd-surfer, which may simply be to enjoy themselves and entertain the crowd, is irrelevant – all that is required is that there is an intention to apply *some* force. This has been construed as being wide enough to include a practical joke (*Williams v Humphrey* (1975), *The Times*, 20 February 1975) and a 'prank that gets out of hand' (*Collins v Wilcock* [1984] 1 WLR 1172). The need for 'immediacy' seems to be met easily, given that the transactional forces in both stage-diving and crowd-surfing are applied within seconds.

Applying the criterion of 'directness' is not without its problems. Historically, this requirement was strictly construed (the classic distinction being that leaving a log for someone to trip over is not sufficiently direct, but throwing a log at them is: *Reynolds v Clarke* (1726) 1 Str 634), but in recent years tort law seems to be relaxing this requirement, closer to that now found in corresponding criminal offences of trespass to the person (see, for example, *Haystead v Chief Constable of Derbyshire* [2000] 2 Cr. App. R. 339). In any event, tort law has long recognised the 'agony of the moment' where A may have intended to apply contact to B, but the force is displaced, perhaps instinctively, from B to C, making A directly liable to C. One interesting, if old, case, concerned a lit firework being tossed by a defendant towards a person, which was passed around a crowd and ultimately injured a claimant. The claim succeeded against the defendant (*Scott v Shepherd* (1773) W.Bl 892). There are clear parallels here with crowd-surfing and stage-diving, where crowd members will be keener to displace the falling person by attempting to propel them to other crowd members, than bear their weight themselves.

The final ingredient of the tort – unlawfulness, is really an issue of lawfulness for the defendant to prove, on the balance of probabilities (*Freeman v Home Office* (No.2) [1984] 2 QB 524). Lawfulness can come from consent, and an issue in crowd-surfing and stage-diving arises as to whether crowd members consent to the risk of injury from those activities, or behave in such a way that the defendant is entitled reasonably to believe that the crowd member does consent (even if he does not). In an older United States case, the claimant holding up his arm in a vaccination line was held to give the defendant a defence (*O'Brien v Cunard SS Co.* 28 NE 266 (Mass. 1891). Could a crowd member who is an experienced festival-goer and knows the likelihood of stage-diving and crowd-surfing at a particular gig, encouraging a performer to stage-dive towards them, or perhaps giving a 'boost' to elevate a prospective crowd-surfer (which subsequently is unsuccessful), fall within this category? Failing that, it would seem difficult for a defendant to establish that the crowd member's mere presence in the front of a crowd (where those activities tend to occur) by itself is sufficient evidence of an implied consent to the risk of bodily contact 'acceptable in the ordinary conduct of daily life' (*Collins v Wilcock* (1984)) at live music events. Being in the zone of potential danger is not enough.

Do crowd members consent to the risk of injury?

A defendant cannot rely on the partial defence of contributory negligence (s.1 Law Reform (Contributory Negligence) Act 1945) in a battery claim, following the very recent Court of Appeal case of *Pritchard v Co-Operative Group (CWS) Ltd* [2011] EWCA 329, for example by suggesting that a crowd member, by not moving to the side of the crowd or staying at the back of a crowd, had contributed to their injuries.

One advantage of a claim in battery is that it is actionable per se, i.e. without needing to prove any damage (although it will often be relatively straightforward to establish causation and damage).

A significant disadvantage of a claim in battery is that such claims may not be covered by public liability insurance carried by a stage-diving performer or, perhaps, a crowd-surfer. In one recent case, a 16-year old girl sustained significant dental injuries, including 5 fractured teeth, when a performer from the band Hawthorne Heights stage-dived into the audience at the Bristol Academy, landing on her head. Further injuries were caused to her when the performer was dragged from the crowd. Unfortunately, she was unable to recover any significant damages from the performer, since the band's US public liability insurance policy did not cover injuries arising from stage-diving and crowd-surfing. This is also an issue where injuries are caused in contact sports (see, for example, the background to *Elliot v Saunders and Liverpool Football Club* (1994), unreported QBD per Drake J.). Claimants should choose their cause of action battleground wisely.

The insurance policy did not cover injuries arising from stage-diving and crowd-surfing

If a claim is brought in battery, it would seem only to be capable of being brought against the person 'directly' inflicting the force: the stage-diver or crowd-surfer. Intermediaries, passing the person on through the crowd, may be acting in the 'agony of the moment' and may have defences of 'necessity': since their actions immediately and directly result from the risks presented to them by the stage-diver or crowd-surfer (analogous to *Scott v Shepherd* (1773) W.Bl 892 noted above). Other members of a stage-diving performer's band will not be vicariously or indirectly liable for a battery committed by the stage-diving performer.

What about negligence by the stage-diver or crowd-surfer?

If the ingredients of the tort of battery are not met, if, for example, a court was persuaded that the action lacked any of the sufficient requirements of 'intention', 'directness' or 'unlawfulness', then a crowd member who is injured when a stage-diver or crowd-surfer falls onto them may be able to establish negligence, on normal negligence principles. Given the scarcity of domestic reported cases on stage-diving and crowd-surfing, it is helpful to revert to first principles.

It would seem relatively straightforward to establish that where the stage-diver or crowd-surfer unintentionally creates a risk of reasonably foreseeable physical injury to a person belonging to a class comprising crowd members, a duty of care arises: there is clearly sufficient 'proximity' in a legal sense: *Murphy v Brentwood District Council* [1991] 1 AC 398). The risks of both stage-diving and crowd-surfing are well known and so reasonably foreseeable. Some well-known performers have been reported to have suffered serious injuries to themselves when executing stage dives with awkward landings, and others have allegedly caused serious injuries to crowd members. In 2010 alone, a member of the British band 'Ou Est Le Swimming Pool', performing at the Pukkelpop Festival in Belgium, was reported to have caused serious injuries to a young girl in the crowd when executing a stage dive, and, in the United States, a New Jersey woman claimed damages in a federal court against the band 'Fishbone', their lead singer and others, for injuries she allegedly sustained, including a fractured skill, broken clavicle and perforated eardrum, as a result of a stage-dive at a concert in Philadelphia. She pleaded her claim in both (i) negligence and (ii) assault and battery.

It would seem relatively clear that, whether judged by the professional standard of the reasonably competent performer (for stage-diving) or the reasonable fellow crowd member (for crowd-surfing), a breach of duty can often

be readily established, considering the foreseeability of harm to others, the likelihood of that harm, the severity of the potential harm and the practicability of precautions (see, for example, the classic dictum of Lord Reid in *Morris v West Hartlepool Steam Navigation Co. Ltd* [1956] AC 552). Although serious injuries seem to be fortunately rare, there remains an ever-present risk of physical injury of some type or kind, above the threshold triggering 'something to be done about it' (see, for example, *Tomlinson v Congleton Borough Council* [2004] 1 AC 46). Whilst some precautions may be (and are often) taken by stage-divers and crowd-surfers, such as removing items from pockets, sharp jewellery, rough clothing and heavy footwear, to reduce the forces on contact with erstwhile supporters in the crowd, the only reasonable precaution is avoidance. There is often practically no scope, in time, for any warning to be effective to make the landing zone within the crowd reasonably safe, and the sheer unpredictability of crowd dynamics make any assessment of destination, path or trajectory inherently hazy.

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An injured claimant would need to establish causation: that the act caused or materially increased the risk of injury. This seems relatively straightforward to establish, although one could conceive cases where there is a naturally vibrant and exuberant crowd, perhaps fuelled by alcohol, where a significant degree of inter-crowd movement (and perhaps forceful contact) would be inevitable without any failed stage-dive or crowd-surfing at all. A claimant in such circumstances, perhaps engaged in the violent 'moshing' within some crowds, may find an evidential burden difficult to discharge. In a crowd, it seems almost inevitable that there may be interaction between the breach of duty and any resultant damage to an injured claimant, but it seems equally unlikely that such foreseeable interaction of a third party (*Knightley v Johns* [1982] 1 WLR 349] or any misjudged but well-intended attempt at evasive action by the claimant (*Spencer v Wincanton Holdings Ltd (Wincanton Logistics Ltd* [2009] EWCA 1404) could represent intervening acts of such causative potency as to break any chain of causation. Causation seems likely to be met.

It seems difficult to conceive any viable defences. Whilst a defendant stage-diver or crowd-surfer could attempt to raise a partial defence of contributory negligence (s.1 Law Reform (Contributory Negligence) Act 1945), it seems unlikely that a crowd member on the receiving end of an 'incoming' stage-diver or crowd-surfer and injured as a result of being unable to avoid contact, displace the burden or carry the load, would attract sufficient '*relative blameworthiness*' (*Reeves v Metropolitan Police Commissioner* [2001] AC 360) to make any deduction of damages 'just and equitable' for section 1 of the Act (see also the recent case of *St. George v Home Office* [2008] EWCA Civ 1068, where the imbalance of power between the tortfeasor and the claimant negatived any such deduction). Claimants are often afforded a high degree of latitude when making decisions in a dilemma produced by the 'heat of the moment', making their actions less likely to be criticised (*Jones v Boyce* (1816) 1 Stark 493). Given that stage-diving and crowd-surfing are almost exclusively carried out in areas of high crowd density ahead of the central part of the stage, an injured claimant is unlikely to be criticised for failing to escape the impact zone – there simply may be no such opportunity in the time and space available. However, it may be that the reduction in perception, reaction time and evasive action that alcohol might bring to an injured claimant could justify a deduction in the right case.

Some concluding thoughts on personal liability

An injured claimant may well have, in theory, strong prospects of success in establishing personal liability, in battery or in negligence, for the actions of a stage-diver or a crowd-surfer who causes them injuries. Obviously, stage-divers, as the performers, are readily identifiable, and more likely to be resourced to meet any judgment (although their position on insurance should be considered carefully). A claim against a crowd-surfer enjoys similar notional strong prospects of success, although difficulties in tracing the culprit and them meeting any judgment are obvious. The key evidential difficulty is simply that such events happen in an instant, in an anonymous unconnected crowd of many, and piecing together a credible evidential matrix to attach personal liability in such circumstances can be particularly difficult, particularly where witnesses may be untraceable, there may be no truly independent witnesses or surveillance footage, nearby security stewards may be unwilling to co-operate in giving evidence and there may even exist a culture against what may be perceived by fellow concert-goers as an unwanted expansion of 'compensation culture.'

The key evidential difficulty is simply that such events happen in an instant

In those circumstances, might an injured claimant stand a better prospect of establishing a claim against an organiser of the event and/or an occupier of the premises on which the event is held? This will be considered in Part Two.

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