# Dance Club Injuries in New York - Appellate Courts Dismiss One Case but Allow Other Case to Proceed

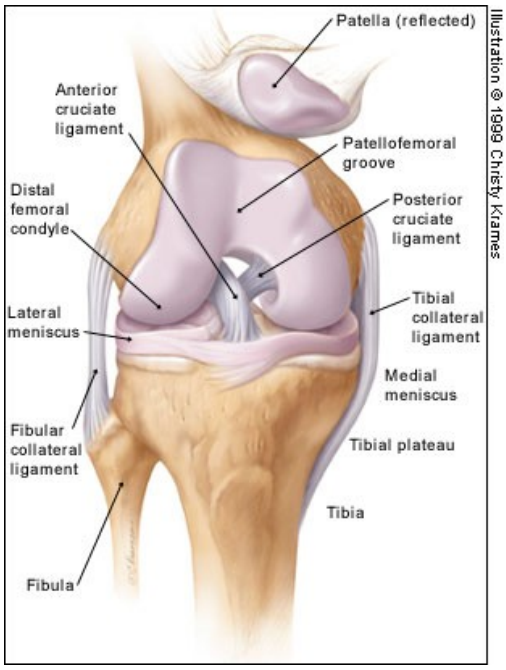
Posted on December 17, 2009 by John Hochfelder

Perhaps the term “dance club” is a misnomer here; we’re really talking about **moshing** (also called slam dancing) which is an informal term referring to dancing to music in a violent manner by jumping up and down and deliberately colliding with others.

Sounds like a sure-fire way to get hurt and that’s just what happened in two cases that have now made their ways up to the New York appellate courts. Each, though, came to a different result.

**In one case**, a 36 year old concertgoer, David Schoneboom, was injured at a club in Manhattan listening to his favorite group, “The Crumbsuckers.” Earlier in the evening he had watched from the balcony performances from the first two groups: “Kill Your Idols” and “Subzero.” Why the balcony? Simple. Schoneboom said that it was too violent on the floor where he saw moshing was ongoing.

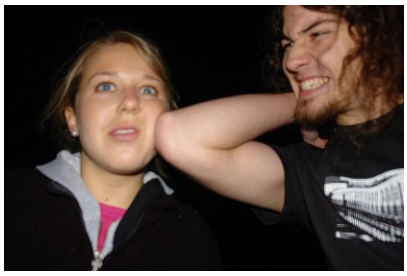
Nonetheless, when his favorite group came on to play, he admits he went down to the floor near, but not into, the area where the moshing was taking place. And that’s when he got shoved from behind into the side of his knee and ended up with a **torn anterior cruciate ligament and a torn meniscus** which required reconstructive knee surgery.




Schoneboom sued the club claiming that it was the club's negligence in failing to prevent the violence which caused his injury. Not so, said both the trial judge who dismissed the complaint and the **appellate court which upheld the dismissal in Schoneboom v. B.B. King Blues Club & Grill**.

As we mentioned, **here**, the **lower court determined that Mr. Schoneboom had assumed the risk of being injured**, because he fully appreciated the risk of colliding with a slam dancer and nonetheless elected to place himself in close proximity to that activity.

**In the other recent appellate court case** involving injuries related to moshing, a 15 year old boy was injured at Club Warsaw in Brooklyn when attending a concert by the group "Senses Fail." The boy, Elliot Rishty, claims he placed himself 4-5 rows away from any moshing but that the mosh pit spread and he was then **elbowed or struck in the nose** by a moshing participant. He sued.



The trial judge found that the alleged occurrence was not foreseeable and therefore dismissed the complaint. The appellate court, though, in **Rishty v. DOM, Inc**., reversed and ruled that a trial should be held to determine whether the defendant should have been aware of and controlled the conduct of its patrons and, if so, whether the failure to do so was a proximate cause of Elliot's injury.

In an unavailing argument, the defense urged that even if the spread of the mosh pit violence were foreseeable and controllable, Elliot had assumed the risk of any alleged moshing that may have been involved in causing his injury.

The decisions in these two cases, coming within two weeks of one another by two different appellate panels, appear to be irreconcilable. So, we contacted the attorneys, obtained facts not disclosed in the decisions and reviewed the appellate briefs of the parties.

**Here are some of the factors that appear to distinguish the cases from one another**:

- Martin Schoneboom was 36 years old at the time, had participated in moshing at over 30 concerts and saw violent moshing escalating throughout the evening before deciding to stand near the mosh pit.
- Elliot Rishty was only 15 years old at the time, there's no evidence he'd ever participated in moshing and it appears that moshing may have been ongoing at his concert for only 15 minutes or so before he was struck.

When there are important areas of law on which different appellate department panels rule opposite one another, then New York's highest court, the **Court of Appeals**, may decide to accept an appeal in one of them so as to resolve the issues for the entire state and bind all appellate divisions (there are four of them).

In the two  cases discussed here, it's unlikely the Court of Appeals would accept such an appeal. The issues as presented in these two cases do not appear to be that far-reaching and the different factual scenarios may explain the contrary holdings.

Rishty v. DOM, Inc. is now headed for trial. We will report on future developments – either a settlement or a trial verdict - and we will continue to explore related assumption of risk case decisions as they are issued.