

Marine Extension Bulletin

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Woods Hole Oceanographic Institution Sea Grant Program
Cape Cod Cooperative Extension



Some Liability Issues for Massachusetts Shellfish Farmers

As Massachusetts' shellfish aquaculture industry continues to grow, issues of risk and liability may arise. This bulletin describes some of the potential risks and liabilities, while providing some tips for protecting shellfish farmers, shellfish consumers, and the public from harm.

It takes a great deal of time and energy to get a shellfish farm up and running, from getting an area licensed, planting the juvenile shellfish, to pulling nets and scrubbing gear. When the time comes to harvest those shellfish, it's also time to think about what is at stake and how risks can be minimized. What are some of the liabilities associated with a shellfish farm? For example, what happens if a member of the public is injured on a licensed area? What responsibilities do shellfish farmers have for employee

injuries? What happens if a customer becomes ill after consuming cultured shellfish?

Some Background

In Massachusetts, licensed aquaculturists are granted the exclusive use of an area for the purposes of growing shellfish (§ 57 of Chapter 130, Massachusetts General Laws). Under the law, the public has reserved the right to use the waters and lands as long as that use is compatible with aquaculture. What does that mean? It means that no one without the consent of the license holder can take shellfish from that area, disturb the area or the growth of the shellfish, discharge any substances that injure the shellfish, or willfully destroy or remove the gear. And if they do? Violators may be sued by

the license holder for triple damages and costs under § 63 of Chapter 130, Massachusetts General Laws.

In the event of a lawsuit, proper documentation is critical for both the plaintiff and the defendant. Losses should be completely documented, including the specific extent of damage caused, any costs incurred, and any steps taken to repair the damages. In addition to written records and receipts, it is advisable to seek professional legal advice. It is also a good idea to notify the shellfish officer and the town, as the town may choose to pursue the matter.

Injury to a Member of the Public

Responsible shellfish farmers should do their best to maintain a safe and clean shellfish farm. Still, the Massachusetts



Photo by Bill Walton

Many shellfish aquaculturists head out to work their farm when the tide is out and their farms are exposed.

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coastline is regularly visited by residents and tourists, and the potential for someone to be injured on a shellfish farm—either at low tide when equipment is exposed, or at high tide when it's no longer visible—is real.

Under tort law, compensation-seeking lawsuits associated with such injuries are also a realistic possibility. According to a decision handed down by the Massachusetts Superior Court in 2000 (*McCarthy v. Town of Hamilton*, 11 Mass. L. Rep. 347), “Before liability for negligence can be imposed, there first must be a legal duty owed by the defendant to the plaintiff, and a breach of that duty proximately resulting in the injury” (Mass. Super. 2000). A land owner owes a duty of care to all visitors, and although a shellfish farmer may very well not own the land, it could reasonably be argued that the farmer has a degree of control over that land. “A duty of care may arise from the right to control land, even where the person held to such a duty does not own the land in question.” (*McCarthy*). Therefore, a shellfish farmer could be considered to owe a duty of care to all lawful visitors.

To recover damages an injured person “must establish that she suffered bodily harm as a result of conduct for which the defendant can be held liable, such as the defendant’s negligence or breach

of warranty.” (Second Edition of Massachusetts Tort Damages § 3-1). How is negligence defined? Negligence is failing to exercise reasonable care, which, in turn, is defined as the amount of care “which a reasonable man in his position, information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another” (Restatement (Second) of Torts § 298 (1965)).

The most basic form of reasonable care is maintenance of markers to warn visitors about the conditions in the area to prevent injuries before they occur. According to § 61 of Chapter 130, Massachusetts General Laws, shellfish farmers must plainly mark the licensed area “by monuments, marks or ranges and by stakes or buoys, with the number of the license painted in figures at least two inches in height in a conspicuous place on each of said stakes or buoys or on flags attached thereto.” It would be wise to check local regulations for any additional requirements upon local shellfish farmers.

Regular maintenance of these markers is essential. Additionally, it is advisable that the farmer keep proof of such efforts. This could be accomplished by keeping a written log book of checks and maintenance, although photographs (taken every couple of months or some

regular interval) would be even better. Any damaged or missing markers should be repaired within a reasonable amount of time. In the event of a lawsuit based on negligence, accurate and complete records of site maintenance will be the best defense.

Although it is advisable to maintain the area’s markers for the safety of the public and the protection of the shellfish and gear, some might argue that a well-marked shellfish farm is an open and obvious danger. The Supreme Court of Massachusetts has stated that a landowner has no duty of care with regard to a risk that is open and obvious to a person of average intelligence; the dangers of visiting such an area should be apparent. Note, however, that there have been no cases in which this has been applied to shellfish farming operations. Following the industry’s current best management practices, which are often adopted by courts as the reasonable standard of care, is advisable.

Lastly, it is important to remember that a legal duty of care is owed only to lawful visitors. Under the Colonial Ordinances of 1641–1647, private ownership of tidelands was allowed, but the public’s right to fish, fowl, and navigate the area was retained. This has been interpreted to mean that “there is no general right of the public to pass over the [tidal flats] or to use it for bathing purposes” (*Wellfleet v. Glaze*, 403 Mass. 79, 85 (Mass. 1988)), but that the public has a right to walk along the beach between the high and the low water mark in order to access public areas for the purpose of fishing (*Barry v. Grela*, 372 Mass. 278, 279 (Mass. 1977)). As such, it is legal for a person to pass over privately owned tidelands and licensed areas to access public waters, as long as the intrusion is for the purpose of fishing in open areas. In this situation, both the shellfish farmer and the landowner would owe a duty of care to that person. Although visitors that are in the area simply for bathing purposes do not have a right of access and therefore are owed no duty of care, it is



Photo by Andrew Cummings

Many shellfish farmers hire a crew to help out with chores on the farm.

in everyone's best interests to prevent injury to any visitors.

Injury to an Employee

Working a shellfish farm is a lot of work. Occasionally, license holders may decide to hire someone to help out. What happens if that person gets hurt while working on the farm? In Massachusetts, an employee is entitled to compensation from the employer for "personal injury arising out of and in the course of his employment" (§ 26 of Chapter 152, Mass. Gen. Laws). An employer is usually defined as someone who has the authority to hire and fire people, controls the work schedule, gets the benefit of the work of the employees and is responsible for working conditions. All private employers are required by law to purchase insurance or qualify as self-insurers.

But what is an "employee"? The definition is fairly broad: "a person in the service of another under any contract of hire, express or implied, oral or written" (§ 1(4) of Chapter 152 Mass. Gen. Laws). Individuals may be hired as independent contractors, but this is usually done for seasonal or casual workers, and not for long-term hires (see the *Resources* section for information on independent contractors). Independent contractors are not considered employees and coverage is optional. The decision to hire helpers as employees or independent contractors should be carefully considered, and put in writing so both the employer and employee are aware of this decision and its implications.

What about volunteers? "Individuals who volunteer or donate their services, usually on a part-time basis, for public service or religious or humanitarian objectives are not considered to be employees of those organizations." (Labor and Employment in Massachusetts: A Guide to Employment Laws, Regulations & Practices, § 2-6 (2003)). Although a volunteer is not an employee, a shellfish farmer has a responsibility to protect volunteers from harm. This duty

of care arises because there is a special relationship between the two parties; a special relationship does exist between an employer and a volunteer, because the volunteer is providing a service to the farmer with the farmer's consent. The work of the volunteer benefits the shellfish farmer and a farmer must exercise reasonable care when accepting the services of volunteers. While the work environment should be made as safe as possible, volunteers should be warned about the dangers of harvesting shellfish. If a shellfish farmer were to be negligent regarding the safety of volunteers, the farmer would be liable for injuries.

Shellfish Consumption Liability

Another issue of concern to shellfish farmers is liability associated with the consumption of seafood. If a person consumes shellfish and becomes ill or suffers some other injury, such as a chipped tooth, there are three causes of action upon which a lawsuit could be based: 1) strict product liability, 2) negligence, and 3) breach of warranty.

The most common cause of action in food-borne illness and injury litigation is strict product liability. In general, an individual engaged in selling or distributing a defective food product is liable for the harm caused by the product's defect. What makes a product defective? A product is defective if it contains a manufacturing defect, is defective in design, or contains inadequate warnings. (Restatement (Third) of Torts, Products Liability, §2 (1998)). Noncompliance with an applicable product safety statute or regulation, such as Haz-

ard Analysis and Critical Control Point (HACCP) regulations, can also render the product defective.

A harm-causing ingredient of a food product constitutes a manufacturing defect if a reasonable consumer would not expect the food product to contain that ingredient. For example, the Massachusetts Supreme Judicial Court has held that a restaurant owner is not liable for personal injuries suffered by a diner when a fish bone lodged in her throat, because a consumer should reasonably expect to find bones in fish chowder. (See *Webster v. Blue Ship Tea Room, Inc.*, 198 N.E.2d 309, 312 (Mass. 1964)). The fish chowder was, therefore, not defective. In the case of shellfish, consumers should exercise reasonable caution when consuming such foods, being careful of shell fragments or small pearls.

In general, to win a lawsuit based on strict product liability, the injured party must prove that the product was defective and unreasonably dangerous when it left the defendant's control and that the defect caused the plaintiff's injury. Strict liability is rarely successful in food-borne illness and injury cases. Very few foods are risk-free and many contain natural occurring bacteria and other hazards like



Responsible shellfish farmers routinely visit their site to check on their shellfish and maintain the gear and markers.

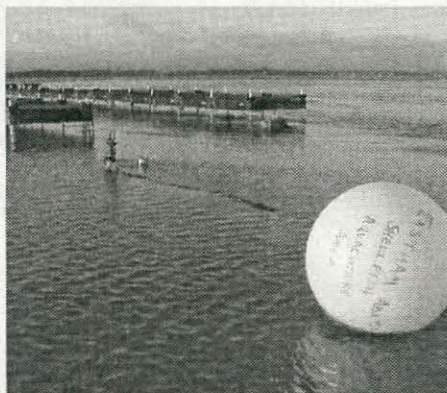
bones and shells.

Failure to warn consumers about potential dangers can also result in negligence claims, especially if warning labels are required by law and not used. A shellfish farmer can minimize the risk of negligence claims by exercising due care, following industry guidelines, and providing the freshest shellfish possible. Furthermore, it is in the best interest of shellfish farmers and the general public to clearly post the risks associated with consumption of shellfish.

In addition to strict product liability and negligence, Massachusetts has adopted the Uniform Commercial Code, which states that a seller incurs obligations simply by selling a product, either as express or implied warranties. For a finding of liability in breach of warranty cases, no negligence on the part of the defendant is required. Rather, the injured party must only prove that the merchant sold the non-conforming food and that the food caused the injury.

In Massachusetts, an express warranty is created if the seller makes "any affirmation of fact or promise" about the goods to the buyer. (§ 2-313(1)(a) of Chapter 106, Mass. Gen. Laws). Representations can be via labels, advertisements, or sales pitches. If a shellfish farmer makes claims regarding the product, i.e., the shellfish are disease-free or safe to eat, the farmer has made an express warranty. If these representations are untrue, the farmer has breached the warranty and can be held liable for the harm caused by the product.

There is also an implied warranty that accompanies the sale of a product. If a buyer is relying on a seller's skill to furnish suitable goods and the seller is aware of the consumer's reliance, there is an implied warranty that the goods are fit for the purpose for which it is sold. (§ 2-315 of Chapter 106, Mass. Gen. Laws). Most consumers rely on the knowledge and skill of foodsellers to furnish a product that is fit for human consumption. This is complicated for shellfish farmers, because most cultured



Proper marking of the bounds of a shellfish farm is important for both the shellfish farmer and the general public

Photo by Bill Walton

shellfish is sold to be consumed raw. Since the shellfish farmer is aware of this, the shellfish may have to be fit for raw consumption, potentially a difficult objective to achieve given the inherent hazards associated with consuming raw shellfish.

How can this risk be reduced, for both the shellfish farmer and the consumer? First, the shellfish farmer should adhere to all federal and state regulations and industry guidelines. Industry standards are often the benchmark for determining whether a seller exercised due care; following proper procedure can go a long way in reducing exposure to negligence lawsuits and improving the safety of the product. Given the concerns about the consumption of raw shellfish, warning labels should be included on all products. Finally, a seller should refrain from making any representations about the product that may be untrue or misunderstood.



Note: The preceding information is intended for informational purposes only and does not constitute legal advice. It is based on the National Sea Grant Law Center's interpretation of relevant law and cases. Independent legal counsel should be sought prior to taking any action referred to in this bulletin. This is in no way intended to

be a complete list of liabilities.

This document, a collaboration of the Woods Hole Oceanographic Institution Sea Grant Program, Barnstable County's Cape Cod Cooperative Extension, and the National Sea Grant Law Center, should be cited as follows: *Marine Extension Bulletin: Some Liability Issues for Massachusetts Shellfish Farmers*, by W. Walton and S. Showalter.

References and Resources:

- Massachusetts General Laws, Chapter 130, particularly sections 57-68; www.state.ma.us/legis/laws/mgl/gl-130-toc.htm
- Code of Massachusetts Regulations 322 (2004); www.mass.gov/dfele/dmf/commercialfishing/cmr.htm
- Massachusetts Department of Public Health brochure, "Massachusetts Shellfish Harvesting and Distribution;" www.mass.gov/dph/fpp/publication_seafood.htm
- National Shellfish Sanitation Program Model Ordinance <http://vm.cfsan.fda.gov/%7Eear/nsspo-toc.html>
- *Labor and Employment in Massachusetts: A Guide to Employment Laws, Regulations & Practices*, Second Edition (2003), by Jeffrey L. Hirsch, ISBN 032712444X.
- Working as and Hiring Independent Contractors; www.nolo.com/law-center (type in "independent contractor" in the search box)
- *Massachusetts Tort Damages*, Second Edition (1999), by Michael B. Bogdanow, ISBN 032710662X.
- Massachusetts Department of Industrial Accidents FAQ; www.mass.gov/dia/QUESTION/Employer-Questions.htm and www.mass.gov/dia/QUESTION/EmployeeQuestions.htm
- Massachusetts Aquaculture Association; www.massaqua.org/announcements.htm
- Massachusetts Aquaculture White Paper and Strategic Plan; www.state.ma.us/CZM/aquatoc.htm