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RE: Seafood Liability Issues for Charter Boat Captains (MASGP 08-007-08)

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Dear Jim,

Below is the summary of research regarding the question you posed to the National Sea Grant Law Center about the liability issues related to the proper handling of fish caught on a charter boat. As I understand it, you are particularly concerned with a situation in which a passenger aboard the boat might become ill from eating seafood that was not properly cared for by the charter boat captain or crew. The following information is intended as advisory research only and does not constitute legal representation of the University of Delaware Sea Grant Program or its constituents. It represents our interpretations of the relevant laws.

Liability is always a concern, but there are ways to manage the risk. A finding of civil liability will turn on whether the captain or crew was negligent in handling the fish. Basically, an individual's actions are negligent if he fails to exercise reasonable care. Reasonable care is generally defined as the amount of care "which a reasonable man in

his position, with his 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)).

An individual is negligent if he fails to take reasonable steps that cost less than the product of (a) the magnitude of harm the steps would avoid and (b) the probability of the harm arising should preventative steps not be taken (U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (2nd Cir. 1947)).

This premise may be easier to understand as a formula.

B < PL

Where B is the burden (cost) of the precautions that could have been taken to avoid the illness or injury; L is the loss that the illness or injury could reasonably be anticipated to cause; and P is the probability that illness or injury would occur if precautions are not taken (Brotherhood Shipping Co. v. St. Paul Fire and Marine Ins. Co., 985 F.2d 323 (7th Cir. 1993)).

Charter boat captains and owners can reduce their liability risk in a number of ways. First, insurance policies can alleviate many of an operator’s liability concerns. Any policy purchased by an owner or operator should contain provisions for personal injuries. In addition, the vessel owner can require passengers to sign waivers of liability before departure. These waivers serve to document that the passengers have been made aware of the risks and accepted them. As part of the waiver, charter boat captains should communicate risks and necessary precautions to their passengers. Finally, and most importantly, the captain and crew should take all the necessary precautions to prevent illness. This would include following any industry standards.

My research did not reveal any special seafood safety requirements for charter boats. However, the FDA’s final regulations (21 CFR 123) require processors of fish and fishery products to develop and implement Hazard Analysis Critical Control Point (HACCP) systems for their operations.¹ As you know, HACCP “focuses on identifying and preventing hazards that could cause foodborne illnesses rather than relying on spot-checks of manufacturing processes of finished seafood products to ensure safety.”² The FDA has published guidance for developing HACCP systems to help processors to identify hazards and formulate control strategies for their products.³

Processors are defined as “any person engaged in commercial, custom, or institutional processing of fish or fishery products, either in the United States or in a foreign country. (21 CFR 123.3(l)). Processing includes to “handling, storing, preparing, heading,

¹ Those final regulations were published in the *Federal Register* on December 18, 1995 and became effective on December 18, 1997.

² <http://www.cfsan.fda.gov/~comm/shaccp1.html> .

³ Fish and Fisheries Products Hazards and Controls Guidance, U.S. Food & Drug Administration, 3d ed. June 2001. Available at <http://www.cfsan.fda.gov/~comm/haccp4a.html> .

eviscerating, shucking, freezing, changing into different market forms, manufacturing, preserving, packing, labeling, dockside unloading, or holding.” *Id.* 123.3(k)(1). While the FDA definitions are broad enough to include the storing of fish by charter boat crews, the regulations do not apply to the “practices such as heading, eviscerating, or freezing intended solely to prepare a fish for holding on board a harvest vessel.” *Id.* 123.3(k)(2)(ii). Additional research would need to be conducted to determine if charter boats are legally required to develop HACCP plans.

Although the FDA regulations do not specifically address safe handling practices on charter boats, HACCP is an excellent risk management tool. Charter boat captains could apply the concepts in the guidance as a “best practices,” which would illustrate that they are taking reasonable steps to reduce risks to others. The development of a HACCP plan and use of waivers to educate passengers about the risks, would be two valuable precautions charter boat captions could be encouraged to take.

I hope you find this letter helpful. Please let me know if you have further questions or would like additional information. Thank you for bringing your questions to the National Sea Grant Law Center.

Sincerely,

A handwritten signature in cursive script that reads "Terra Bowling".

Terra Bowling
National Sea Grant Law Center