

Stephanie Otts:

This podcast is brought to you by the National Sea Grant Law Center at the University of Mississippi School of Law with funding support from the NOAA Sea Grant College Program. The views and opinions expressed are those of the host and contributors, and do not necessarily reflect the views of the National Oceanic and Atmospheric Administration or the U.S. Department of Commerce.

Zachary Klein:

Hello and welcome back to season two of the National Sea Grant Law Center's Law on the Half Shell podcast. As you no doubt know by now, I'm your host, Law Center Ocean and Coastal Law Fellow Zak Klein. The theme of this season is COVID and coastal resilience. Two weeks ago, we surveyed the impacts that COVID has had on the U.S. seafood industry and how the industry adapted to the new normal caused by the pandemic. On last week's episode, we learned about COVID's impacts on the United States foremost federal fisheries management statute, the Magnuson Stevens Act, and the various entities and processes created and governed by it.

Zachary Klein:

In today's episode, we wrap up our assessment of COVID and various angles of the U.S. Seafood industry, and how seafood is produced, by focusing on COVID's impact on fishing crews and vessel personnel. People have been fishing professionally since the founding of the United States, and well beyond. For centuries, if not millennia. It is perhaps no surprise that fishermen and fisherwomen, are an apt marker for measuring how the nation has handled various pandemics over the years. You should remember the National Sea Grant Law Center's Executive Director, Stephanie Showalter Otts, from this season's second episode about COVID and cruise lines. And she's returning to be our guide for today's discussion of how fishing crews and personnel have been affected by and adapted to the pandemic. Those of you with a soft spot for incredible tales from the high seas won't be disappointed. Steph will recount the epic saga of Thomas Tomlinson, and the lawsuit that he won after surviving unbelievable conditions when he came down with smallpox aboard a fishing vessel in the 19th century. Buckle up for episode five folks. Let's find out about the intersection of the COVID 19 pandemic, fishing, cruise, and vessel personnel.

Zachary Klein:

Steph, can you tell us about the role that COVID played with respect to fishing crews?

Stephanie Otts:

Yeah. In terms of airborne public health crisis, fishing vessels, you can imagine, were tinder boxes ready to explode. I don't know if any of our listeners are fans of the Deadliest Catch, but I could not imagine trying also to mitigate the spread of COVID while fishing for crab on the Bearing Sea. It just does not seem like an environment that you can really wear a mask, social distance. There's just too many things going on on a fishing vessel. In a statement that was released by the Alaska Marine Safety Education Association, with respect to fishing operations, having a crewman come down with COVID would mean returning to port, and mandatory quarantine for the vessel and crew. Obviously, that's going to cost money in both lost fishing time and fuel to come back to port, but in very remote fishing ports, if a crew member was actually to get very sick, they might have to have a medivac to get to a hospital or a facility where they could be taken of.

Stephanie Otts:

That's lost fishing time and added expense that no one needs. Lots of fishing in the United States, particularly far offshore from the coast, is in remote waters. COVID really presented extreme risk for vessel owners and crews, and raised a lot of concerns about how best to continue to operate and keep everybody safe while also fishing. The other element with fishing that makes it really unique, and thinking back to my reference to the Deadliest Catch, is you don't fish year round. There are harvest seasons, some only last a couple of weeks, maybe a couple of months. If you aren't able to go out and fish at a particular time because of a COVID quarantine, you could lose your whole year's income, not just the two weeks of fishing.

Stephanie Otts:

As the virus inevitably spread across the country, there were legal questions about how to handle fishermen and crew members getting sick under these very challenging circumstances. Who would be responsible for the cost of treatment? Just how much are they responsible for paying for? An added twist with respect to fishing vessels is Admiralty Law. Zak, did you study Admiralty Law in school?

Zachary Klein:

No, unfortunately, I never got the chance.

Stephanie Otts:

Admiralty Law, which is also known as Maritime Law, is the body of law that governs navigation and shipping. Pretty much it covers all contracts, torts, injuries, or offenses that might take place on navigable water. Think about collisions among ships, or cargo containers falling off of cargo vessels, but it also covers the ship captain's obligations to the crew, to the passengers of their vessels, the rights of crew members and other legal issues. Because seaborne transportation, or ocean transportation, is one of humanities oldest form of commerce, the foundations of Admiralty Law are pretty old. While I was doing research for this episode, I came across this fun fact on the Wikipedia page for Admiralty Law that some people may know. That Alexander Hamilton and John Adams were both Admiralty lawyers, but John Adams actually represented John Hancock in an Admiralty case in colonial Boston involving the seizure of one of Hancock's ships for violations of custom regulations.

Stephanie Otts:

Admiralty has been with us for a while. Like I said, it covers everything from custom violations, if you don't fill out the right paperwork when your ship is coming into port, to what happens if a sailor falls off of a rigging onto the deck, when you know something was happening out at sea.

Zachary Klein:

It sounds like it's a broad topic, but just what exactly does it have to do with fishing crews?

Stephanie Otts:

Crew members on fishing vessels are entitled to the same rights under Maritime Law, as crew members on other vessels, like cruise ships or cargo vessels. Fishing crew members who are injured or disabled in the service of their vessel are entitled to what's known as maintenance and cure, meaning the vessel has to cover expenses during the time that the sailor, or a fishing crew member is sick or injured, including medical care. The obligation to cure refers, or requires a ship owner to provide medical care, free of

charge, to a crew member injured in the service of the ship until they have reached what's known as maximum medical cure. Pretty much until they're back to as much as they possibly can get back.

Stephanie Otts:

This could include long-term care for very serious injuries. There's cases of, unfortunately, crew members of vessels becoming paralyzed because they fell, or were caught between equipment, or something like that, that might actually take a long time to recover from. Their medical expenses are covered by the vessel during that time, but there also an obligation for maintenance, which refers to living expenses during your convalescence. There's both this obligation to cover the direct costs of medical care, if you are injured or become ill during your service, but also living expenses while you're recovering.

Zachary Klein:

Wow, this sounds like pretty serious business. If that's the case, and it's also by no means the usual topic matter, or subject matter, that the National Sea Grant Law Center usually deals with, how exactly did this principal, and did these issues end up on the National Sea Grant Law Center's radar?

Stephanie Otts:

As we've talked about on other episodes, the National Sea Grant Law Center receives questions from Sea Grant programs at universities around the country, and many Sea Grant programs work directly with the commercial fishing industry. We received a question from an extension agent who works with the commercial fishing industry in Alaska. Questions were coming up during their local discussions around COVID 19, specifically about the obligations of captains and vessel owners to provide medical care for crew members. People were wondering what was going to happen during the pandemic once the fishing season started. What happens if a crew member becomes ill with COVID? What happens if somebody is quarantined? Do the ship owners have to pay the expenses? The lodging expenses, or the living expenses of those fishermen when they're quarantined. Or, later on in the pandemic, when there were local restrictions on social distancing, or mask wearing, what if a crew member didn't follow those rules when they were on board, or on shore leave? Were captains going to be liable for that, if the community felt that they were being endangered by these violations of their local rules?

Zachary Klein:

Well, this all then begs the question, just exactly who is responsible for paying the bill?

Stephanie Otts:

Yeah. We get this question. As you know, lawyers, the first thing we do is we go into the legal databases and look for cases. Sometimes you run across the case in your research and you just can't believe what you're reading. While most of the news coverage of COVID 19 made analogies to the Spanish Flu that occurred in the early 1900s, when I personally think of diseases on ships, for some reason, I think of smallpox. I don't know why, but that's just always what jumps to mind. When this question came in, I got to wondering about whether there were any cases out there about smallpox on ships. You would have quarantine around smallpox, but it was also an extremely contagious disease that people were worried about.

Stephanie Otts:

It turns out there is one. The case name is Tomlinson v Hewitt. It was issued by a California court in 1872. Thomas Tomlinson was suing the owner of a steamer, a cargo ship, that he was working aboard when he became ill with smallpox. We'll get to the legal analysis, but I just have to share the story of the sailor. We could not let this episode go by without talking about the saga of Thomas Tomlinson.

Stephanie Otts:

It all started on October 2nd in 1896. Thomas was part of the crew of this steamship Pacific, which had arrived in Gardner City, which was a community in Oregon on the Umpqua river. Not right at the bay of the Pacific Ocean. This was a bit upriver. He came down with smallpox and the captain told Thomas that he couldn't get proper treatment on board, but the captain said, "I've secured the services of a physician in Scottsburg," which was a town 10 to 15 miles upriver, and that he had a boat that could take Thomas there.

Stephanie Otts:

Reading between the lines of the facts of this case, it seems Thomas was a bit skeptical of this plan, because he said he would go if proper provision had been made to take care of him, but if it hadn't, he wanted to stay on board. You can't at really fault him for this. He was being taken off the vessel. He was sick, and he was being told that he needed to travel 10 to 15 miles upriver to go to a physician. He was told by the captain, "Nope, everything's taken care of." He got in this other vessel to go up river. Turns out he had a right to be concerned. When he got to Scottsburg, he was informed that, "Nope. Sorry, we have no doctor here. I don't know why you came here."

Stephanie Otts:

The closest doctor was 60 miles away. He checked in with the contact for the steamship company in town about the arrangements the captain had claimed, but no luck. They said, "Sorry, we don't have a doctor here. We don't know what you're talking about."

Zachary Klein:

Unbelievable.

Stephanie Otts:

By now, poor Thomas was visibly ill with smallpox. Luckily, we don't have to worry about smallpox now, but he had actually broken out with smallpox, and everybody could tell by looking at him what was wrong. He caused quite a stir in this town. I just have this image in my head of this poor sailor showing up in this town with smallpox, trying to find a doctor, and the town saying, "Nope, sorry." He had no documentation, a letter of recommendation, or why he was there. I think they said he only had \$17 with him. Even if he could have found a doctor or lodging, he didn't have any money, and the town wasn't going to let him stay.

Stephanie Otts:

He, and the person who was piloting the vessel that he was on, they're like, "Okay, well, we'll just have to return to the Pacific, to the steamship. We'll just have to go back." He returned to his vessel, but remember, this is 1892. He had to go by boat downriver 10 to 15 miles while sick with smallpox. I just can't imagine how miserable Thomas must have been. He gets back to the vessel. He tells the captain,

"There's no doctor there. You didn't really make any arrangements. What happened?" The captain said, "No, I don't know. I made arrangements. I don't know what you're talking about."

Stephanie Otts:

Turns out later that the captain admitted on the stand during trial that he never attempted to make arrangements, or even inquired about arrangements in Scottsburg. Completely lying. You can imagine this captain just wanted this sailor off his boat, and out of his hair, and probably also didn't want to catch smallpox.

Zachary Klein:

Wow.

Stephanie Otts:

The captain did not allow Thomas to get back on board the steamship, yeah. He couldn't get back on board. Captain said, "Nope. He can't come back on board." I'm sure this had gotten pretty nasty. While Thomas was in Scottsburg, while the town was trying to get him out of there, he was told to go to Winchester, which was a town about six miles downriver from where the Pacific was currently docked. He could obtain a horse so he could get to Coos Bay in Oregon. Why he might need a horse, you ask? Is that would be traveled by land.

Stephanie Otts:

He was working on a steamship that just came from Coos Bay. The steamship could have definitely taken him back to Coos Bay, but the captain refused to let Thomas back on board, or take him to Coos Bay.

Zachary Klein:

Then what happened?

Stephanie Otts:

He left the boat with the boat man of this smaller vessel who was going to take him to Winchester. Now, I have to give credit to this boat man, because no one else wanted Thomas around. It seems odd to me that this boat man would spend so much time with Thomas in close quarters. He'd already taken him to Scottsburg. He brings him back to the vessel, the vessel won't let him on board. Now he's supposed to take him to Winchester. Maybe he had had smallpox before and survived, and wasn't worried about getting sick. Maybe he was just more compassionate. I don't know, but I think this person is definitely one of the heroes in this story. They leave the Pacific for the second time. Thomas manages to arrive safely in Winchester, where he meets a nice young man who allows him to sleep in the house for the night and provide a horse in the morning. Unfortunately, this turns out to be a terrible idea for the young man in Winchester, because he died two weeks later from smallpox.

Zachary Klein:

Oh no!

Stephanie Otts:

His compassion was not rewarded very well. The case doesn't say what happened to the boat man after he dropped Thomas off at Winchester. I really hope he made it through okay. We don't know. But Thomas got his horse in the morning and proceeded on horseback alone to Coos Bay. Just keep in mind, this is a person who is sick, potentially dying with smallpox, who is now proceeding on horseback, on land, to Coos Bay. According to the court, he was on the road for about eight to ten hours, and then came to a river crossing that needed to get a ferry to get across to the town proper. By the time he arrived, he was exhausted, very sick. Given the modes of communication and transportation in the late 1890s, it took two days to get word to town and to get help.

Stephanie Otts:

This is another rabbit hole that I went down. It said that he had to flag somebody down on the road to go ahead, to put up the signal that the ferry was needed. Then, I guess, that message eventually made its way into town. Someone came, found him, but realized he was sick, so then went back to get a doctor. Poor Thomas laid on the beach by the river from Sunday night until Tuesday morning, without food or water, until a doctor, dispatched by the town authorities, finally arrived to care for him.

Stephanie Otts:

Although he wasn't taken to a house, or a hospital, it appears the doctor did care for him on the beach, must have set up some sort of a tent, or a lean to shelter where he could be cared for. Thomas remained there under the care of the doctor for three weeks until he was well enough to be moved to a small logging station, or community, where he stayed for another five weeks until he had recovered enough to travel. I do not see how Thomas survived this ordeal.

Zachary Klein:

Me neither. That is ... If that was in a book, they would say it wasn't believable. That could never happen in real life.

Stephanie Otts:

Yes, yes. It definitely seems like a movie. Yeah. He finally gets well enough to travel. He manages to make it someplace in California, and he files a lawsuit, which I do not blame him at all. He files a lawsuit against the captain and the ship owners for this ordeal. The legal question presented to the court, as it was written by the court, was "The important question is thus presented, does the fact that the disease of the seamen is malignant, lonesome, and infectious, and that his longer continuance on board exposes the remainder of the ship's company to the danger of contracting it justify the master in setting him ashore without any provision, whatever for his care, his sustenance, or his proper medication, or nursing?" I think the court played its hand in the way that it wrote the question.

Stephanie Otts:

But the court was looking at this issue of maintenance and cure that I talked about before, that sailors, or crew members, who fall ill during their service to a vessel are entitled to have their medical care provided for them, and to be maintained during their period of convalescence. The court, thinking about that obligation of captains and ship owners, concluded that, "It has appeared to me difficult to imagine a stronger case of either disregard by a master of his duty to a sick seamen, or the rights of the people onshore, who he exposed to the infection of a malignant disease, and of the dictates of common humanity."

Stephanie Otts:

Ultimately, the court ordered \$2,500 in damages, which the judge said was great, but likely not as great as a jury would've awarded. So that was a good thing that they were in front of a judge, and not a jury. According to an online historical currency calculator I used online, I found that the \$2,500 in damages would be the equivalent of about \$74,000.

Zachary Klein:

After all that.

Stephanie Otts:

Pretty egregious case. Yep. After all of that, he was awarded \$2,500 and told that the ship captain and owner needed to make it right.

Zachary Klein:

I think one of the crazier details about that story too, just by virtue of being a little familiar with how the legal system works, is that it's not as though the plaintiff there, that the sailor who was sick with smallpox, would've pocketed all of that \$2,500. He was still expected to then go and pay the doctor who cared for him, the horses, and whatnot. I can't imagine putting myself in those shoes in today's money. \$75,000 already didn't seem like a lot, but if you were expected to pay all your medical bills and all that debt he accrued along the way, I guess they didn't have any concept of emotional distress yet, because that is not a lot of money for all that ordeal.

Stephanie Otts:

I'm assuming the lawyers got paid as well. Yeah.

Zachary Klein:

True.

Stephanie Otts:

We don't know how much Thomas actually walked away from, for what I would argue is, yes. I can't imagine the emotional distress of that whole situation. You may be wondering why I took you down that huge rabbit hole of that case. One, I just had to share that story. That was just, when you find a case like that, you just want to let people know about it. I think that deserves a movie, but how is all of this relevant for COVID? Well, you could just replace any fishing crew member today with Thomas. Instead of coming down with smallpox, what if a fishing crew member came down with COVID? Can the ship owner, or captain, just put that crew member on a zodiac and send them back to shore, and say, "You're on your own"?

Stephanie Otts:

No, the courts have been pretty clear that a ship owner must pay maintenance and cure for any illness or injury which occurs, or is aggravated, while the seaman is in the ship's service. If a crew member is hired and starts working for the vessel, and they become ill with COVID, they're entitled to maintenance and cure. For most ships, for large ships, if you think about cruise ships, or maybe some of the nicer cargo ships, they might have medical facilities on the vessel. In some cases, crew members can receive care while they're on the vessel, but for very serious injuries, or something like COVID, which is a

contagious respiratory disease, and if a crew member would stay on board, would really endanger the rest of the crew, then they are allowed to be removed from the vessel to obtain medical care, but the vessel owners remain responsible for those medical expenses incurred by the crew member when they're on shore, including lodging, and food, and other things that they might need. For instance, if they're not sick enough to be admitted to a hospital, but they can't work, and so they're maybe staying in a hotel in a particular port.

Zachary Klein:

That gives us a pretty good sense of how responsibility is apportioned, when everything runs smoothly, when the outbreak, or the illness, the symptoms, are identified right away, and they're able to get the person to a hospital, or to a doctor, and they go willingly and it all goes very smoothly. But let's say they deviate it from the norm. They deviate from the script a little bit. What kind of responsibility, what kind of legal issues arise for the people on board if somebody who's infected that then goes on to land doesn't respect quarantine rules? Let's say they expose someone. They don't properly social distance. How do these rules apply once we're talking about deviations from the script a little bit?

Stephanie Otts:

It's not clear. We don't know here at the National Sea Grant Law Center, we don't know. I haven't seen any cases directly related to COVID 19 illnesses on fishing vessels. There may be some working their way through the courts, but I haven't been aware of any. While we were working with extension agents and others to try to answer these questions, we really didn't have any solid ground to work from. You kind of have to look to similar situations, like the smallpox case, but there are some rules with respect to liability, captain's liability for things that their crew members might do. There is a U.S. Law called the Jones Act that incorporates some of these Maritime Law, Admiralty Law provisions into U.S. Law. One of the things that the Jones Act has is that a ship owner may be vicariously liable for any harm that is negligently inflicted upon the crew, through the negligence of the ship owners, officers, agents, employees, including the captain.

Stephanie Otts:

You know what that means, is that they're not ... The captain maybe ... Or I'm sorry, the ship owner, maybe didn't do anything directly, but their captain did, or an employee did. They are liable for those actions, in a vicarious nature. That could mean that if a captain, for instance, is encouraging crew members to not follow mask mandates, for instance, or maybe the crew member wants to wear a mask and the captain says, "No, you can't do that." Potentially, that could be considered negligence to instruct your crew to go against the CDC guidelines for vessels. If another crew member was infected by COVID because of the orders that the captain was giving, it could be that the ship owner would be liable for that.

Stephanie Otts:

Again, all of this is speculation. This situation may never have come up during COVID. Like I said, we're not aware of any lawsuits being filed, but these were the kind of things that ship owners, captains, and fishing crew members were wrestling with at the beginning of the pandemic. What can happen? What if social distancing orders, or CDC guidelines are not followed while you're on the ship, and someone gets sick? Or, something else happens? All of that is really speculation. We don't really know, because weren't on those vessels as the fishing season started during COVID. But that's on the boat though. That still is the obligation of captains and crew members to each other. It's all clearly covered by these

Maritime Law, but there were also some questions about like, "Okay, well what if a fishing crew comes into port, and they head into the bar and they refuse to wear masks?", or, "They refuse to social distance and there's a COVID outbreak?"

Stephanie Otts:

This is similar to a lot of fears about just vessels being sources of disease outbreaks. It happened with smallpox. It happened with cholera, and yellow fever. Port communities were just always nervous when vessels came in because they were concerned that crews would bring these diseases into their towns. But a ship owner is generally not liable for the negligence of others unless such negligence create unseaworthy conditions for the ship.

Stephanie Otts:

In the previous scenario, I was talking about the captain maybe not allowing, or not enforcing CDC guidelines on their ship, and somebody, the crew members, could be getting sick. That potentially may be as an unseaworthy condition that makes that ship unseaworthy in the sense that it can't operate because it's crew members are at risk of getting COVID. That's not the same thing as a fishing crew member being in a bar, or a restaurant, and potentially being infectious for COVID. In that kind of situation, it would probably be very unlikely that a ship owner, or a captain, would be liable for what happened with their crew members when they were on land, going about their activities in a port when they came in to offload their catch, or to end their particular fishing season.

Zachary Klein:

Sure. That makes a lot of sense. I'm curious though. We've covered a lot of ground with respect to the medical side of COVID and its impact on fishing crews, the laws pertaining to care for crew members who get sick, but surely there were other legal dimensions to fishing crews and fishing fleets experiences with the laundering COVID. Would you be able to share any insights about that with us?

Stephanie Otts:

Yeah. Of course, the captains, ship owners, and fishing crew members were also worried about their money, their paychecks. That if they were not able to fish, they did not have an income for that season, or potentially that year. Maybe the owner needed the money to be able to pay the mortgage on the boat? Of course, the crew members needed that because that's their income. In addition to all these concerns about how can we continue to fish in a safe manner, in light of the COVID pandemic, there was also a lot going on about how can we get relief money to the fishing industry. Congress was aware of the need for money to go to the seafood sector, and the fishing industry. In the Cares Act, Congress did allocate \$300 million to fishing participants, but they had to demonstrate lost revenue.

Stephanie Otts:

It wasn't clear when the Cares Act was passed how you were going to do that, and what income qualified. Congress also created the Paycheck Protection Program, which allowed employees to ... Or employers, and independent contractors, to apply for loans to replace lost payroll, or your paycheck, but there were questions about, "Okay, is a fishing crew member an employee?" Usually not. They're usually classified as an independent contractor. Were they able to apply for their own PPP loans? Often, crew members are not issued a paycheck. They're paid in a portion of the catch, known as a fish share. How do you account for that? How do you know what the income would be? In addition to having to worry

about their health, and a desire to continue to fish, in these very short windows, there was a lot of just, I can imagine, stress and anxiety over being able to access the relief funding that Congress was allocating.

Zachary Klein:

Sure. That makes a lot of sense. Most of the time people weren't becoming fishermen so they can do paperwork. It's definitely not what they expected or signed up for. Thanks so much for share your insights into that.

Zachary Klein:

That'll do it for season two, episode five. We hope this has been a helpful peak behind the curtain of COVID and fishing crew, including what makes, and perhaps has always made the world of Admiralty and fishing crews so unique, especially with respect to the law. Case in point, the unbelievably true ordeal of poor Thomas Tomlinson and the lawsuit he won after surviving it. There is a timelessness to the lessons imparted by Mr. Tomlinson's story, and others like it, that rings true in our modern era of COVID. Whether it's something as simple as defining who is an employee, or identifying who is legally responsible for taking care of someone who comes down with a pandemic illness under the most inconvenient of circumstances. COVID has shown a light on how much the world of fishing crews, and the law that regulates them, have to teach us in both good times and bad.

Zachary Klein:

From all of us at the National Sea Grant Law Center, thanks for joining us for this episode of Law and the Half Shell. Be sure to subscribe on Spotify, Apple Podcasts, or wherever you listen to podcasts, and give us a like, or follow us on Facebook, Twitter, and LinkedIn to find out more about the Law Center's work and what we're up to. Until next time everyone. Thanks for listening.