

Spring 1996

Don't Slip Under the Apple Tree....Because "Pick-Your-Own" Farmers Will Have No Liability!

Sharlene A. McEvoy

Follow this and additional works at: <https://digitalcommons.fairfield.edu/nealsb>

Recommended Citation

McEvoy, Sharlene A. (1996) "Don't Slip Under the Apple Tree....Because "Pick-Your-Own" Farmers Will Have No Liability!," *North East Journal of Legal Studies*: Vol. 4 , Article 4.

Available at: <https://digitalcommons.fairfield.edu/nealsb/vol4/iss1/4>

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. **You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself.** For more information, please contact digitalcommons@fairfield.edu.

DON'T SLIP UNDER THE APPLE TREE...
BECAUSE "PICK-YOUR-OWN" FARMERS WILL HAVE NO LIABILITY!

by

Dr. Sharlene A. McEvoy*

ABSTRACT

In recent years, there have been efforts by various interest groups to lobby legislatures in an effort to limit liability. Among the groups that have successfully petitioned legislators for such relief are the skiing, horseback riding and white water rafting industries. This article examines a unique law passed by the Massachusetts state legislature to protect "pick your own" farming operations. It is the premise of this article that the passage of such laws is part of an increasing trend to limit the ability of injured parties to recover for their injuries.

Introduction

In August, 1994, Governor William F. Weld signed into law a bill that had been passed by the Massachusetts State legislature to exonerate owners, operators and employees of "pick your own" farmers from liability to those injured on their premises.¹ This first-in-the-nation law provides blanket protection for these agricultural operations but limits the ability of visitors to such farms to recover in the event of injury. It is the premise of this paper that such a law is unnecessary in that it provides overbroad protection for farms in the Commonwealth.

The Legislation

The law added a section to an existing statute, MGLA, Chapter 128, (Agriculture) limiting the extent to which owners and operators of "pick your own" farms could be held liable for injuries to persons who enter the property. The upshot of the law is that a farmer who allows a person to "conduct agricultural harvesting" which includes cutting Christmas trees, would not be held liable for the injury, death, or damage to property which results from the harvesting activity. The only circumstances under which the former could be held liable is if he or she engages in willful, wanton or reckless conduct.²

The law requires the farmer to put a sign on the premises in black letters at least one-inch high which states:

*Associate Professor of Business Law, School of Business, Fairfield University, Fairfield, CT.

WARNING

Under section 2E of Chapter 128 of General Laws:

"The owner, operator, or any employee of this farm shall not be liable for injury or death of persons or damages to property, resulting out of the conduct of this "pick your own" harvesting activity in the absence of willful, wanton or reckless conduct."³

The law was introduced into the state legislature in 1993 but died. In 1994, the bill passed easily, aided by the Massachusetts Farm Bureau Federation, Inc. which made the bill one of its "top legislative priorities."

The Arguments in Favor of the Legislation

The Massachusetts Farm Bureau Federation, Inc. offered a position paper in support of S.929. Noting that the "pick your own" operations are a "unique blend of education, recreation and marketing,"⁴ the group stated that orchards, vegetable and small fruit farms, and Christmas tree growers allow consumers and tourists to come to their farms to harvest the crop themselves and then buy what they pick.

Among the activities in which the amateur harvesters engage are climbing ladders, carrying large bags filled with produce such as apples, or cutting and dragging Christmas trees.⁵ Under the law, any injury sustained in connection with such activities would be the responsibility of the harvester.

The Farm Bureau, the lobbying group for the seventy-five "pick your own" operations in the Commonwealth, conceded that such enterprises are a "growing form of farm marketing in the Northeast because of labor costs,"⁶ as well as a public relations and educational device.

The Farm Bureau cautioned that the "liability exposure" makes such operations "increasingly prohibitive," warning lawmakers that the farmers who opened their acreage to visitors might lose their farms because of litigation. The Farm Bureau advised legislators that passage of the law would give farmers a valuable tool to protect their assets and to minimize their "exposure to claims."⁷

While the Farm Bureau could cite no similar law in effect in other states, it analogized S.929 to another law in the Commonwealth and other states which involves equine liability⁸ as well as a law in Massachusetts which limits the liability of property owners who allow recreational users to enter their property without charge. The Farm Bureau noted that in the "pick your own" situation the harvester does not pay to participate but buys only the product harvested.⁹

In its statement on behalf of the legislation, the Farm Bureau labeled it a "pro-consumer" bill because it requires a posted warning. It also argued that the bill did not

interfere with legitimate claims in negligence. For example, farmers still owe a duty of care to keep the premises free from hazards that might foreseeably cause injury to visitors such as an open pit into which they might fall or for providing pickers with ladders with loose or missing rungs. Finally, the Farm Bureau argued that passage of the bill "would enhance agricultural, marketing, educational, recreational tourism and open space protection in Massachusetts."¹⁰

This "mom and apple pie" attitude is a typical approach to legislation of this kind, promising great benefits if the bill is passed and dire consequences if it fails. This argument is similar to those used by the skiing, equine (stable owners) and white water rafting industries when they proposed legislation in other states to limit their liability due to the inherent risks of those recreational activities.

However, not one of the seventy-five "pick your own" operations has closed due to a lawsuit as Douglas Gillespie, Director of Government Relations for the Massachusetts Farm Bureau Federation, conceded.¹¹

While there were a few lawsuits brought against growers which prompted the push for the law, the cases were relatively insignificant. One farmer was sued twice in 1982 by a woman who broke a hip when she fell off a ladder and by a man who fell and injured his back. The total damages recovered were \$50,000. Another farmer paid more than \$20,000 in 1991 to a man who tripped over an apple. In another minor incident, a farmer received a letter from a woman claiming that her son suffered from a case of poison ivy as a result of a visit to his orchard. To stave off a possible lawsuit, the farmer paid \$50.00 to cover the boy's medical expenses.¹² According to Farm Family Mutual Insurance Company, there is a claim pending for \$100,000 brought by a man who claimed to have sprained his back picking up a pumpkin.¹³ This brief list hardly indicates a flood of lawsuits especially when one considers the large numbers of people who have come to these farms over the years and harvested produce for which farmers were paid.

The farmers also claimed that their liability insurance premiums have risen as much as 20% in the past five years but such an experience is little different from that of other providers of recreational activities. The Farm Bureau Federation says that a farmer who paid \$200.00 a year in liability premium is now paying \$350.00 or more.¹⁴ Yet some farmers admit that they could not survive without the profits from a "pick your own" operation. One conceded that as a result of his "pick your own" farm, he has the money to pay laborers to pick apples on his other properties.¹⁵

Arguments Against the Legislation

The passage of this law by the Massachusetts State Legislature is a blunderbuss approach to a relatively minor problem. As the facts indicate, there have been few major lawsuits, just some relatively minor claims. No farmer has been forced into bankruptcy or has lost a farm as a result of a lawsuit. That insurance premiums have risen is more a

function of the insurance industry's anticipation of claims which have not materialized, rather than reflection of a large number of suits.

In the claims that did occur, breaking a hip in a fall off a ladder is a serious injury to suffer as a result of undertaking an activity that should be relatively safe. Would it be unreasonable to expect an employee of the farm to hold the ladder for an inexperienced climber or to provide directions for proper placement of the ladder? Certainly the "civilians" who participate in these activities are not experienced in climbing or cutting, and the farmers should be aware that the individuals do not have the agility of experienced pickers. As one farmer admitted, "People come out of the city, they just don't know what they're doing."¹⁶

Since the farmers know that the "amateur harvesters" do not know what they are doing, farmers or their designated employees should offer an "orientation" lecture to tourists before they harvest about the possible dangers inherent in climbing and picking. Farmers could also require harvesters to sign a waiver which informs them of the potential hazards and notifies them that they assume the risks inherent in produce-gathering activities. These activities should be listed in the document. Harvesters could be also required to pay a nominal "picking fee" in addition to paying for what they gather. The picking fee could be used by farmers to pay any increased insurance costs.

Under this law,¹⁷ a business invitee (the harvester) is relegated to the position of trespasser, owed the lowest duty of care. As a result, any harvester injured by machinery or equipment owned by the farmer, would not be compensated unless the injured party could show willful, wanton or reckless conduct which would be extremely difficult to prove.¹⁸ In fact, this law is so broadly written that gross negligence on the part of the farmer is covered. In his letter to Governor Weld urging a veto, a representative of the Massachusetts Academy of Trial Attorneys, Edward J. Smith, compared S.929 to the duty of ordinary care owed to child trespassers under another Massachusetts law.¹⁹ Smith argued that under the "pick your own" statute, it is unclear what the farmer's duty would be to a minor child, if the farm has an attractive nuisance on the premises. Thus the "pick your own" law is in no way comparable to the equine liability law in place in Massachusetts and elsewhere which does not exonerate the stable owner from liability for negligence.²⁰

This law requires a person injured on the premises of a "pick your own" operation to show willful, wanton or reckless conduct. This places an extremely difficult burden on a potential claimant and will shield the farmers from most claims. This is the reason why the Farm Bureau Federation lobbied so vigorously in favor of the law.

Conclusion

One "pick-your-own" operator acknowledged that people want the experience of seeing where their food comes from. These operators also know that in the appropriate season, their orchards and tree farms are meccas for senior citizen groups and families

with children who reside in cities and suburbs who are not familiar with the potential hazards of a farm. These "pick your own" operators advertise their farms to attract people to their premises and charge for the produce they pick but will not now be held responsible for injuries sustained during the process of the harvest. Very few businesses are afforded this kind of protection by state statutes where they can invite customers to their premises in search of a profitable transaction and then not be held liable if the patron sustains an injury. The businesses that have heretofore received such protection are those in which the patron might reasonably expect some injury because of risks inherent in the activity like skiing, horseback riding and white water rafting. Yet even these operations almost uniformly require participants to sign an exculpatory agreement which details the risks of participation.

In its successful lobbying effort to secure passage of this law, the Massachusetts Farm Bureau Federation stated that the "pick your own" operations serve as a wonderful public relations and educational tool.²¹ Farmers' public relations may not be enhanced when tourists are greeted by a sign disclaiming liability on the premises. Pickers must now understand that they cannot sue for injuries sustained as a result of agricultural harvesting if such injuries are inherent dangers in the activity. Visitors to a "pick your own" operation are not on a par with white water rafters, skiers or horseback riders and do not expect air bags to be placed under trees from which they will pick fruit. But in their lust for risk taking, they do have a right to expect clear information about potential risks, safe equipment and a degree of responsible supervision while on the premises.

ENDNOTES

1. Bill Summary, S. 929, An Act Relative to the Preservation of Farms in the Commonwealth, Courtesy, Elizabeth J. Moroney, Committee on Natural Resources and Agriculture, House of Representatives, Commonwealth of Massachusetts, January 9, 1995.
2. *Id.*
3. MGLA, Ch. 128, Sec. 2E (1994).
4. Douglas P. Gillespie, Position Statement, on S. 929, An Act Relative to the Preservation of Farms in the Commonwealth, Massachusetts Farm Bureau Federation, Inc. (hereinafter Farm Bureau Position Statement).
5. *Id.*
6. *Id.*
7. *Id.*

8. Like many other states Massachusetts has passed a law limiting the liability of stable owners for riding accidents. Connecticut's law P.A. 93-286 says:
Each person engaged in recreational equestrian activities shall assume the risk and legal responsibility for any injury to his person or property arising out of the hazards inherent in equestrian sports, unless the injury was proximately caused by the negligence of the person providing the horse or horses to the individual engaged in recreational equestrian activities or the failure to guard or warn against a dangerous condition, use structure or activity by the person providing the horse or horses to his agents or employees.
9. Farm Bureau Position Statement.
10. *Id.*
11. Tom Moroney, "Wary Apple Growers Get Picky," *Boston Sunday Globe*, October 2, 1994 at 36.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. In key part, An Act Limiting the Liability of Certain Farming Operations says:
No owner, operator or employee of a farm who allows any person to enter said farm for the purpose of agriculture harvesting, including the cutting of Christmas trees under a so-called "pick-your-own" agreement shall be liable for injuries or death to persons or damage to property resulting from the conduct of such operation in the absence of willful, wanton or reckless conduct on the part of said owner, operator or employee.
18. Letter of Edward J. Smith, Massachusetts Academy of Trial Attorneys to Governor William F. Weld, Aug. 9, 1994, at 1.
19. C. 231, Sec. 85Q.
20. G.L., C. 128, Sec. 2D.
21. Farm Bureau Position Statement.