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Amy Cawthon Bellah

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JURISDICTION—DETERMINING THE LINE BETWEEN OCSLA AND DOSHA—IN AN ALREADY MURKY AREA OF THE LAW, THE FIFTH CIRCUIT LEAVES OPEN MORE QUESTIONS THAN IT ANSWERS

Amy Cawthon Bellah*

IN ALLEMAN V. OMNI Energy Services Corp., the Fifth Circuit held that the Outer Continental Shelf Lands Act (OCSLA), rather than the Death on the High Seas Act (DOSHA), governed tort claims arising from a helicopter crash that resulted in a passenger’s death. The court correctly held that OCSLA applied in this case, but it did not clarify the dividing line between these two acts. The court used contradictory analysis in support of its holding and left open many questions regarding the proper determination of the applicable statute.

In December 2004, a helicopter owned by Omni Energy Services Corporation (Omni) crashed into the Gulf of Mexico while trying to land on an offshore oil platform. The pilot landed the helicopter on the helipad, but equipment stored nearby prevented the passengers from exiting the aircraft. When the pilot attempted to move the helicopter, it collided with the equipment, skidded around the landing pad, and fell into the Gulf of Mexico. Passenger Bert Hollier remained in the water for two hours and then died of a heart attack during rescue.

* J.D. Candidate, Southern Methodist University Dedman School of Law, 2011; B.A., Southern Methodist University, 2004. The author would like to thank her husband and family for their love and support.

1 580 F.3d 280, 285–86 (5th Cir. 2009). This opinion also addressed which statute should properly apply to a contract claim, but that is outside the scope of this note.
2 See id.
3 See id.
4 Id. at 282.
5 Id.
6 Id.
7 Id. at 282–83.
Hollier's heirs brought suit against Omni, and Omni motioned for partial summary judgment “on the issue of whether the actions before the Court are governed by the Outer Continental Shelf Lands Act or . . . the Death on the High Seas Act.” The district court granted Omni’s motion finding that DOSHA governed the tort action because “the helicopter was engaged in the traditional maritime activity of transporting passengers over the seas,” Hollier’s injury was not related to his work on the platform, and Hollier’s injury and death did not occur until he was in the ocean. Plaintiffs’ remedies were limited by DOSHA, and state law did not apply. This disallowed the recovery of non-pecuniary damages for the injury, which would have been permitted if OCSLA and Louisiana state law governed the claim. The district court’s opinion discussed the division in the lower courts over similar issues “when events straddle the statutory reach of both statutes.” Hollier’s heirs appealed, arguing that OCSLA and Louisiana state law should provide their remedy. On appeal, the Fifth Circuit reversed and remanded the case, holding that OCSLA properly governed the tort claims.

The Fifth Circuit considered the issue of “where to draw the line between the Outer Continental Shelf Lands Act . . . and the Death on the High Seas Act.” “OCSLA extends the laws and jurisdiction of the United States to the seabed and artificial islands on the outer Continental Shelf, including offshore platforms. The laws of the adjacent state also apply, to the extent they are not inconsistent with federal law.” By contrast, “DOSHA provides a right of action for any death occurring on the high seas beyond a marine league from the shore, or, in the case of a commercial aviation accident, more than 12 nautical miles from shore.” Relying primarily on the Supreme Court’s

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9 Id. at 462.
10 See id. at 459.
11 Id. at 459–60.
12 Id. at 461.
14 Id. at 286.
15 Id. at 282.
16 Id. at 283 (citing 43 U.S.C. §§ 1333 (a)(1)–(a)(2)(A) (2000)).
17 Id. at 285 (citing 46 U.S.C. § 761 (2000)). DOSHA was amended in 2006. See 46 U.S.C. § 30301 (2006). The events at issue in this case took place in 2004, so the court applied the version of DOSHA that was in effect at that time. Alleman, 580 F.3d at 286 n.3.
decision in *Rodrigue v. Aetna Casualty & Surety Co.*,\(^\text{18}\) the Fifth Circuit found that the accident “actually occurred” on the platform and that OCSLA properly governed the case.\(^\text{19}\)

In its analysis as to which law properly applied in this case, the court referenced Supreme Court and Fifth Circuit decisions that have addressed the dividing line between the application of OCSLA and DOSHA.\(^\text{20}\) The *Alleman* court relied most heavily on the Supreme Court’s decision in *Rodrigue* to support its holding that the accident actually occurred on the platform and that as a result, OCSLA should apply.\(^\text{21}\) In *Rodrigue*, the Supreme Court carefully explained OCSGA and thoroughly discussed Congress’s intention that “artificial islands, though surrounded by the high seas, were not themselves to be considered within maritime jurisdiction,” and as such, OCSLA and state law of the adjacent state governed accidents “actually occurring” on artificial island drilling rigs.\(^\text{22}\) The *Rodrigue* Court determined that the deaths in that case actually occurred on the platform—one of the deaths occurred when a crane on the oil platform collapsed and the other occurred when a worker fell from an oil derrick onto the artificial island—and that DOSHA was not the proper remedy.\(^\text{23}\)

The *Alleman* court determined that the helicopter accident actually occurred on the platform but that the injury to the Hollier did not occur until he was in the water; therefore, the court looked to two Fifth Circuit cases to explain that the location of the injury did not change the “actually occurring” analysis under *Rodrigue*.\(^\text{24}\) In *In re Dearborn Marine Service, Inc.*, the Fifth Circuit applied OCSLA to deaths of platform workers who were not actually on an artificial platform but were on a nearby standby vessel.\(^\text{25}\) *Alleman* noted the court’s statement that even though the injured persons were not on the oil platform, “Congress did not intend that application of state law necessarily should cease at the physical boundaries of the platform. The same concerns may be equally applicable to accidents fortuitously consum-

\(^\text{19}\) *Alleman*, 580 F.3d at 286.
\(^\text{20}\) See id. at 285–86.
\(^\text{21}\) See id. (citing *Rodrigue*, 395 U.S. at 366).
\(^\text{22}\) *Rodrigue*, 395 U.S. at 365–66.
\(^\text{23}\) Id. at 353–54, 365–66.
\(^\text{24}\) See *Alleman*, 580 F.3d at 286.
\(^\text{25}\) 499 F.2d 263, 275 (5th Cir. 1974).
mated in the surrounding sea.'" In Smith v. Pan Air Corp., the Fifth Circuit applied DOSHA when the pilot of a helicopter was killed after the rotor struck the ball of a crane on the platform, causing it to crash into the Gulf of Mexico. The Alleman court relied on Smith for the determination that OCSLA has been applied to "incidents in which platform workers who were the victims of torts originating on these artificial islands were not actually injured or killed until they fell, jumped, or were pushed into the surrounding seas." The court also attempted to distinguish the facts in Smith—which applied DOSHA rather than OCSLA—from the current facts, noting that the injured party in Smith was a pilot rather than a platform worker and that because the crane ball was extended out over the water, the accident occurred over the high sea rather than on a platform.

Finally, the Alleman court briefly mentioned another Supreme Court decision, but the court seemed to rely on the case only as additional support for the Rodrigue holding that accidents "actually occurring" on artificial islands are not governed under DOSHA. In Offshore Logistics, Inc. v. Tallentire, the Supreme Court considered the statute that governed the deaths of two platform workers who were killed when the helicopter carrying them from the platform to the shore crashed more than thirty miles off the coast, and the Court held that DOSHA should control.

The decision in Alleman is based on an inconsistent analysis of the applicable law. This area of the law is confusing and unclear, with courts applying "shifting rationales" to determine the proper statutory application. The Alleman court should have tackled the questions that needed to be clarified in order to establish a clear division between OCSLA and DOSHA. The court relied most heavily on the Supreme Court's decision in Rodrigue, but depending on this case is problematic because it seems to support the requirement that accidents governed under OCSLA

26 Alleman, 580 F.3d at 286 (quoting Dearborn, 499 F.2d at 273).
27 684 F.2d 1102, 1105, 1112 (5th Cir. 1982).
28 Alleman, 580 F.3d at 286 (quoting Smith, 684 F.2d at 1110 (citing Oliver v. Aminoil, USA, Inc., 662 F.2d 349 (5th Cir. 1981) (per curiam); Bible v. Chevron Oil Co., 460 F.2d 1218 (5th Cir. 1972) (per curiam); Bertrand v. Forest Corp., 441 F.2d 809 (5th Cir. 1971) (per curiam)).
29 See id. at n.4 (citing Smith, 684 F.2d at 1110–11).
30 See id.
must be closely related to actual work on the platform, which the accident in *Alleman* was not. In *Rodrigue*, the accidents and injuries all occurred on an artificial platform during and as a result of actual platform work, and as the Supreme Court later explained in *Tallentire*, "OCSLA was presumed applicable . . . because of the proximity of the workers' accidents to the platforms and the fact that the fatalities were intimately connected with the decedents' work on the platforms." The district court in *Alleman* based its holding in part on the above statement from *Tallentire* and the fact that the death was not related to actual platform work. The Fifth Circuit, however, did not address this issue in *Alleman* or attempt to reconcile its holding with a possible nexus requirement between the injury and the actual platform work. Instead the court merely announced that the accident actually occurred on the platform and presented this as sufficient support for the application of OCSLA under the holding in *Rodrigue*.

The *Alleman* court's partial reliance on *Smith* also presents challenges. First, the events of *Smith* are not easily distinguishable from the current case when viewed in light of the *Alleman* court's broad determination that accidents "actually occurring" on platforms are within the statutory reach of OCSLA. The accident in *Smith* was caused when a helicopter struck a piece of equipment that was located on an artificial drilling platform, and this equipment was arguably just as much a part of the platform as the equipment that the helicopter in the current case collided with. The *Alleman* court attempted to distinguish this by noting that the *Smith* court made its determination based on the fact that the accident occurred over the high sea since the crane ball was hanging over the water, but this distinction is difficult to reconcile with the fact that *Alleman* also used *Smith* in support of the assertion that OCSLA could be applied to accidents where the injuries occurred beyond the physical boundaries of the platform. Further, the *Alleman* court attempted to

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36 See *Alleman*, 580 F.3d at 286.
37 See id.
38 See id. at n.4.
39 *Smith* v. *Pan Air Corp.*, 684 F.2d 1102, 1105 (5th Cir. 1982); see *Alleman*, 580 F.3d at 286.
40 See *Alleman*, 580 F.3d at 286 n.4.
distinguish \textit{Smith} on the basis that the injured party in the current case was an actual platform worker, while the injured party in \textit{Smith} was a pilot.\textsuperscript{41} This distinction, however, falls short under the Supreme Court's subsequent opinion in \textit{Tallentire} which indicates that the status of the person injured should not impact which statute applies.\textsuperscript{42} "Congress determined that the general scope of OCSLA's coverage, like the operation of DOSHA's remedies, would be determined principally by locale, not by the status of the individual injured or killed."\textsuperscript{43} Under this reasoning, both of \textit{Alleman}'s distinctions between \textit{Smith} and \textit{Alleman} fall short, and it is difficult to reconcile the use of OCSLA to govern the current case when DOSHA governed the \textit{Smith} case.

Though the Fifth Circuit correctly determined that OCSLA governed the accident in \textit{Alleman}, its analysis and reasoning leaves the division between the statutes unclear, and the court missed a critical distinction between cases applying OCSLA and those applying DOSHA. In cases applying OCSLA, the injuries either did or \textit{could have} occurred on the platform, though in some cases they actually occurred in adjacent waters; in cases applying DOSHA, the injuries did not and \textit{could not have} occurred on the platform.\textsuperscript{44} This distinction applies consistently to all the cases discussed by the court and would have established a clear dividing line for application in future cases. In \textit{Rodrique}, the negligent act and the subsequent injuries all actually occurred on the platform, and in \textit{Dearborn}, some of the workers killed happened to be on a nearby vessel, but the source of the negligence originated on the platform, and the court suggested that the workers could have been on the platform and that the injuries would have been the same.\textsuperscript{45} In cases cited by \textit{Smith} to support the application of OCSLA when injuries occurred in the water, the workers could have been injured on the platform by the negligent act, but by chance happened to fall off the platform into the water.\textsuperscript{46} By contrast, \textit{Tallentire} and \textit{Smith}

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\item \textsuperscript{41} See id.
\item \textsuperscript{42} See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 219 (1986).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} See \textit{infra} notes 45–48 and accompanying text.
\item \textsuperscript{45} Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 353–54 (1969); \textit{In re Dearborn Marine Serv., Inc.}, 499 F.2d 263, 273 (5th Cir. 1974) (finding that "accidents fortuitously consummated in the surrounding sea" should be governed by OCSLA).
\item \textsuperscript{46} See \textit{Smith} v. Pan Air Corp., 684 F.2d 1102, 1110 (5th Cir. 1982) (citing Oliver v. Aminoil, USA, Inc., 662 F.2d 349 (5th Cir. 1981) (per curiam); Bible v. Chev-
both held that DOSHA should apply to helicopter accidents that resulted in deaths, but under the facts of those cases, the injuries could not have occurred on artificial platforms. In Tallentire, the crash took place miles from the platform, and in Smith, the helicopter collided with a crane ball hanging out away from the platform resulting in the crash into the sea below.

In the current case, the helicopter was not flying when the accident occurred—it struck a piece of equipment as the pilot tried to reposition it and skidded around the platform. While skidding, the helicopter could have crashed into more equipment on the platform, causing injuries or death to the passengers while still on the platform, but by chance, the helicopter slid into the adjacent sea, causing the injuries to occur in the water instead. It is clear that the injuries could have occurred on the OCSLA-governed platform. Thus, the Alleman court could have defined the line more clearly between OCSLA and DOSHA by determining that accidents that actually occurred or could have occurred on an artificial platform would be governed by OCSLA while accidents that did not and could not have occurred on a platform would be governed by DOSHA.

Moving forward, there is still a need for clarification of the proper division between OCSLA and DOSHA because lower courts are divided in their treatments of these cases, and the Fifth Circuit did not offer any clarity in Alleman. It left unanswered a number of questions addressed by the district court. The court did not address the questions of whether an accident must relate to work on the platform or whether the courts should consider whether a helicopter was engaged in traditional maritime activities like transporting passengers. The court also failed to address whether the injured party’s status can be used to determine which law applies. Finally, the Alleman court did not reconcile its decision to apply OCSLA with its ear-

47 See Tallentire, 477 U.S. at 220; Smith, 684 F.2d at 1112.
48 See Tallentire, 477 U.S. at 209; Smith, 684 F.2d at 1105.
50 See id. at 282-83.
52 See id. at 462.
53 See id.
lier holding in Smith, where DOSHA governed a very similar accident.\footnote{See Alleman, 580 F.3d 280 at 286.}

In conclusion, the Fifth Circuit’s application of OCSLA in this case was correct, but its reasoning was not, and the court’s decision failed to establish any clear boundaries between OCSLA and DOSHA. Rather than relying on the fact that the accident actually occurred on the platform and on the status of the injured party as a worker, the court should have determined that accidents only have to be able to occur on the platform for OCSLA to properly govern. Because the Fifth Circuit did not set out a clear standard that can be easily applied to future cases, the decision in Alleman will not put an end to the divergent treatments among the lower courts, and the Fifth Circuit will likely be forced to address this issue again in the future.