If a Helicopter Hits an Offshore Platform and Crashes at Sea, Where Do You Bury the Survivors?

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If a Helicopter Hits an Offshore Platform and Crashes at Sea, Where Do You Bury the Survivors?

In Alleman v. Omni Energy Services Corporation (“Alleman II”) the Fifth Circuit reached the surprising conclusion that a helicopter passenger who died on the high seas did not, legally speaking, die on the high seas. Alleman II is the most recent in a series of cases dealing with a perplexing choice-of-law question: If a helicopter hits an offshore oil platform but then crashes at sea, are the claims of survivors governed by the Death on the High Seas Act (“DOHSA”) or the Outer Continental Shelf Lands Act (“OCSLA”)? The answer could matter a great deal to the victims’ survivors. If OCSLA governs then the survivors will generally be entitled to pecuniary, nonpecuniary, and possibly punitive damages under the wrongful death statute of the adjacent state. If DOHSA governs, however, the survivors will most likely be limited to pecuniary damages, which in some cases – for example, an unmarried worker with no dependents – may mean essentially no recovery at all.

Although six previous federal opinions had applied DOHSA on similar facts, the Fifth Circuit held in Alleman II that OCSLA governed the survivors’ claims.

1 Alleman v. Omni Energy Services Corp., 580 F.3d 280 (5th Cir. 2009) (“Alleman II”).
5 DOHSA provides that recovery “shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought.” 46 U.S.C.A. § 30302 (2007). The United States Supreme Court held in Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (1978), that because DOHSA specifies pecuniary losses only, plaintiffs may not recover nonpecuniary damages where DOHSA applies.
6 See Ross Diamond, Unequal Recovery for Death on the High Seas, 45 Trial 34, 40 (September 2009) (“[W]here the decedent was an elderly retiree who no longer supported anyone . . . – or was a teenage boy with no income or
This article argues that the Fifth Circuit’s holding was legally incorrect, but produced the correct result, if only because DOHSA as currently constructed is illogical and unfair. The case of Alleman illustrates several of the problems resulting from the jumbled mess Congress has made of a uniform remedy for wrongful deaths at sea. The proper resolution of the conundrum presented in Alleman is not to stretch OCSLA to where it should not apply, but to reform DOHSA to provide a remedy more in line with those available under state law.

Part I explains how the District and Circuit courts in Alleman analyzed prior cases involving helicopter crashes at sea but reached opposite conclusions about which law controls. Part II argues that the Fifth Circuit reached the wrong decision in Alleman II because it ignored its own tests for when OCSLA and DOHSA apply. Part III explains that even if the holding in Alleman II was legally wrong, it produced the correct result because applying DOHSA would have denied the plaintiffs fair compensation for their loss. DOHSA’s bar on nonpecuniary damages conflicts with the prevailing views on just compensation in nearly every state, and denies compensation to survivors merely because of the fortuity that their loved-ones died at sea rather than on land. The history of DOHSA shows that, at least until recently, it could not have been deemed the “considered judgment” of Congress that survivors of victims at sea should receive less fair compensation than those on land. By creating the Commercial Aviation Accident exception in 2000, however, Congress entrenched DOHSA’s inequities by making nonpecuniary damages available only to survivors of commercial aviation accident victims while treating everyone else as second-class survivors. Part IV considers the substantial problems raised by the Commercial Aviation Accident exception, and concludes that it should have been applied in Alleman, although neither the District Court nor the Circuit Court recognized this. Part

dependents but who was the pride and joy of his family – DOHSA [leaves] surviving family members with no recoverable damages for a great loss.”).
V concludes that if Congress is interested in providing a just and uniform remedy for wrongful deaths on the high seas – and in avoiding the problem in Alleman – it must follow the lead of almost every state and amend DOHSA to allow for nonpecuniary damages.

I. Helicopters, Platforms, and the Deep Blue Sea

No fewer than eight federal court opinions have had to determine the choice of law when a helicopter hits an offshore oil platform and falls into the sea.\(^7\) Aside from informing us that landing helicopters on offshore platforms is wildly dangerous, these cases have generally had one consistent message: DOHSA controls. Of the prior Fifth Circuit and district court opinions addressing the question, the only opinion in which a court applied OCSLA concerned a non-fatal injury, and thus DOHSA was never an option.\(^8\) The Fifth Circuit in Alleman II is the first court confronted with a fatality in such a situation to find that OCSLA controls.

The facts of Alleman are as follows: On December 17, 2004, Thomas Alleman, Bert Hollier, and Mark Parker, who were all employed as offshore platform workers for subcontractors of

\(^7\) See Alleman II, 580 F.3d at 285-286 (helicopter hits a boat landing onboard an offshore platform while trying to land, then falls into the Gulf of Mexico; OCSLA governs a passenger’s wrongful death claim because the impact took place on or above the platform itself), overruling Alleman v. Omni Energy Services Corp., 512 F. Supp. 2d 448, 459-462 (E.D. La. 2007) (“Alleman I”) (same facts; holding that the passenger’s wrongful death claim was governed by DOHSA); Smith v. Pan Air Corp., 684 F.2d 1102, 1111-1112 (5th Cir. 1982) (helicopter hits a crane ball suspended over the Gulf of Mexico from a drilling platform and falls into the sea; pilot’s wrongful death claim governed by DOHSA); Brown v. Eurocopter, S.A., 111 F.Supp.2d 859, 862-863 (S.D. Tex. 2000) (helicopter experiencing mechanical problems over the Gulf of Mexico collides with an offshore platform and falls into the sea; DOHSA applies to pilot’s death, but under “commercial aviation accident” exception in amended form of DOHSA the survivors can pursue nonpecuniary damages), revising Brown v. Eurocopter, S.A., 38 F.Supp.2d 515, 518 (S.D. Tex. 1999) (same crash; pilot’s wrongful death claim governed by DOHSA but with no nonpecuniary damages); Williamson v. Petroleum Helicopters, Inc., 32 F.Supp.2d 456, 460 (S.D. Tex. 1999) (same crash as in Brown; passengers’ wrongful death claims governed by DOHSA); Browning v. Petroleum Helicopters, Inc., 1997 WL 129390, *3 (E.D. La.) (helicopter becomes entangled in safety fence while attempting to land on offshore platform, then falls to the sea; platform worker’s injury claim governed by OCSLA); Garrett v. Air Logistics, Inc., 1996 WL 492300, *3 (E.D. La.) (helicopter collides with offshore platform and then falls into the sea; platform worker’s wrongful death claim governed by DOHSA).

\(^8\) See Browning, 1997 WL 129390 at *3 (choosing whether maritime law or OCSLA governs worker’s injury claims).
W&T Offshore, Inc., boarded a helicopter operated by Omni Energy Services Corp. The pilot, Ernie Smith, attempted to land the helicopter on W&T’s Ship Shoal 130-E platform so that Hollier and Parker could inspect the platform’s fire safety equipment. When Smith attempted to land the helicopter’s main rotor struck a boat landing that W&T had stored near the helipad, causing the helicopter to skid in circles across the helipad. The helicopter momentarily came to rest on the edge of the platform, then fell into the Gulf of Mexico. Alleman and Parker were injured in the fall but were eventually rescued. Hollier floated in the water for two hours and died of a heart attack while being rescued.

Hollier’s family brought a wrongful death action against Omni, which was consolidated in the Eastern District of Louisiana with the personal injury suits brought by Alleman and Parker. Omni moved for partial summary judgment on the question of whether Hollier’s heirs’ claims were governed by DOHSA or OCSLA. On March 9, 2007, the District Court ruled that the wrongful death claims were governed exclusively by DOHSA.

**Alleman I: DOHSA Governs the Wrongful Death Claim**

The court began its analysis by noting the significance of the answer; if DOHSA applies, then the plaintiffs’ remedies would be limited to pecuniary damages, but if OCSLA applies then the plaintiffs’ claims would be governed by Louisiana law, which allows for the recovery of

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9 *Alleman I*, 512 F.Supp.2d at 451-452.
10 *Id.* at 452.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Alleman II*, 580 F.3d at 282-283.
16 *Id.* at 459-462.
The court then considered the text of the two statutes. DOHSA was enacted by Congress in 1920 to provide a wrongful death action for deaths on the high seas, which had been declared unavailable in general maritime law by the Supreme Court’s 1886 decision *The Harrisburg.* At the time of Hollier’s accident in 2004 DOHSA provided:

(a) Subject to subsection (b), whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league [3 nautical miles] from the shore of any State . . . the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent’s wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

(b) In the case of a commercial aviation accident, whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas 12 nautical miles or closer to the shore of any State … this chapter shall not apply and the rules applicable under Federal, State, and other appropriate law shall apply.

Without specifically identifying the accident as a “commercial aviation accident,” the court concluded that because the accident occurred more than twelve nautical miles from the Louisiana coast the situs requirement of DOHSA was satisfied.

The court then considered the text of OCSLA. Congress passed OCSLA, or the “Lands Act,” in 1953 to address the legal concerns arising from the construction of semi-permanent oil platforms on the Outer Continental Shelf. The Supreme Court has stated that “[t]he purpose of the Lands Act was to define a body of law applicable to the seabed, the subsoil, and the fixed

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17 *Id.* at 459-460. As discussed below, this analysis, while accurate in most maritime death cases, may have been incorrect on the facts of this case because of the applicability of the Commercial Aviation Accident exception; see infra notes 113-116 and accompanying text.


20 *Alleman I*, 512 F.Supp.2d at 460.

structures such as those in question here [i.e., drilling platforms] on the outer Continental Shelf.\textsuperscript{22} The statute extends U.S. legal jurisdiction to “the subsoil and seabed of the outer Continental Shelf and to all artificial islands . . . permanently or temporarily attached to the seabed.”\textsuperscript{23} Regarding the laws to apply on such artificial islands, OCSLA provides:

2. (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf . . .\textsuperscript{24}

Thus, “artificial islands” such as drilling platforms are governed by federal law, but because federal law “might be inadequate to cope with the full range of potential legal problems, the Act supplemented gaps in the federal law with state law” adopted as “surrogate federal law.”\textsuperscript{25}

In considering whether DOHSA or OCSLA should apply, the court in \textit{Alleman I} noted that “the Supreme Court and lower courts have used shifting rationales to determine which statute applies to a fatal accident near an artificial island.”\textsuperscript{26} In \textit{Rodrigue v. Aetna Casualty and Surety Co.} the Supreme Court held that claims concerning the accidental deaths of two platform workers on an offshore platform were governed by OCSLA.\textsuperscript{27} The Supreme Court concluded that Congress intended for OCSLA, rather than DOHSA, to apply to deaths of workers on platforms “in part because men working on these islands are closely tied to the adjacent State . . . unlike transitory seamen to whom a more generalized admiralty law is appropriate.”\textsuperscript{28} Nearly

\textsuperscript{23} 43 U.S.C. § 1333(1).
\textsuperscript{24} 43 U.S.C. § 1333(2)(A).
\textsuperscript{25} \textit{Rodrigue}, 395 U.S. at 357.
\textsuperscript{26} \textit{Alleman I}, 512 F.Supp.2d at 461.
\textsuperscript{27} \textit{Rodrigue}, 395 U.S. at 365-66.
\textsuperscript{28} \textit{Id.} at 355.
two decades later in *Offshore Logistics, Inc. v. Tallentire* the Supreme Court held that the deaths of two offshore platform workers in a helicopter crash in the Gulf of Mexico fell under DOHSA because the deaths occurred “on the high seas” and because traditional maritime principles supported the application of admiralty law over OCSLA.\(^\text{29}\) Distinguishing the case from earlier cases that applied OCSLA to the deaths of platform workers (e.g. *Rodrique*), the Court noted that in those earlier cases it applied OCSLA “not because of the status of the decedents [as platform workers] but 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.”\(^\text{30}\)

The district court then turned to prior cases in which helicopters crashed into platforms. In *Smith v. Pan Air Corporation* the Fifth Circuit held that DOHSA governed the wrongful death claims of a helicopter pilot who was killed when his helicopter crashed into the Gulf of Mexico after the tail rotor struck a crane ball attached to an offshore platform.\(^\text{31}\) In choosing between OCSLA and DOHSA, the Fifth Circuit stated that the location of the negligent act was not decisive, and that “[t]he place injury occurs and the function the injured person was performing are more significant.”\(^\text{32}\) Because the injury occurred in the water, and because the helicopter pilot was engaged in the maritime activity of transportation rather than the traditionally land-based activities of platform workers, the Fifth Circuit found that DOHSA applied.\(^\text{33}\)

The District Court for the Eastern District of Louisiana reached a similar decision in *Garrett v. Air Logistics, Inc.*, holding that DOHSA governed the wrongful death claims of platform workers whose helicopter collided with an offshore platform and then plunged into the

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\(^\text{30}\) Id. at 219.

\(^\text{31}\) Smith v. Pan Air Corp., 684 F.2d 1102, 1111 (5th Cir. 1982).

\(^\text{32}\) Id.

\(^\text{33}\) Id.
Although acknowledging that courts have applied OCSLA to incidents in which platform workers were not actually injured or killed until they fell, jumped, or were thrown into the surrounding seas, the court in Garrett reasoned that applying OCSLA is appropriate when the “incident is due to the use or misuse of equipment aboard the platform and the impact or contact with a vessel or navigable waters is simply incidental.” The court concluded that because the helicopter was being used to transport personnel, which is a traditional maritime activity, and because the decedent drowned as a result of the submersion of the helicopter in the high seas, the maritime aspects of the accident predominated over the essentially passive role played by the platform. The same court reached a different conclusion, however, in Browning v. Petroleum Helicopters, Inc., which concerned the personal injury claims of a platform worker who was injured when the helicopter in which he was traveling hit an offshore platform and then crashed into the sea. In that case the court found that the plaintiff’s status as a platform worker who was only incidentally aboard the helicopter pointed to the application of OCSLA. It is worth noting that Browning did not concern a fatality, and thus DOHSA was not applicable.

The district court in Alleman I concluded that the court’s approach in Garrett, a case with very similar facts, was consistent with the Supreme Court’s holding in Tallentire, in which the Supreme Court said that the application of OCSLA hinged on the proximity of the accident to the platform and the intimate connection between the fatalities and the decedents’ work on the platform. The district court concluded:

35 Id. at *2.
36 Id. at *1-2.
38 Id.
39 Alleman I, 512 F.Supp.2d at 462.
Here, as in Garrett, the fatality did not arise out of the decedent’s work on platform operations. Rather, he was a passenger in a helicopter, like the workers in Garrett and Tallentire, being transported between artificial islands or between an island and the shore. As in Tallentire and Garrett, the helicopter was engaged in the traditional maritime activity of transporting passengers over the seas, and plaintiffs’ decedent was killed when the helicopter crashed into the sea. Overall, the place of the injury, the relationship of the use of the helicopter to traditional maritime activity and the lack of a close nexus between decedent’s death and his actual work on the platform convince the Court that DOHSA and maritime law apply to the claims of the Hollier heirs.  

The Hollier heirs, dissatisfied with this conclusion because it limited their remedy to pecuniary damages, appealed to the Fifth Circuit. The Fifth Circuit accepted the case and reached a very different conclusion.

Alleman II: OCSLA Governs

The Fifth Circuit’s analysis, like that of the District Court, began with the Supreme Court cases Rodrigue and Tallentire, but drew different conclusions from those cases. Quoting Tallentire, the court stated, “[I]n Rodrigue, the Court held that an admiralty action under DOHSA does not apply to accidents ‘actually occurring’ on these artificial islands, and that DOHSA therefore does not preclude the application of state law as adopted federal law through OCSLA to wrongful death actions arising from accidents on offshore platforms.” The court then cited an earlier Fifth Circuit case, In re Dearborn Marine Serv., Inc., for the proposition that “Congress did not intend . . . that these island-platforms be within admiralty’s jurisdiction.” Based on these principles, the court then concluded that because the helicopter crash occurred as

40 Id.
41 Alleman II, 580 F.3d at 285-86.
43 Id., quoting In re Dearborn Marine Serv., Inc., 499 F.2d 263, 272-73 (5th Cir. 1974).
a result of hitting a boat landing on the deck of the platform, “[t]his accident ‘actually occurred’ on the oil platform itself and OCSLA therefore applies.”

Implicitly acknowledging that the holding could appear at odds with the court’s earlier holding in *Smith v. Pan Air*, the court stated, “It does not impact our analysis that Hollier fell into the sea after the accident occurred on the platform.” The court distinguished Hollier’s accident from the one considered in *Smith* by pointing out that in *Smith*, “(1) … the accident occurred on or over the high seas [i.e. the helicopter collided with a crane ball extended out over the sea], rather than on the platform, and (2) that the decedent was a helicopter pilot engaged in a maritime-type function, rather than a platform worker.” The court concluded that the holding was therefore consistent with *Smith*.

This conclusion is debatable. It ignores the premise in *Smith* that “[t]he place injury occurs and the function the injured person was performing are more significant” than “[t]he place where the negligence or wrongful act occurs.” Bert Hollier’s injuries – like those of the decedents in *Tallentire, Smith*, and *Garrett* – occurred when his helicopter crashed into the Gulf of Mexico. The location of injury, however, is apparently irrelevant under *Alleman II*. Likewise, the fact that Bert Hollier – like the decedents in *Tallentire, Smith*, and *Garrett* – was engaged in maritime transportation rather than his land-based duties at the time of the accident is also apparently irrelevant. The holding of *Alleman II* appears to have collapsed the broader inquiry of *Smith* into a simple question of whether the wrongful act occurred over the platform or over the water.

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44 *Id.*
45 *Id.*
46 *Id.* at 286 n. 4.
47 *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982).
II. Why the Fifth Circuit Got It Wrong

The Fifth Circuit’s holding in *Alleman II* seems reasonable. It makes sense to follow a straightforward rule that if the accident actually occurred over the platform OCSLA applies, and if it actually occurred over the high seas DOHSA applies. There are two problems with this approach, however. The first is that the determination of where the accident “actually occurred” is by no means straightforward. The second is that the holding ignores the Fifth Circuit’s own tests for when OCSLA and DOHSA apply.

The Fifth Circuit’s opinion takes it as self-evident that the accident “actually occurred” when the helicopter’s tail rotor made impact with the boat landing on the platform. From Hollier’s perspective, however, the more significant impact was surely the one when his helicopter crashed into the unforgiving water of the Gulf of Mexico. To put it bluntly, bumping your tail rotor might ruin your day, but crashing your helicopter into the high seas will ruin your whole week. This is the rationale behind the decisions in *Smith, Garrett*, and *Alleman I* to focus on the place of the injury rather than the place of initial impact. A further problem is that in any fatal accident there will likely have been a number of acts that could potentially have contributed to the decedent’s wrongful death. Hollier’s heirs, for example, could have sought to recover against the pilot for negligence in operating the helicopter; they could have sought to recover against the helicopter manufacturer for negligently designing an aircraft that loses control after a foreseeable impact; they could bring claims against the rescuers for negligence in the rescue, leaving Hollier to flounder in the water for hours before his heart failed. Since these wrongful acts could have occurred partly over the platform, partly over water, and partly back on land, where did the wrongful act “actually occur”? The answer appeared simple in *Alleman II* because
Hollier’s heirs only sued the platform operator, but in many cases the test in *Alleman II* will be unworkable. In such cases a focus on the location of the injury, such as the courts applied in *Smith*, *Garrett*, and *Alleman I*, will likely produce a clearer result.

The second problem with the opinion is that it ignores Fifth Circuit precedent on when OCSLA and DOHSA apply. In the first half of *Alleman II*, in which the court discusses whether OCSLA or maritime law governed the helicopter owner’s contract with the platform operator, the court cites the Fifth Circuit’s test for determining when OCSLA applies:

We use a three-part test to determine whether OCSLA applies: (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artific[ial] structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law. *Union Texas Petroleum Corp. v. PLT Eng’g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990).48

In the contract dispute for which the court considered this test, the parties did not dispute the first and third elements, and the court concluded that maritime law did not apply of its own force to the contract.49 The court did not, however, apply the test to the Hollier heirs’ wrongful death claims. If it had, the result of the case would likely have been different.

Assuming for the sake of argument that the controversy arose on a situs covered by OCSLA – although, as discussed above, it is debatable whether the controversy arose from the helicopter’s impact with the boat landing or from its crash into the sea – there is a compelling argument that federal maritime law applies of its own force, thereby precluding application of OCSLA under the second prong of the test articulated in *Union Texas Petroleum*. Fifth Circuit and Supreme Court authority make clear that when an aircraft crashes at sea maritime tort jurisdiction applies. The court in *Alleman II* even stated, albeit in the section concerning

48 *Alleman II*, 580 F.3d at 283.
49 *Id.* at 283-85.
contracts, that “[t]he contract at issue was to provide helicopters and other aircraft to ferry workers between platforms and the shore. If those aircraft crash on the high seas, maritime tort jurisdiction applies.” The court apparently forgot this principle by the very next page, however. In Smith the Fifth Circuit stated that “the simple fact that [the decedent’s] death occurred as a result of an aircraft crash into the high seas is alone enough to confer jurisdiction under the DOHSA.” The Fifth Circuit stated in Motts v. M/V Green Wave that DOHSA supplies admiralty jurisdiction independent of any doctrinal test for the existence of such jurisdiction. The court further stated, “DOHSA applies where the decedent is injured on the high seas, even if a party’s negligence is entirely land-based.” The Supreme Court stated in Executive Jet Aviation, Inc. v. City of Cleveland that, “[o]f course, under the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court.” In Tallentire the Supreme Court stated concerning the deaths of platform workers in a helicopter crash at sea, “Here, admiralty jurisdiction is expressly provided under DOHSA because the accidental deaths occurred beyond a marine league from shore.” The message of these courts is unambiguous: if an aircraft crashes on the high seas and someone dies, maritime tort law and DOHSA apply.

The Fifth Circuit declared in Union Texas Petroleum that OCSLA does not apply where maritime law applies of its own force. It stated in Laredo Offshore Constructors, Inc. v. Hunt Oil Co. that “where admiralty and OCSLA jurisdiction overlap, the case is governed by maritime law.

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51 Smith, 684 F.2d at 1111.
52 Motts v. M/V Green Wave, 210 F.3d 565, 569–70 n.4 (5th Cir. 2000).
53 Id. at 567.
55 Tallentire, 477 U.S. at 218.
56 Union Texas Petroleum Corp. v. PLT Eng’g, Inc., 895 F.2d 1043, 1047 (5th Cir. 1990).
law.”57 Despite clear and binding precedent stating that maritime law applies to a helicopter crash on the high seas, and also clear and binding precedent that where maritime law applies OCSLA does not, the court in Alleman II nonetheless found that OCSLA governed Hollier’s heirs’ claims. It could only have done so by ignoring binding precedent.

A further reason the court should not have applied OCSLA to the wrongful death claims is that in this instance federal and state laws are inconsistent. OCSLA states that it only applies state laws “[t]o the extent that they are applicable and not inconsistent . . . with other Federal laws.”58 The third prong in the Union Texas Petroleum test likewise requires that the state law not be inconsistent with Federal law.59 The fact that Louisiana law allows recovery of nonpecuniary damages, and DOHSA does not, makes clear that federal law and state law are inconsistent.60 Since both DOHSA and state law via OCSLA potentially applied to this case, but the remedies available under state and federal law are inconsistent, the court should have concluded that it was precluded from applying state law because of the applicability of inconsistent federal law. The Fifth Circuit does not appear to have considered this question.

Finally, it is worth noting that every other court faced with a fatality in similar circumstances applied DOHSA rather than OCSLA. The Fifth Circuit in Smith applied DOHSA on very similar facts. District Courts facing the same or similar facts in Alleman I, Brown v. Eurocopter, S.A., Williamson v. Petroleum Helicopters, Inc., and Garrett all applied DOHSA.61 The United States Supreme Court in Tallentire and Mobil Oil Corp. v. Higginbotham62 held that

57 Laredo Offshore Constructors, Inc. v. Hunt Oil Co., 754 F.2d 1223, 1229 (5th Cir. 1985).
59 Union Texas Petroleum, 895 F.2d at 1047.
60 See supra notes 4 and 5.
61 See supra note 7.
DOHSA governed the wrongful death claims of platform workers who died in helicopter crashes on the high seas. The Fifth Circuit is of course not bound to follow the decisions of district courts, and the facts in *Smith, Tallentire, and Higginbotham* were distinguishable. The weight of precedent, though, should perhaps have encouraged the Fifth Circuit to conclude that a statute purporting to address “death on the high seas” does what it says it does.

### III. Why the Fifth Circuit Got It Right, or, What’s Wrong with DOHSA

Although the Fifth Circuit’s decision in *Alleman II* was, legally speaking, wrong, it nevertheless produced the correct result, if only because DOHSA as currently constructed is illogical and unfair. DOHSA’s bar on nonpecuniary damages is an anachronism that defies the prevailing views on just compensation in nearly every state. It denies compensation for what most people consider a grievous loss, and the compensation it does allow tends to discriminate against the young, the old, women, and minorities. To make matters worse, DOHSA allows nonpecuniary damages in a narrow class of cases while denying it in others, without any sound policy rationale for the distinction. While it would have been more consistent with precedent for the Fifth Circuit to have applied DOHSA in *Alleman II*, to do so would have deprived Hollier’s heirs of a remedy that would have been available to them if the helicopter had crashed at land, on the platform itself, or even just closer to shore.

It is worth asking how we arrived at a system that determines whether a survivor’s loss of her loved one’s companionship is worth compensating based on the accident of whether he died on land or at sea (or, as discussed in Part IV below, in a commercial airliner). In this area, as in so many other areas of the law, “a page of history is worth a volume of logic.”

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A Brief History of Death on the High Seas

Courts that have considered the disparity in remedies available under DOHSA and state wrongful death statutes have sometimes noted, with much hand-wringing, that DOHSA’s bar on nonpecuniary damages may be unfair but we are stuck with it because it represents the “considered judgment” of Congress. A study of DOHSA’s historical context, however, shows that, at least until recently, it could not have been deemed the “considered judgment” of Congress that survivors of accident victims at sea should receive less fair compensation than do survivors of accident victims on land. As discussed below, the best explanation for the disparity in remedies is that Congress passed DOHSA at a time when no plaintiffs could obtain nonpecuniary damages, and although times have changed Congress has not bothered to amend the statute properly since.

DOHSA emerged as a response to the Supreme Court’s 1886 decision in The Harrisburg, in which the Court was asked to determine whether an action for wrongful death existed under maritime law. The Court concluded that because there was no action for wrongful death in the common law, no wrongful death remedy existed in maritime law either. By that time, however, legislatures had begun to rectify that gap in the common law. In 1846 the British Parliament passed Lord Campbell’s Act to create a right of action for wrongful death on behalf of a decedent’s immediate survivors. All fifty American states subsequently adopted wrongful death acts generally patterned after Lord Campbell’s Act, which had been interpreted to allow recovery of “pecuniary losses,” i.e. the financial contributions the decedent could have been

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64 See Higginbotham, 436 U.S. at 625 (“The Death on the High Seas Act, however, announces Congress’ considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages.”)


expected to make to his survivors had he lived, minus his personal consumption expenses.\textsuperscript{67} Congress passed DOHSA in 1920 to craft a federal wrongful death remedy that was consistent with the state wrongful death statutes that had arisen in the preceding decades.\textsuperscript{68} In 1920 the universal rule in wrongful death statutes in both the United States and England was that recovery was permitted only for “pecuniary” loss.\textsuperscript{69} The specification of “pecuniary” damages in DOHSA, therefore, was not a rejection of nonpecuniary damages, but rather was an affirmative grant of a remedy available in every state.\textsuperscript{70}

It was soon recognized in many states, however, that the pecuniary loss rule results in numerous injustices. The lives of children are essentially worthless under the rule because children generally have little income and no dependents, and the lives of women are valued much less than those of men because women generally make less income than men.\textsuperscript{71} The rule likewise provides little damages for the deaths of elderly people because of limited future income, and tends to systematically offer lower recoveries for the deaths of minorities than for those of white people because of disparities in income.\textsuperscript{72} It should be noted that such inequities continue to this day in recoveries under DOHSA.

In response to these injustices, most states have moved either through legislation or judicial action to recognize loss of society or companionship from a wrongful death as a real loss

\textsuperscript{67} Id. at 20; Katherine J. Santo, \textit{The Worth of a Human Life}, 85 N.D. L. REV. 123, 129-30 (2009).


\textsuperscript{69} Id..

\textsuperscript{70} See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 628-629 (1978) (Marshall, J., dissenting; discussing historical context of DOHSA).

\textsuperscript{71} Santo, \textit{supra} note 67, at 130.

\textsuperscript{72} McClurg, \textit{supra} note 66, at 6-7, 20.
that deserves compensation.\textsuperscript{73} Wrongful death statutes in twenty-seven states expressly allow for the recovery of some form of loss-of-society damages, while courts in twenty-one states have interpreted their wrongful death statutes to allow such damages even if the statutes do not expressly provide for them.\textsuperscript{74} New York and Alabama are currently the only states that do not allow loss-of-society damages in wrongful death cases.\textsuperscript{75} In addition, twelve states have enacted wrongful death statutes that allow recovery for the grief or mental anguish of the survivors, while courts in eleven other states have interpreted their wrongful death statutes to allow some recovery for grief.\textsuperscript{76} Thus, a majority of jurisdictions have rejected the strict limitation to pecuniary damages embodied in the Lord Campbell type statutes.\textsuperscript{77}

Based in part on these changes in perception of what a just remedy for a wrongful death entails, the Supreme Court in 1970 finally overruled \textit{The Harrisburg} in \textit{Moragne v. States Marine Lines, Inc.}, in which the court established for the first time that a remedy for wrongful death exists under general maritime law.\textsuperscript{78} Noting discrepancies in the availability of wrongful death remedies based on whether an accident happened in federal or state waters,\textsuperscript{79} the Court stated that it declined to adhere any longer to “a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy.”\textsuperscript{80} In 1974 in \textit{Sea-Land Services, Inc. v. Gaudet} the Court expanded the \textit{Moragne} wrongful death

\textsuperscript{73} Santo, \textit{supra} note 67, at 130. \textit{See}, e.g., \textit{Wycko v. Gnodtke}, 105 N.W.2d 118, 121 (Mich. 1960) (characterizing loss of society damages as pecuniary damages in order to uphold a wrongful death jury verdict for the death of a minor).

\textsuperscript{74} McClurg, \textit{supra} note 66, at 24-26.

\textsuperscript{75} \textit{Id.} at 25-26.

\textsuperscript{76} \textit{Id.} at 26-27.

\textsuperscript{77} See Force, \textit{supra} note 68, at 790 (“The rationale in the early decisions interpreting Lord Campbell-type statutes has been rejected in almost every state.”).


\textsuperscript{79} \textit{Id.} at 395.

\textsuperscript{80} \textit{Id.} at 405.
remedy to include loss of society, a nonpecuniary loss encompassing the loss of “love, affection, care, attention, companionship, comfort, and protection.” 81 The Court recognized that DOHSA provided only for pecuniary damages, but stated that “a clear majority of States ... have rejected such a narrow view of damages.” 82 The Court chose to permit loss of society damages in order to “align[] the maritime wrongful-death remedy with a majority of state wrongful-death statutes” and “to shape the remedy to comport with the humanitarian policy of the maritime law.” 83

Had the Gaudet loss-of-society remedy survived, it is likely that Aleman I and II, and this paper, would have been unnecessary. A general maritime remedy offering both pecuniary and loss-of-society damages would have effectively supplanted DOHSA, and would have removed much of the significance of the choice of law between federal and state law in maritime death cases. But it was not to be. In 1978 the Supreme Court ruled in Mobil Oil Corp. v. Higginbotham that the specification of pecuniary damages in DOHSA precluded the award of nonpecuniary damages where DOHSA applies. 84 In 1990 the Supreme Court further limited the Moragne-Gaudet remedy by declaring that loss of society damages are not available for the wrongful death claim of a Jones Act seaman, even if the death occurred in territorial waters where DOHSA does not apply. 85 The end result of these opinions is that the Moragne-Gaudet remedy has very limited applicability, and none where DOHSA applies.

There is a strong argument that the bar on nonpecuniary damages that the Court in Higginbotham found in DOHSA is not really there. Justice Marshall, in his dissent in Higginbotham, wrote:

82 Id. at 587.
83 Id. at 587-88.
The dictates of fairness and the words of this Court would all be beside the point, of course, if Congress could be said to have made a determination to disallow any recovery except pecuniary loss with regard to deaths arising on the high seas. But Congress made no such determination when it passed DOHSA. Congress was writing in 1920 against the background of *The Harrisburg*, under which a remedy for death on the high seas depended entirely on the existence of a statute allowing recovery. This rule left many dependents without any remedy and was viewed as “a disgrace to civilized people.” By enacting DOHSA, Congress sought to “bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea.” …

The Court today uses this ameliorative, remedial statute as the foundation of a decision denying a remedy. It purports to find, in the section of DOHSA that provides for “fair and just compensation for the pecuniary loss sustained,” 46 U.S.C. § 762, a “considered judgment” by Congress that recovery must be limited to pecuniary loss … Nothing in this section, however, states that recovery must be so limited; certainly Congress was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover at least their pecuniary loss.\(^86\)

Several scholars have agreed with Justice Marshall’s analysis that the language of DOHSA was not intended to limit a plaintiff’s remedies, but rather to create a maritime wrongful death remedy equivalent to those available on land. Professors David Farber and Philip Frickey wrote that “[t]he majority’s conclusion that this section reflected Congress’ ‘considered judgment’ to reject nonpecuniary damages is unsupported by reference to any legislative history.”\(^87\) Professor Robert Force has stated that “[t]he inclusion of the word ‘pecuniary’ in the DOHSA should not, standing alone, constitute an obstacle to a broader remedy under the DOHSA. . . . [T]here is no evidence that Congress intended persons who are killed on the high seas to recover less damages than are generally recovered in cases in which people have been killed on land.”\(^88\)

Whatever the historical truth of Marshall’s argument, it is now beside the point. Congress amended DOHSA in 2000 to allow the recovery of nonpecuniary damages, but only for the

\(^{86}\) *Higginbotham*, 436 U.S. at 628-629 (1978) (Marshall, J., dissenting; internal citations omitted).


\(^{88}\) Force, *supra* note 68, at 790.
survivors of commercial aviation accident victims. In an effort to make DOHSA more “fair” for certain plaintiffs, Congress made it less fair for everyone else.

IV. The Commercial Aviation Accident Exception

DOHSA’s Commercial Aviation Accident (“CAA”) exception, like DOHSA itself, was Congress’ response to a Supreme Court ruling it found unfair. Two Supreme Court cases emerged from the legal wrangling over the wrongful death claims resulting from the crash of Korean Air Lines (“KAL”) Flight 007 on August 31, 1983.\(^9^9\) The KAL flight was shot down over the Sea of Japan by Soviet jets that had mistakenly targeted it as a spy plane, killing all 269 passengers and crew.\(^9^0\) One of the many lawsuits filed against KAL resulted in an award in the Southern District of New York that included loss-of-society damages for the mother and sister of one of the victims.\(^9^1\) The district court allowed the loss-of-society damages on the grounds that the Warsaw Convention, which governed certain aspects of the litigation, provided for an award for “damage sustained,” which the court read to include nonpecuniary damages.\(^9^2\) The Second Circuit affirmed the award, but in 1996 the Supreme Court reversed in \textit{Zicherman v. Korean Air Lines Co.}\(^9^3\) The Court concluded that the applicable law governing the case was U.S. law, and that the U.S. law governing deaths on the high seas was DOHSA.\(^9^4\) Because the Court in \textit{Higginbotham} had read DOHSA as prohibiting nonpecuniary damages, the Court concluded that


\(^9^0\) \textit{Id.} at 137-38.

\(^9^1\) \textit{Zicherman v. Korean Air Lines Co.}, 43 F.3d 18, 21 (2d Cir. 1994).

\(^9^2\) \textit{Id.} at 20.


\(^9^4\) \textit{Id.} at 225-26, 229-30.
the plaintiffs were barred from recovering loss-of-society damages.\textsuperscript{95} In a second KAL-related case, \textit{Dooley v. Korean Air Lines Co.}, the Court ruled that DOHSA likewise barred survival actions under which the decedents’ survivors could bring actions for the decedents’ pre-death pain and suffering.\textsuperscript{96} The Court stated:

DOHSA expresses Congress’ judgment that there should be no such cause of action in cases of death on the high seas. By authorizing only certain surviving relatives to recover damages, and by limiting damages to the pecuniary losses sustained by those relatives, Congress provided the exclusive recovery for deaths that occur on the high seas.\textsuperscript{97}

The message was clear: If DOHSA applies, no one gets nonpecuniary damages. The injustice of this rule became abundantly clear to Congress when they realized that it would apply to the victims of TWA Flight 800 as well.

TWA Flight 800 crashed in the sea off of Long Island on July 17, 1996, killing all 230 passengers and crew.\textsuperscript{98} Wrongful death lawsuits ensued shortly thereafter, but it was immediately apparent that under the Supreme Court’s ruling in \textit{Zicherman} plaintiffs would be denied any nonpecuniary damages.\textsuperscript{99} Members of Congress soon got involved. Congressman William Shuster of Pennsylvania authored a House Report entitled \textit{Nonapplicability of Death on the High Seas Act to Aviation Incidents}, which stated:

The effect of this decision [i.e. \textit{Zicherman}] is to treat families differently depending on whether their relative died in an aircraft that crashed into the ocean or one that crashed into land. If the plane crashes into the ocean, DOHSA applies and the family is entitled only to pecuniary damages. However, if a plane crashes into the land or within 3 miles of land, the applicable State tort law would apply. These generally permit the award of non-pecuniary damages such as loss of companionship.

Given the nature and speed of air travel, it is often a matter of happenstance as to where an aircraft crashes. The result is that a family’s rights under the law depend on

\begin{itemize}
  \item \textsuperscript{95} \textit{Id.} at 230-31.
  \item \textsuperscript{96} \textit{Dooley v. Korean Air Lines Co.}, 524 U.S. 116, 121-23 (1998).
  \item \textsuperscript{97} \textit{Id.} at 123.
  \item \textsuperscript{98} Ginger and Skinner, \textit{supra} note 89, at 148-149.
  \item \textsuperscript{99} \textit{Id.} at 150.
\end{itemize}
pure chance. At the Subcommittee’s hearing on this issue, parents noted that where DOHSA applied, the life of their child was made to appear practically worthless in the eyes of the law.\textsuperscript{100}

The Report then states that the purpose of the bill is “to ensure that all families would be treated the same regardless of where a plane happened to crash,” and “to ensure that families of airline accident victims will receive fair treatment under the law.”\textsuperscript{101}

After some political wrangling Congress enacted the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century on April 5, 2000.\textsuperscript{102} One provision amended DOHSA so that it would no longer apply to any “commercial aviation accident … occurring on the high seas 12 nautical miles or closer to the shore of any State …”\textsuperscript{103} Another provision amended § 762 of DOHSA to add the following clauses:

\begin{itemize}
  \item (b)(1) If the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any State … additional compensation for nonpecuniary damages for wrongful death of a decedent is recoverable. Punitive damages are not recoverable.
  \item (2) In this subsection, the term “nonpecuniary damages” means damages for loss of care, comfort, and companionship.\textsuperscript{104}
\end{itemize}

The act further stated that the amendments to DOHSA shall apply to any death occurring after July 16, 1996 – the day before the crash of TWA Flight 800.\textsuperscript{105} The clear intent of the act was to provide loss-of-society damages to the survivors of the Flight 800 victims.

\textsuperscript{100} H.R. Rep. No. 105-201, at 3 (1997).

\textsuperscript{101} Id.


\textsuperscript{103} Id. at § 404. \textit{See} Brown v. Eurocopter, S.A., 111 F.Supp.2d 859, 861 (S.D. Tex. 2000) (discussing amendments to DOHSA). The provision currently appears, in amended form, in 46 U.S.C. § 30307(c), which provides: “(c) Within 12 nautical miles. -- This chapter does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States.”

\textsuperscript{104} Id. The provision currently appears, in amended form, in 46 U.S.C. § 30307(b), which provides: “(b) Beyond 12 nautical miles. -- In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.” “Nonpecuniary damages” are defined in § 30307(a) as “damages for loss of care, comfort, and companionship.”
Congress could have viewed the problem of DOHSA in two different ways. It could have viewed the problem as DOHSA provides a less generous recovery than plaintiffs could obtain under state law, just because their accident happened to take place on the high seas. Congress could have addressed that problem quite easily – by allowing for recovery of nonpecuniary damages under DOHSA. Instead, Congress viewed the problem as DOHSA provides a less generous recovery for the plaintiffs of TWA Flight 800 than they likely would have received if the plane had crashed on land. And that specific problem was the one that Congress set out to solve.

Before evaluating the wisdom of that decision, it is worth noting that the DOHSA amendments do not define “commercial aviation accident.” Only two courts so far have considered the meaning of the phrase, and they have reached contrary results. The first court to consider the question was faced with facts strikingly similar to those in Alleman.

What Exactly Is a “Commercial Aviation Accident”? 

In Brown v. Eurocopter SA the District Court for the Southern District of Texas addressed the wrongful death claim of a helicopter pilot whose helicopter collided with an offshore platform and then crashed into the sea after experiencing mechanical difficulties over the Gulf of Mexico. In a 1999 decision the court had concluded that DOHSA, rather than OCSLA, governed the pilot’s wrongful death claim. After the DOHSA amendments passed in 2000, upon plaintiff’s motion the court considered whether the remedy in Brown’s action would

105 PL 106-181, 114 Stat. 61, § 404(c).
106 Brown, 111 F.Supp.2d at 860.
come under the CAA exception, thereby permitting recovery of nonpecuniary damages. After considering dictionary definitions, the court concluded that “[t]he inescapable conclusion is that Brown’s flight falls within the plain meaning of ‘commercial aviation accident,’ and thus the amended DOHSA provisions are applicable.”

The only other decision to consider the meaning of the term “commercial aviation accident” reached a contrary conclusion. In *Eberli v. Cirrus Design Corp.*, which concerned a wrongful death claim involving a pilot ferrying an aircraft for delivery with no passengers, the district court for the Southern District of Florida concluded that the CAA exception did not apply. The court stated that it did not agree with the reasoning in *Brown*, and argued instead that the use of the term “commercial aviation accident” in 46 U.S.C. § 30307 indicates that “Congress wanted the statute to apply only in cases involving the types of aviation disasters, such as the crash of TWA flight 800, that motivated Congress to enact section 30307.”

The treatment of the CAA question in *Alleman I* and *II* is puzzling. The District Court appears to have assumed without discussion that the accident was a “commercial aviation accident” for purposes of 46 App. U.S.C. § 761(b), but also states that nonpecuniary damages are not available because the “new version” of DOHSA was not in effect at the time of the accident. The court appears to have confused the recodification of DOHSA in 2006 into 46

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109 *Id.* at 862.
111 *Id.* at 1373.
112 *Id.* at 1374. See also Ginger and Skinner, *supra* note 89, at 160 (“The legislative history of this amendment to DOHSA makes it clear that the only reasonable construction of the Commercial Aviation Exception is that the provision applies solely to actions arising from commercial airline accidents on the high seas and has no application whatsoever in wrongful death actions arising from general aviation accidents on the high seas.”).
113 *Alleman I*, 512 F.Supp. at 460 (“Thus, DOHSA applies to aviation deaths that occur more than 12 nautical miles from shore. The accident in this case occurred … more than twelve nautical miles from the coast of Louisiana.”)
114 *Id.* at 460 n.4.
U.S.C. §§ 30301-30308 with the Aviation Investment and Reform Act, which was enacted in 2000 and which made its DOHSA remedies retroactive to July 16, 1996. Since the accident happened in 2004, if the accident was a CAA nonpecuniary damages should have been available under DOHSA. The Fifth Circuit opinion merely notes, “DOHSA was amended in October 2006. See 46 U.S.C. § 30301. Because the events at issue in this case occurred in 2004, we apply the version of DOHSA that was in effect at the time.” This statement suggests that the Fifth Circuit made the same error as the District Court concerning the timing of the 2000 DOHSA amendments. The court does not say whether the accident qualifies as a CAA or not. Hollier’s heirs do not appear to have argued that they were entitled to nonpecuniary damages under the CAA exception, which is surprising given the favorable holding in Brown, another Southern District of Texas case with very similar facts. Although the plaintiffs won anyway, their failure to raise this argument is unfortunate for the state of the law, because it remains unclear whether the Fifth Circuit considers a helicopter crash a CAA or not.

To summarize, the District Court in Alleman I appears to have deemed the accident a CAA but failed to draw the proper conclusions based on that fact, and the Fifth Circuit did not consider the issue. After ten years we know that “commercial aviation accident” includes accidents like TWA Flight 800, but beyond that the meaning of the phrase remains unclear.

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116 See David W. Robertson and Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 33 TUL. MAR. L. J. 381, 508-509 (suggesting that the remedies available under the CAA exception should have been applied in Alleman I).

117 Alleman II, 580 F.3d at 285 n.3. It would have been more accurate to state that DOHSA was recodified in 2006 to incorporate the 2000 amendments.

Was the CAA Exception a Good Idea?

The potential applicability of the CAA exception in *Alleman* illustrates much of what is wrong with DOHSA today. First, it is not clear if the CAA exception even applies. Second, if it does not apply then Hollier’s heirs are treated unfairly compared with the survivors of CAA victims, and if it does apply then the survivors of a boat crash victim who died in the exact same spot would be treated unfairly compared with Hollier’s heirs. Third, even after *Alleman II*, survivors of an accident victim who died in essentially the same way as Bert Hollier – a helicopter crashing into the Gulf of Mexico after hitting an offshore platform – could find their damages calculated under any of three statutory measures based on minor differences in where and how the accident took place, without any particular policy rationale to explain why the survivors in one case are more deserving than those in another.\(^1\)

While there is no standard test for judging the wisdom of statutory enactments, reasonable people can agree that a law should be clear, it should be fair, and hopefully it should make sense. The DOHSA amendments fail on all grounds.

First, is the CAA exception clear? Considering that the two courts to consider the meaning of the term “commercial aviation accident” came to exactly opposite conclusions,\(^2\) and that the courts in *Alleman I* and *II* should have considered it but somehow concluded that they did not have to, we can probably accept that the CAA exception is not a model of clarity.

Second, how can it be fair to say that the survivors of commercial airplane crash victims are somehow more deserving of compensation for the loss of their loved-one’s companionship than are the survivors of the victims of any other type of accident at sea, whether it involve a

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\(^1\) See infra notes 123-129 and accompanying text.

non-commercial aircraft, a cruise ship, or a fishing boat?\textsuperscript{121} Is the loss of the latter survivors any less real? For that matter, is their loss any less real than the survivors of accident victims on land? No policy of maritime law requires or even suggests that deaths at sea merit less compensation than do deaths on land.\textsuperscript{122} The proponents of the DOHSA amendments recognized that it is fundamentally unfair to deny compensation for a survivor’s loss merely because her loved-one died at sea rather than on land. Those proponents failed, however, to follow through on the logical consequences of that insight. The fact that these proponents recognized the unfairness inherent in DOHSA, and then fixed it only for a handful of plaintiffs that happened to be in the news, is a disgrace.

Third, does the CAA exception make sense? It is worth pausing to consider the role of the CAA exception among the tangled web of wrongful death remedies available for offshore crashes of aircraft. If the aircraft crashes within three nautical miles of the state’s coast (or within twelve nautical miles of Texas or Florida),\textsuperscript{123} then it is in state territorial waters and the state’s wrongful death statute applies, allowing nonpecuniary and possibly punitive damages.\textsuperscript{124} If the crash occurs between three nautical miles and twelve nautical miles from shore and is considered a CAA then state law will apply, but if it is not considered a CAA then DOHSA will apply.\textsuperscript{125}

\textsuperscript{121} See Diamond, supra note 6, at 41 (“The law as it stands now is grossly unfair. Currently, the families of an elderly person or a teenager killed in a cruise ship or pleasure boat accident can be left with only a claim for funeral expenses, while the same families of the same victims in a commercial aviation accident are permitted to recover damages for their loss of society and companionship. It is a state of law that should not be permitted in this country.”).

\textsuperscript{122} See Force, supra note 68, at 767-68 (“Why should maritime plaintiffs recover less damages than persons injured on the land? Maritime law generally has been particularly solicitous to seamen and maritime workers and their families. There is certainly no basic principle of maritime law that is hostile to or which would be violated by allowing recovery for loss of consortium.”).

\textsuperscript{123} See United States v. Louisiana, 363 U.S. 1, 29-30 (1960) (noting that, because of prior sovereign claims by the Kingdom of Spain, Florida and Texas have established title seaward within the Gulf to a distance of three marine leagues, or approximately twelve miles).

\textsuperscript{124} 46 U.S.C.A. §§ 30302, 30308.

\textsuperscript{125} 46 U.S.C.A. §§ 30302, 30307(c).
unless the crash occurred as a result of an accident “actually occurring” over an offshore drilling platform, in which case the wrongful death claims will be governed by state law via OCSLA.\textsuperscript{126}

If the crash occurs beyond twelve nautical miles from shore and is considered a CAA then the claim will be governed by DOHSA § 30307(b), which allows both pecuniary and nonpecuniary damages but not punitive damages;\textsuperscript{127} if it is not considered a CAA then regular DOHSA remedies will apply and only pecuniary damages will be available;\textsuperscript{128} and if the crash occurred as a result of an accident over an offshore drilling platform the wrongful death claims will be governed by state law via OCSLA.\textsuperscript{129} Thus, minor differences in the facts of the accident can lead to substantial differences in what the victim’s survivors can recover, without any particular policy rationale to explain why some survivors are more deserving than others. It seems unlikely that a rational legislature tasked with providing a fair and uniform remedy for aircraft crashes at sea could have concocted such a system, and yet here we are.

Reasonable people can debate whether it is preferable for a wrongful death remedy to provide loss-of-society damages. While the vast majority of states have concluded that such damages should be available, an opponent of such damages can advance rational arguments against them: the loss is difficult to measure in an objective way, they play upon passion and sympathy, etc.\textsuperscript{130} Reasonable people cannot dispute, however, that a just legal system should treat similarly situated plaintiffs similarly, or that if it does not then there should at least be a reason for the discrepancy. Equitable treatment is at the heart of what we consider a just legal

\textsuperscript{126} Alleman II, 580 F.3d at 286.
\textsuperscript{127} 46 U.S.C.A. § 30307(b).
\textsuperscript{128} 46 U.S.C.A. § 30302.
\textsuperscript{129} Alleman II, 580 F.3d at 286.
\textsuperscript{130} See Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 623 (“[T]here are valid arguments both for and against allowing recovery for loss of society. Courts denying recovery cite two reasons: (1) that the loss is ‘not capable of measurement by any material or pecuniary standard,’ and (2) than an award for the loss ‘would obviously include elements of passion, sympathy and similar matters of improper character.’”]).
system. One of the defining characteristics of DOHSA as currently constructed is the inequitable
treatment it dispenses.

V. A Better Death on the High Seas

To recap, the District Court in Alleman I probably erred when it failed to find that
Hollier’s heirs were entitled to nonpecuniary damages under DOHSA’s CAA exception. The
Fifth Circuit in Alleman II erred, or at least ignored precedent, when it held that OCSLA
governed Hollier’s heirs’ claims. The Supreme Court in Higginbotham erred when it concluded
that it was the “considered judgment” of Congress that nonpecuniary damages should be barred
from all deaths on the high seas. And Congress erred when it chose to fix a glaring flaw in
DOHSA by patching it only for a limited class of plaintiffs while treating the rest as second-class
survivors.

One solution would solve all of these errors in one fell swoop – extend the nonpecuniary
damages available to the survivors of CAA victims to all plaintiffs under DOHSA. This solution
would be clear. It would be fair. It would bring DOHSA into line with the prevailing view of just
compensation in nearly every state. And, not least of all, because it would make remedies
comparable under state and federal law, it would remove much of the incentive for the
jurisdictional wrangling that commonly besets maritime death litigation, as demonstrated
poignantly by Alleman I and II.

Neither justice nor logic can support a system in which the law says that the family of
one accident victim deserves compensation for their loss of companionship while the family of

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131 See SCHOENBAUM, supra note 21, at 478 (“The battle in many admiralty wrongful death cases is not only over
liability, but also whether plaintiff can invoke the more favorable remedy or can cumulate different remedies in
order to maximize damages. Regrettably, rational policy concerns are usually irrelevant. Courts and litigants alike
are trapped in an overly legalistic and contradictory system of law.”).
another victim, who died in essentially the same way while doing essentially the same thing, is not deserving. This inequity might be tolerable if there were some sort of policy rationale for the distinction, but the author has been unable either to find a cogently expressed rationale or to think one up that half makes sense. The only real explanation is history: Lord Campbell’s Act created a cutting-edge remedy in 1846, DOHSA copied it in 1920, and no one has bothered to question the remedy seriously since. But to paraphrase Justice Oliver Wendell Holmes, Jr., it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Lord Campbell. Congress showed in the 2000 amendments to DOHSA that it was capable of changing an old law, and that it was willing to do so on what it perceived to be grounds of fairness. Congress should do so again, but this time it should take more time to consider what fairness actually requires.

The title of this paper poses a brain-twister to which any sixth-grader will know the answer – you don’t bury the survivors. Congress should take heed, and amend DOHSA so that no more survivors are buried.

132 See Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARVARD L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”).
If a Helicopter Hits an Offshore Platform and Crashes at Sea,
Where Do You Bury the Survivors?

Abstract:

What law governs wrongful death claims when a helicopter crashes into an offshore oil platform and falls into the sea? No fewer than seven federal opinions have focused on this exact question, the answer to which can make a big difference to the victim’s survivors. If the Outer Continental Shelf Lands Act (“OCSLA”) applies then the survivors may seek pecuniary, nonpecuniary, and possibly punitive damages under the law of the adjacent state. If the Death on the High Seas Act (“DOHSA”) applies, however, the survivors may seek only pecuniary damages, which in many cases will mean no recovery at all. Until 2009, every court to consider a fatality under these circumstances applied DOHSA, but in Alleman v. Omni Energy Services Corporation the Fifth Circuit ruled that OCSLA governed the survivors’ claims.

This article considers the District and Circuit opinions in Alleman in order to analyze the outrageous state of affairs currently prevailing in maritime death litigation. Although the Fifth Circuit decision was legally dubious, it produced the correct result if only because DOHSA as currently constructed is illogical and unfair. Its bar on nonpecuniary damages conflicts with the prevailing views on just compensation in nearly every state, and denies compensation to survivors merely because of the fortuity that their loved-ones died at sea rather than on land. Recognizing this injustice, Congress amended DOHSA in 2000, but only fixed it for survivors of commercial aviation accident victims, treating everyone else as second-class survivors. The only just and sensible solution to the jumbled mess that Congress has made of a maritime wrongful death remedy is to amend DOHSA to permit the recovery of nonpecuniary damages in all cases.