

When does an unsafe act become *A Crime?*

By Colonel CHARLES DUNLAP JR.

Can a court label you a killer if you give your car keys to a friend who has been partying? If as a pilot you “buzz” a group of buddies just for laughs?

The kind of surprising answer is “maybe.” If someone dies as a result of what you have done, even though you never intended to hurt anyone, you may still find yourself a convict. Of course, the first priority when an unintended death occurs is always purely safety to figure out how to prevent a recurrence. At some point, however, the issue of personal responsibility must be considered.

Most people in the Air Force understand that when you do something unsafe, you run the risk of not only hurting yourself or others, but also of subjecting yourself to punishment under the Uniform Code of Military Justice (UCMJ). Oftentimes, we would think in terms of a violation of a regulation or a dereliction of duty. But if the unsafe act results in a fatality, other charges might arise.

Under the UCMJ the unlawful death of another can be charged in a number of different ways. These include murder under Article 118, manslaughter under Article 119, and negligent homicide under Article 134.

Murder

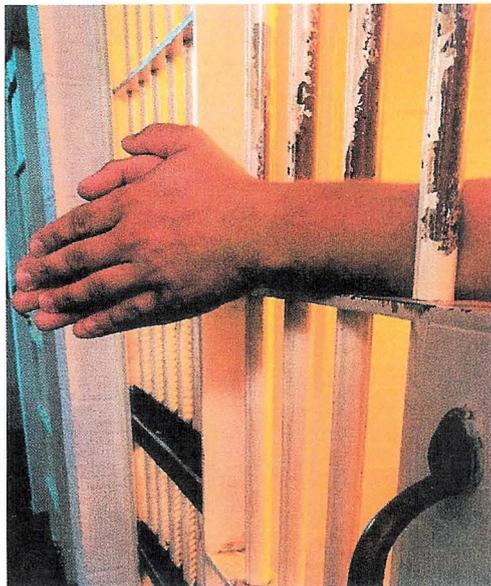
In terms of an Article 118 murder charge, the theory of liability most likely to arise in safety situations relates to conduct inherently dangerous to others. Even if intent to kill is absent, such acts (or omissions) may still constitute murder if done with “wanton disregard” for life.

The Manual for Courts-Martial (MCM) tells us that wanton disregard is characterized by “heedlessness of the probable consequences of the act or omission, or indifference to the likelihood of death or great bodily harm.”

Examples? The MCM provides two illustrations. The first is fairly obvious: “throwing a live grenade toward another in jest” — one can easily see how that constitutes wanton disregard for the safety of others. The second example is a bit more subtle, but very relevant to Air Force members. The MCM explicitly says that “flying an aircraft very low over one or more persons to cause alarm” is the kind of activity that could amount to wanton disregard. If such behavior is linked to a death, a murder charge might result. The maximum punishment for a homicide based on wanton disregard for human life is a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to E-1.

Manslaughter

In military law the next less serious charge, manslaughter, is divided into two categories: voluntary and involuntary. Voluntary manslaughter is an intentional killing, but



one mitigated because it was committed in the heat of passion. More likely to arise out of a safety incident, however, is a charge of involuntary manslaughter. Involuntary manslaughter can occur where the death is the result of culpable negligence. Culpable negligence is negligence accompanied by a culpable disregard for the foreseeable consequences to others.

The MCM provides a number of examples of involuntary manslaughter that could arise in safety-related cases. Specifically, acts of culpable negligence may include such things as “negligently conducting target practice so that the bullets go in the way of an inhabited house within range” and “carelessly leaving poisons or dangerous drugs where they may endanger life.” The punishment for involuntary manslaughter can extend to a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Negligent Homicide

Negligent homicide is the least severe charge that directly punishes those who cause the death of another human being. Under military law, a person can be convicted of this offense for an act (or failure to act) that amounts to simple negligence. Simple negligence occurs when the behavior of a person “exhibits a lack of that degree of care of the safety of others, which a reasonably careful person would exhibit under the same or similar circumstances.”

A conviction for negligent homicide can result even if there is no intent to kill or injure anyone. In other words, under the UCMJ, military members must act as “reasonably careful” people in all their activities or face potential charges if a death results from something they do or fail to do. The maximum punishment for negligent homicide is a dishonorable discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to E-1.

U.S. vs. Spc. 4 Timothy Kick

Negligent homicide is somewhat unusual in that relatively few civilian jurisdictions criminalize conduct based on simple negligence. The Court of Military Appeals (CMA), however, explained the military's rationale for having such an offense in the 1979 case of *U.S. vs. Spc. 4 Timothy Kick*. In upholding Kick's conviction, CMA adopted the rationale of an Army court in an earlier case. That court concluded that in the military the "extensive use, handling and operation of dangerous instruments as weapons, explosives, aircraft, vehicles and the like" necessitated making criminal acts based only on simple negligence. The court concluded that in the armed forces, the "danger to others from careless acts is so great that society demands protection."

U.S. vs. Tech. Sgt. Jose L. Martinez

The 1993 case of *U.S. vs. Tech. Sgt. Jose L. Martinez* is especially interesting because it shows how someone can be convicted of negligent homicide where there was clearly no intent to harm anyone in any way. According to court records, Martinez attended a party for a Sergeant Saucedo to celebrate Saucedo's upcoming departure from Zaragoza Air Base, Spain. Saucedo had a number of drinks and was seen "staggering" in the dormitory. A witness who spoke to him on the phone said he sounded "very drunk." Nevertheless, Martinez gave Saucedo his car keys, and the two drove off the base to go to a disco in downtown Zaragoza. The court reports that "travelling toward town at about 3 a.m., the car flipped over into the oncoming lanes. Sergeant Saucedo was thrown from the vehicle and died as a result of his injuries."

The result? Martinez's act of giving Saucedo car keys under these circumstances was simple negligence, and that negligence was the proximate cause of Saucedo's death. Martinez was sentenced to a bad conduct discharge, reduction to E-1, and a fine of \$1,000. In 1995 the all-civilian Court of Appeals for the Armed Forces rejected Martinez's appeals and let the conviction stand.

Serious Consequences

Whether or not a particular case will be charged (if charged at all) as murder, manslaughter or negligent homicide is dependent upon the unique facts and circumstances of the particular case. In addition, regardless of what is alleged, the commander who is the court-martial convening authority has much discretion to modify the charges. Nevertheless, it's worthwhile to remind ourselves — and others — that careless actions can have serious consequences.

Of course, the worst penalty is living with the terrible fact of being the cause of the death of another human being. Still, if a criminal sanction helps provide additional motivation to be safe, then it well serves one of its key purposes of the military justice system. ❖

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