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Negligent Homicide in Military Law[†]

Joe H. Munster, Jr., and Murl A. Larkin***

The U. S. Court of Military Appeals, in a case handed down early in its history, stated, "[I]t is our view that unlawful homicide through simple negligence is an offense under the Uniform Code of Military Justice."¹ Setting aside for a moment the sweeping nature of this pronouncement which, if literally followed, would make any tort proximately resulting in the death of another punishable as a crime, provided only that it was committed by a person subject to the Uniform Code of Military Justice,² it is interesting to note that such an offense was not recognized at common law,³ is not recognized as an offense in any state in the United States today in the absence of statute, and such statutes are actually few,⁴ and is not specifically made punishable by the Uniform Code of Military Justice. How then does it happen that the tremendous community of soldiers, sailors, airmen, marines, coast guardsmen, and others subject to trial under the Uniform Code of Military Justice are held to such a degree of care and confronted with penal sanctions⁵ in the absence of its use? The purpose of this article is to review the way this offense crept into military law and to consider its scope.

As noted, the common law did not recognize any crime of homicide involving simple negligence alone. The sole homicidal crime involving negligence was that of involuntary manslaughter, and there the negligence had to be culpable or gross, that is, negligence indicating a serious disregard

† The opinions and conclusions expressed in this article are those of the authors and do not necessarily represent the views of the Department of the Navy, the United States Naval School (Naval Justice) or any other governmental agency.

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¹ *United States v. Kirchner*, 1 U.S.C.M.A. 477, 479, 4 C.M.R. 69, 71 (1952).

² 10 U.S.C. §§ 801-940 (Supp. V, 1958).

³ PERKINS, *CRIMINAL LAW* 62 (1957).

⁴ *Ibid.*

⁵ In the military, sentences are not adjudged on each count of the indictment, or, to put it in military language, on each specification of each charge, and it is therefore often impossible to determine in a case involving multiple offenses, including negligent homicide, just what penalty attached to that individual offense. However, in *United States v. Kirchner*, 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952), the sentence was a Bad Conduct Discharge suspended, total forfeitures and six months confinement at hard labor; in *United States v. Clark*, 1 U.S.C.M.A. 201, 2 C.M.R. 107 (1952), the sentence was Bad Conduct Discharge, total forfeitures and confinement for one year; and in *United States v. Russell*, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954), the sentence was Bad Conduct Discharge, total forfeitures and confinement for 18 months. In this latter case, the negligent homicide was coupled with the offense of leaving the scene of an accident.

for the possible consequences of an act.⁶ All of the common-law crimes of homicide are, however, recognized in military law. As a matter of fact, the elements of the offenses of murder⁷ and manslaughter⁸ in military law are specifically delineated by the Uniform Code of Military Justice and amplified in the 1951 *Manual for Courts-Martial*⁹ and are, for all practical purposes, identical with the corresponding common-law crimes. On the other hand, as mentioned, the Uniform Code of Military Justice does not specifically proscribe the offense of negligent homicide and, if it is punishable, it must therefore fall within the proscriptions of Article 134 of the Code,¹⁰ which reads:

Though not specifically mentioned in this . . . [code], all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this code may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

As a preliminary matter, it might be well to consider whether and when the offense of negligent homicide can be laid under the third category of offenses described by Article 134, "crimes and offenses not capital." This phrase refers to acts or omissions, not made punishable under some specific article of the code, which are denounced as crimes or offenses by enactments of Congress or under authority of Congress and which are applicable in the location where the crime was committed.¹¹ For example, this phrase includes some crimes of unlimited application, such as counterfeiting, triable regardless of where committed, and includes crimes of limited application, such as defined in the District of Columbia Code, triable only if committed within the area in which the law is operative.¹² Concerning offenses involving homicide, there is, however, no federal statute of unlimited application and the only federal law of reasonably broad application sounding in negligence is found in the Criminal Code, section 1112, which applies within the special maritime and territorial jurisdiction of the United States,¹³ and which provides that manslaughter, the unlawful killing of a human being without malice, is of two kinds:¹⁴

⁶ PERKINS, CRIMINAL LAW 60-61 (1957).

⁷ UNIFORM CODE OF MILITARY JUSTICE, Article 118, 10 U.S.C. § 918 (Supp. V, 1958).

⁸ UNIFORM CODE OF MILITARY JUSTICE, Article 119, 10 U.S.C. § 919.

⁹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 351-55.

¹⁰ 10 U.S.C. § 934 (Supp. V, 1958).

¹¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 383.

¹² *Ibid.*

¹³ 18 U.S.C. § 7 (1952).

¹⁴ 18 U.S.C. § 1112 (1952). (Emphasis added.)

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or *without due caution and circumspection*, of a lawful act which might produce death.

The language "due caution and circumspection," when included in manslaughter statutes, has almost universally been held not to refer to ordinary simple negligence such as would give rise to civil liability but to an amount or degree or character of negligence equal to gross or criminal negligence.¹⁵ Thus, homicide by simple negligence will not constitute an offense under the "crimes and offenses not capital" phrase of Article 134 unless it is committed in the District of Columbia or in a territory or possession of the United States which has a federal statute covering such offense, or unless it is committed within a federal area in which, by operation of the Assimilated Crimes Statute,¹⁶ a state statute covering such offense is made federal law. This is, of course, far short of making the offense triable without limitation.

Since the offense of negligent homicide must therefore amount to either a disorder or neglect to the prejudice of good order and discipline or to conduct of a nature to bring discredit upon the armed services, to constitute a triable offense under the code, and since both of these concepts of offenses have existed, practically in identical language, for many years in military law, it may be well to review their history. Neither the Articles for the Government of the Navy¹⁷ nor the Articles of War¹⁸ which immediately preceded the Uniform Code of Military Justice contained any mention of negligent homicide. Further, prior to World War II, it does not appear that either of the armed forces recognized this offense. The 1928 Army *Manual for Courts-Martial* and the 1937 *Naval Courts and Boards* were both silent on the subject. Even as late as the effective date of the Uniform Code of Military Justice,¹⁹ the offense was totally unknown to the Navy, although by then the Army had developed some law on the subject,²⁰ and the Air Force, when it became a separate organization, had followed the Army's

¹⁵ See generally, Riesenfeld, *Negligent Homicide, A Study in Statutory Interpretation*, 25 CALIF. L. REV. 1, 37-40 (1936). Some examples of cases so holding, arising since that article, include *Phillips v. State*, 204 Ark. 205, 161 S.W.2d 747 (1942); *People v. Penny*, 44 Cal. 2d 861, 285 P.2d 926 (1955); *People v. Hurley*, 13 Cal. App. 2d 208, 56 P.2d 978 (1936); cf. *Maryland v. Chapman*, 101 F. Supp. 335 (D. Md., 1950).

¹⁶ 18 U.S.C. § 13 (1952).

¹⁷ REV. STAT. § 1624 (1875), as amended.

¹⁸ REV. STAT. § 1342 (1875), as amended.

¹⁹ May 31, 1951.

²⁰ See, e.g., the following cases (discussed *infra*): *United States v. Jones*, 10 B.R.-J.C. 255 (1951); *United States v. Bell*, 9 B.R.-J.C. 301 (1950); *United States v. Bussard*, 7 B.R.-J.C. 197 (1950); *United States v. Patch*, 7 B.R.-J.C. 89 (1950); *United States v. Smith*, 1 B.R.-J.C. 307 (1949); *United States v. Senck*, 78 B.R. 175 (1948); *United States v. Rhimes*, 69 B.R. 123 (1947); *United States v. Groat*, 34 B.R. 67 (1944).

lead.²¹ As late as 1943, however, the Army appeared to consider simple negligence insufficient to render a homicide a criminal act.²²

The earliest indication that a homicide occasioned by simple negligence was to be considered an offense under military law appeared in 1944 in *United States v. Groat*.²³ In that case the accused was charged with negligently and unlawfully killing a pedestrian by striking him with an automobile while operating it in a grossly negligent manner. The court, by exceptions and substitutions, found Groat guilty only of negligent killing, eliminating the words "unlawfully" and "in a grossly negligent manner" from the specification. The Board of Review stated, "his negligent killing of another soldier on a military post was a neglect to the prejudice of good order and discipline" under Article of War 96.²⁴ One member dissented, stating the offense found was negligent operation of an automobile, not an offense at common law, and the fact that homicide resulted was beside the point. He was unable to see why an act should be an offense *on a military post* and not an offense *off the post*.²⁵ It is obviously an easy step, however, from a negligent killing by automobile on a military post to a similar killing off post while driving a government vehicle—*United States v. Rhimes*,²⁶ to the same type of killing off post by private vehicle—*United States v. Senck*.²⁷

The second appearance of simple negligence appears to have been in 1947 in the case of *United States v. Tyndall*.²⁸ The accused, charged with the wilful, felonious and unlawful shooting of the victim, resulting in his death, was found guilty of manslaughter under Article of War 93,²⁹ but the reviewing authority approved only a finding that the accused carelessly and negligently discharged a pistol, resulting in death.³⁰ Essentially, the finding, as approved, was careless discharge of a firearm, an act which has been considered conduct to the prejudice of good order and discipline for generations.³¹ The fact that death resulted was incidental to the approved findings and the case may therefore be cited as authority only for the proposition that, under certain circumstances, the offense of involuntary manslaughter includes the lesser offense of careless discharge of a pistol.³²

²¹ See, e.g., *United States v. Jaekley*, 4 C.M.R. (A.F.) 130 (1951).

²² *United States v. Vislan*, 25 B.R. 349, 352 (1943).

²³ 34 B.R. 67 (1944).

²⁴ *Id.* at 74. (Emphasis added.) Article of War 96, Act of June 4, 1920, ch. 227, III F, 41 Stat. 806, is the predecessor of Article 134 of the Uniform Code of Military Justice.

²⁵ *Id.* at 75, 76 (dissent).

²⁶ 69 B.R. 123 (1947).

²⁷ 78 B.R. 175 (1948).

²⁸ 67 B.R. 303 (1947).

²⁹ Act of June 4, 1920, ch. 227, III F, 41 Stat. 805.

³⁰ 67 B.R. at 308.

³¹ WINTEROP, *MILITARY LAW & PRECEDENTS* 731 (War Dep't ed. 1920).

³² The offense of careless discharge of firearms is listed in the current manual under Article 134 (*MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 381-82*).

In the following year, 1948, *United States v. Senck*³³ was decided. The accused in that case was a member of the military police, who at a pre-Christmas fireworks demonstration attempted to apprehend a fleeing demonstrator. The street was crowded and the accused pulled his pistol and appeared to fire a warning shot into the ground. The bullet ricocheted and struck and killed a bystander. The accused claimed that he had stumbled and the gun had gone off accidentally. He was charged with manslaughter under Article of War 93, the specification alleging that accused, through culpable negligence did unlawfully kill, etc. The court found accused guilty except for the words "through culpable negligence," for which were substituted the words "without due caution or circumspection."³⁴

It is to be noted the original charge of manslaughter was defined in the then applicable Manual³⁵ as involving "culpable negligence." The court-martial did not, however, invent the phrase "without due caution and circumspection" but apparently borrowed it from the definition of the federal offense of manslaughter,³⁶ discussed above.³⁷ Since the phrase is generally considered equivalent to gross or criminal negligence, the court-martial actually still found the accused guilty of manslaughter even though different terms were used. The Board of Review, however, appeared to consider that the change in terminology in the specification served to reduce the finding to simple negligence. It said, "it would appear, and we so hold, that a charge of involuntary manslaughter alleged to have been committed by a *culpably negligent* shooting with a pistol, in violation of Article of War 93, includes a finding of guilty of an *unlawful* homicide accomplished by simple negligence in shooting with a pistol, in violation of Article of War 96, for simple negligence is but a lesser breach of the duty to use 'due caution and circumspection' than is culpable negligence."³⁸ It was further held that the negligent killing in question was conduct of a nature to bring discredit on the service,³⁹ which was, after all, not an illogical result since, under the Board of Review's interpretation of "due caution and circumspection," the act would have amounted to a federal offense if it had been committed in the special maritime or territorial jurisdiction of the United States, wherein the statute⁴⁰ applied.

Thus, by 1948, depending upon the circumstances, a negligent homicide might in the Army be a neglect to the prejudice of good order and disci-

³³ 78 B.R. 175 (1948).

³⁴ 78 B.R. at 177.

³⁵ A MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1928, 165-66.

³⁶ Act of Mar. 4, 1909, ch. 321, § 274, 35 Stat. 1143, now in 18 U.S.C. § 1112 (1952) (set out in text at note 14 *supra*).

³⁷ See text at notes 14-15 *supra*.

³⁸ 78 B.R. at 178. (Emphasis is the court's.)

³⁹ *Ibid.*

⁴⁰ Act of Mar. 4, 1909, ch. 321, § 274, 35 Stat. 1143, now in 18 U.S.C. § 1112 (1952).

pline, as in *Groat*, or discrediting conduct, as in *Senck*, even in the absence of any statutory provisions other than those which had been insufficient for such purpose for many years. Actually, under the particular set of facts involved in the *Groat* case, it is not at all unreasonable to find that the conduct in question was prejudicial to good order and discipline, but the interesting question is whether a civilian policeman under the same findings would have been guilty of an offense against the state in the *Senck* situation, for if not, the conduct could hardly be discrediting to the armed forces.

The next development was the 1948 amendment by Congress of the Articles of War.⁴¹ The amended articles failed to mention the offense of negligent homicide but did necessitate a revision of the Army's *Manual for Courts-Martial*. In this revision, the Army mentioned negligent homicide as a lesser included offense of the offense of manslaughter and as a violation of Article of War 96.⁴² In addition, a sample specification was included in the Manual⁴³ and a limitation of punishment was set for the offense.⁴⁴

With the offense of negligent homicide included in an authoritative publication, numerous cases followed. Many of them initially involved a charge of manslaughter under Article of War 93 with a finding of the sanctioned lesser included offense,⁴⁵ although in at least one case the accused was initially charged with negligent homicide under Article of War 96.⁴⁶ In the majority of the cases the opinions refer to the District of Columbia Code definition of the offense of negligent homicide,⁴⁷ and the impression is given that the Boards of Review were relying on that statute to bolster their conclusion that the offense was a crime at military law. Actually, such was unnecessary, however, for prior to the Uniform Code of Military Justice, Boards of Review and the Judicial Council of the Army and Air Force were considered generally to have no authority to find a Manual provision invalid or of no effect.⁴⁸

⁴¹ Selective Service Act of 1948, ch. 624, §§ 201-45, 62 Stat. 604, 627-42 (1948).

⁴² MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1949, 234-35.

⁴³ *Id.* at 330.

⁴⁴ *Id.* at 140 (one year, Bad Conduct Discharge, and total forfeitures).

⁴⁵ See, e.g., *United States v. Smith*, 1 B.R.-J.C. 307 (1949); *United States v. Patch*, 7 B.R.-J.C. 89 (1950); *United States v. Bell*, 9 B.R.-J.C. 301 (1950); *United States v. Jones*, 10 B.R.-J.C. 255 (1951).

⁴⁶ *United States v. Bussard*, 7 B.R.-J.C. 197 (1950).

⁴⁷ 49 Stat. 385 (1935), D. C. CODE § 40-606 (1951).

⁴⁸ See e.g., *United States v. Delph*, 9 B.R. 235 (1939), where the Board of Review stated, at 258, "irrespective of Article of War 38 [the predecessor of Article 36, U.C.M.J.], the President, as Commander in Chief, may give such orders to the Army as he sees fit, relating to the actions of reviewing authorities as well as to any other activities of the Army. Such orders must be obeyed unless they are unlawful. To justify disobeying an order, its illegality must be clearly shown." Also of interest is the case of *United States v. Jaekley*, 4 C.M.R. (A.F.) 130 (1950-51), wherein the Board of Review noted that the offense of negligent homicide had been "condemned" in the 1949 Manual. *Id.* at 135 (1950). The Judge Advocate General of

Next, the provisions of the 1949 Army *Manual for Courts-Martial* were carried over into the 1951 United States *Manual for Courts-Martial*, although the statute, this time the Uniform Code of Military Justice, was again silent on the subject. The present Manual, however, as the 1949 Manual, contains no discussion of the elements of the offense or the circumstances under which a negligent homicide may amount to conduct prejudicial to good order and discipline or discrediting conduct. We therefore had, by 1951, a gradual addition of an offense to those punishable under the "general article." While a certain act under a certain set of circumstances might logically constitute an offense under the concept of either prejudicial or discrediting conduct, the Manual provisions⁴⁹ and sample specifications⁵⁰ are so general in their terms that it appears the assumption was made by the Manual drafters that a negligent killing is, regardless of its attendant circumstances, a punishable offense.

The question of negligent homicide quickly came to the attention of the United States Court of Military Appeals after 1951. It was contended in *United States v. Roman*,⁵¹ in 1952, that instructions should have been given the court-martial on negligent homicide as a lesser included offense of unpremeditated murder. The court said such instructions were unnecessary under the circumstances of the case, but went on to define negligent homicide as "the unlawful killing of a person as the result of the failure to use due caution and circumspection in the circumstances. It is homicide accomplished by simple negligence."⁵² It is to be noted that the court, in utilizing the words "due caution and circumspection," definitely ascribed to them a different meaning than that commonly ascribed in civilian jurisdictions.⁵³ The case did, however, arise under the Articles of War and the Court of Military Appeals may have been influenced by the language of the *Senck* case.

One year later, the U. S. Court of Military Appeals met the problem

the Air Force, in his remarks, specifically noted that the offense had not been "condemned" by the Manual, as such could be done only by statute. He concluded that a negligent homicide could be an offense *only* where the conduct involved was found specifically to constitute either discreditable or prejudicial conduct. *Id.* at 143 (1951).

⁴⁹ "Among the offenses which may be included in a particular charge of murder are . . . negligent homicide in violation of Article 134 . . ." MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, 353. "Among the offenses which may be included in a particular charge of voluntary manslaughter are . . . negligent homicide in violation of Article 134 . . . Among the offenses which may be included within a particular charge of involuntary manslaughter are negligent homicide in violation of Article 134 . . ." *Id.* at 354-55.

⁵⁰ "In that . . . did, (at) (on Board) . . . , on or about . . . , 19 . . . , unlawfully kill . . . , [by negligently . . . the said . . . (in) (on) the . . . with a . . .] [by driving (a motor vehicle) (. . .) against the said . . . in a negligent manner] [. . .]." *Id.* at 491.

⁵¹ 1 U.S.C.M.A. 244, 2 C.M.R. 150 (1952).

⁵² *Id.* at 254, 2 C.M.R. at 160.

⁵³ See text at note 15 *supra*.

directly in *United States v. Kirchner*⁵⁴ with the definite statement that "unlawful homicide through simple negligence is an offense under the Uniform Code of Military Justice." The court stated further that "it is not necessary for us to find recognition of this offense in the articles of the Code relating to murder and manslaughter. We say only that it may be punished as conduct of a nature to bring discredit upon the armed forces or a disorder and neglect to the prejudice of good order and discipline in the armed forces." The case involved simple negligence in the handling of firearms and the accused had entered a plea of guilty. The court entertained "no doubt of the fundamental propriety" of punishing such a killing, under the theory of prejudicial or service discrediting conduct.⁵⁵

The Court of Military Appeals based its ruling on this "fundamental propriety" and on (1) the fact that the 1951 *Manual for Courts-Martial* listed the offense, provided a maximum punishment therefor, and set out a sample specification, and (2) the fact that negligent homicide was recognized as an offense under Article of War 96, notwithstanding it was not so recognized under the Articles for the Government of the Navy.

Before discussing the "fundamental propriety" of punishing a killing resulting from simple negligence, it is pertinent to consider the other two bases of the decision. Concerning the first, Manual provisions which pertain to the law of crimes do not have the force and effect of statutory law. Article 36⁵⁶ of the Code authorizes the President to prescribe regulations governing "the procedure, including modes of proof," in cases before courts-martial, but does not give him authority to create new offenses or to enlarge the scope of statutory offenses, and this has been recognized by the Court of Military Appeals in several cases since the *Kirchner* case.⁵⁷ Consequently, Manual provisions referring to negligent homicide at best could be only persuasive; that is, since the President apparently considered the offense to be either prejudicial or discrediting conduct, his opinion would be entitled to some weight.

Concerning the other ground mentioned in the opinion, the Court of Military Appeals admitted that Article 134 must be interpreted in the light of existing service customs and usages, but discarded the argument that there had theretofore been no uniform service usage inasmuch as the Navy had not recognized negligent homicide as an offense. Further, in noting that both the Army and Air Force had held that negligent homicide was

⁵⁴ 1 U.S.C.M.A. 477, 4 C.M.R. 69 (1952).

⁵⁵ *Id.* at 479, 4 C.M.R. at 71.

⁵⁶ 10 U.S.C. § 836 (Supp. V, 1958).

⁵⁷ *E.g.*, *United States v. Jenkins*, 7 U.S.C.M.A. 261, 22 C.M.R. 51 (1956); *United States v. Eagleson*, 3 U.S.C.M.A. 685, 692, 14 C.M.R. 103, 110 (1954) (concurring opinion). See also *United States v. Johnson*, 7 U.S.C.M.A. 488, 492-93, 22 C.M.R. 278, 282-83 (1957).

an offense, the court cited various decisions,⁵⁸ all of which, except the *Senck* case, discussed above, post-dated the Army and Air Force Manuals of 1949, and all of which, except *Senck*, were therefore undoubtedly predicated upon the concept that if the Manual says the offense constitutes prejudicial or discrediting conduct, it must be so. Concerning the *Senck* case, it has already been noted that the decision therein was based upon a misunderstanding of the import of the statutory phrase "due caution and circumspection."

Still deferring for a moment any discussion of the "fundamental propriety" of punishing negligent homicide, another concept which has found repeated recognition by the Court of Military Appeals bears scrutiny—preemption by Congress of the entire field of particular types of crimes. For example, the court, in discussing whether the offense of "wrongful taking," *i.e.*, the taking of property of another without any specific intent, constituted an offense under Article 134, has stated in a majority opinion:⁵⁹

Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles. . . . As the Manual itself notes, there is scarcely an irregular or improper act conceivable which may not be regarded as in some indirect or remote sense prejudicing military discipline under Article 134. *Manual for Courts-Martial, United States, 1951*, page 381. We cannot grant to the services unlimited authority to eliminate vital elements from *common law crimes and offenses expressly defined by Congress* and permit the remaining elements to be punished as an offense under Article 134. . . .

We are persuaded, as apparently the drafters of the Manual were, that Congress has, in Article 121, covered the entire field of criminal conversion for military law. We are not disposed to add a third conversion offense to those specifically defined. It follows that there is no offense known as "wrongful taking" requiring no element of specific intent, embraced by Article 134 of the Code.

Compare the background of "wrongful taking" with that of negligent homicide as an offense under Article 134: (1) Neither wrongful taking nor negligent homicide was a criminal offense under the common law⁶⁰ and neither can be characterized as a purely military offense. (2) Neither was recognized as an offense under the Articles for the Government of the Navy. (3) Both wrongful taking and negligent homicide had been held to be

⁵⁸ *United States v. Jones*, 10 B.R.-J.C. 255 (1951); *United States v. Marr*, 4 C.M.R. (A.F.) 511 (1951); *United States v. Deese*, 3 C.M.R. (A.F.) 307 (1950); *United States v. Gilbert*, 3 C.M.R. (A.F.) 18 (1950); *United States v. Bell*, 9 B.R.-J.C. 301 (1950); *United States v. Bussard*, 7 B.R.-J.C. 197 (1950); *United States v. Patch*, 7 B.R.-J.C. 89 (1950); *United States v. Smith*, 1 B.R.-J.C. 307 (1949); *United States v. Senck*, 78 B.R. 175 (1948).

⁵⁹ *United States v. Norris*, 2 U.S.C.M.A. 236, 239, 8 C.M.R. 36, 39 (1953). (Emphasis added.) *Accord*, *United States v. Geppert*, 7 U.S.C.M.A. 741, 23 C.M.R. 205 (1957).

⁶⁰ Wrongful taking: PERKINS, *CRIMINAL LAW* 224 (1957). Negligent homicide: *Id.* at 62-63.

offenses under the old Article of War 96 prior to the enactment of the Uniform Code of Military Justice.⁶¹ (4) The 1949 Army *Manual for Courts-Martial* contained language indicating that both wrongful taking—of an automobile—and negligent homicide were offenses under Article of War 96.⁶² And (5) the 1951 *Manual for Courts-Martial*, contains no mention of wrongful taking as an offense, whereas negligent homicide is mentioned as a lesser included offense of murder and voluntary manslaughter,⁶³ a sample specification is included,⁶⁴ and a limitation is listed in the Table of Maximum Punishments.⁶⁵

It seems that the persuasive effect of the decision of the drafters of the 1951 Manual to omit any mention of “wrongful taking” and to include mention of negligent homicide has been persuasive indeed, unless, of course, the “fundamental propriety” of punishing the homicide is greater than punishing the taking of property.

To develop further the apparent reliance by the Court of Military Appeals upon provisions of the Manual, in *United States v. Johnson*,⁶⁶ in holding that Congress, by enacting Articles 85, 86 and 87, preempted the entire field of absence offenses, the court quoted the following provision of the Manual:⁶⁷

[T]his article is designed to cover every case not elsewhere provided for in which any member of the armed forces is through his own fault not at the place where he is required to be at a prescribed time . . .

It stated further:⁶⁸

We are convinced *by this declaration*, that all specific instances “in which any member of the armed forces is through his own fault not at the place where he is required to be at a prescribed time” are punishable under the provisions of Articles 85, 86 and 87, *supra*, the *sole* specific provisions relating to such instances.

In another case, *United States v. Hallett*,⁶⁹ the specification alleged that, before the enemy, the accused “was guilty of cowardly conduct in that he

⁶¹ Wrongful taking cases include *United States v. Hendrick*, 70 B.R. 293 (1947); *United States v. Meece*, 76 B.R. 11 (1948); *United States v. Evans*, 2 C.M.R. (A.F.) 470 (1949); *United States v. Dedricksen*, 1 C.M.R. (A.F.) 504 (1949).

⁶² Wrongful taking: *Manual for Courts-Martial, U.S. Army, 1949*, 330. Negligent homicide: see text at notes 42–44 *supra*.

⁶³ See note 49 *supra*.

⁶⁴ See note 50 *supra*.

⁶⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 226 (one year, Bad Conduct Discharge, and total forfeitures).

⁶⁶ 3 U.S.C.M.A. 174, 11 C.M.R. 174 (1953).

⁶⁷ *Id.* at 178, 11 C.M.R. at 178 (quoting *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 315).

⁶⁸ *Id.* at 178, 11 C.M.R. at 178. (Emphasis added.)

⁶⁹ 4 U.S.C.M.A. 378, 15 C.M.R. 378 (1954).

wrongfully failed to accompany his platoon on a combat ambush patrol, as it was his duty to do."⁷⁰ The court-martial inquired as to whether it might lawfully find the accused guilty not of cowardly conduct, as proscribed by Article 99(5),⁷¹ but guilty rather of a wilful failure to do his utmost to encounter enemy troops, as denounced by Article 99(8).⁷² The law officer responded in the negative and advised the court that the only lesser included offense available rested on Article 134 and took the form of a "wrongful" failure to accompany his platoon on its ambush patrol. In considering the correctness of these instructions, the Court of Military Appeals said:⁷³

[I]n Article 99 Congress proposed to cover the entire range of offenses which are assimilable to misbehavior before the enemy. No room is left in this area for the application of Article 134. Accordingly, conduct which does not fall within Article 99 may not be punished through an invocation of Article 134.

Applying these principles to the field of homicide, we find that Congress proscribed four different types of murder in Article 118⁷⁴ and proscribed voluntary manslaughter and two different types of involuntary manslaughter in Article 119.⁷⁵ Certainly this, in the absence of any mention of negligent homicide, would seem to constitute a preemption of the field of homicide with the result that courts-martial should not be free to convict an accused under Article 134 of a homicide which fails to fall within the terms of Articles 118 or 119.

It is definite, however, that the Court of Military Appeals did not regard Articles 118 and 119 of the code as having preempted the field of homicide. Negligent homicide, according to the court in the *Kirchner* case, is an offense which "may be punished as conduct of a nature to bring discredit upon the armed forces or a disorder and neglect to the prejudice of good order and discipline in the armed forces."⁷⁶ This language cannot even be equated to that of the Air Force Judge Advocate General in 1951 that negligent homicide could be an offense *only* when the conduct involved was found to constitute either service discrediting or prejudicial conduct.⁷⁷ Indeed, the Court of Military Appeals seems to consider negligent homicide as discrediting or prejudicial conduct *per se*. Moreover, it is evident that the broad statement in the *Kirchner* case, that "unlawful homicide

⁷⁰ 4 U.S.C.M.A. 378, 380, 15 C.M.R. 378, 380 (1954).

⁷¹ 10 U.S.C. § 899(5) (Supp. V, 1958).

⁷² 10 U.S.C. § 899(8) (Supp. V, 1958).

⁷³ 4 U.S.C.M.A. at 382, 15 C.M.R. at 382.

⁷⁴ 10 U.S.C. § 918 (Supp. V, 1958).

⁷⁵ 10 U.S.C. § 919 (Supp. V, 1958).

⁷⁶ 1 U.S.C.M.A. at 479, 4 C.M.R. at 71.

⁷⁷ *United States v. Jaekley*, 4 C.M.R. (A.F.) 130, 143 (1951), note 48 *supra*.

through simple negligence is an offense under the Uniform Code of Military Justice," contains nothing that indicates any requirement for a finding that the homicide is discrediting or prejudicial, and at least one other judicial body has stated that the homicide itself is the discrediting or prejudicial element. Thus, in *United States v. Eagleson*,⁷⁸ the Board of Review said:

Our consideration of the decisions concerning negligent homicide has convinced us that the real factor causing the discredit to the armed forces is the homicide itself. Where the homicide is caused by negligence of the accused, that negligence is deemed to be a sufficient basis for criminal liability as conduct of a nature to bring discredit upon the armed forces, violative of the second clause of Article 134.

Admittedly, the Court of Military Appeals has never made any such sweeping statement. On the other hand, however, neither has it ever defined the offense in terms of prejudicial or discrediting conduct. The most that can be said is that the various negligent homicide cases decided so far involved circumstances which might reasonably be considered as rendering the homicide prejudicial or discrediting conduct. The *Kirchner* case involved the negligent handling of a firearm within a naval reservation and the killing of another serviceman; and other cases have involved drunken⁷⁹ and reckless⁸⁰ driving of automobiles in occupied Germany.

Before an act or omission can constitute an offense under the first clause of Article 134 it must be directly prejudicial to good order and discipline and not prejudicial in a remote or indirect sense,⁸¹ and before an act or omission can constitute an offense under the second clause it must tend reasonably to injure the reputation of the armed services.⁸² The negligent handling of a firearm, with or without death resulting, has long been held to be prejudicial conduct,⁸³ and consequently the negligent killing of another through the careless use of a firearm, with this specific type of carelessness providing the prejudicial element, would logically constitute an offense. Further, various civilian jurisdictions which have legislated into their penal codes the offense of negligent homicide have generally restricted it to death resulting from the negligent use of that dangerous instrumentality, the automobile.⁸⁴ As this effort to protect society becomes more prevalent, or perhaps even now, such a killing of another person might be

⁷⁸ 11 C.M.R. 893, 899 (1953).

⁷⁹ *United States v. Russell*, 3 U.S.C.M.A. 696, 14 C.M.R. 114 (1954).

⁸⁰ *United States v. Bull*, 3 U.S.C.M.A. 635, 14 C.M.R. 53 (1954).

⁸¹ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 381; *United States v. Holiday*, 4 U.S.C.M.A. 454, 16 C.M.R. 28 (1954); *WINTHROP, MILITARY LAW AND PRECEDENTS* 723 (War Dep't ed. 1920).

⁸² *MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951*, 382.

⁸³ *WINTHROP, MILITARY LAW AND PRECEDENTS* 731 (War Dep't ed. 1920).

⁸⁴ See *PERKINS, CRIMINAL LAW* 63 (1957).

considered injurious to the reputation of the armed services. But how much further do we go, or better, will the Court of Military Appeals go?

If "unlawful homicide through simple negligence is an offense under the Uniform Code of Military Justice" in situations other than those involving motor vehicles or firearms, the court is holding military personnel to a degree of care far exceeding that required of other citizens. We will all agree that injuries and death resulting from so-called "attractive nuisances" are compensable in tort, but this is a far cry from such deaths being criminal offenses. Are military personnel, for instance, to be held guilty because a neighbor's child drowns in a serviceman's swimming pool, if such is an attractive nuisance in his state? Is a pilot of a military aircraft guilty of a crime if, in an air crash with fatal injury to passengers, the crash is held to be the result of pilot error? Is a Commanding Officer of a military activity to be assessed a criminal punishment because of negligent maintenance of stairways and a resultant fatal injury?⁸⁵ Obviously there is more to this problem than the simple statement that negligent homicide is an offense under the code. Certainly it may be an offense, but should it be in every instance?

Some of these questions may be answered in the not too distant future, but until they are answered all members of the armed services are confronted with considerable uncertainty with regard to the penal aspects of negligent conduct which may result in a death. It is believed proper that negligent homicide as an offense under the Uniform Code of Military Justice should be limited to deaths resulting from simple negligence in the operation of motor vehicles and to deaths resulting from careless or negligent discharge of firearms. In the event subsequent developments in case law do not thus limit the application of negligent homicide, the only remedy is the enactment of legislation including within the Uniform Code a specific offense of negligent homicide with appropriate limitations on its coverage. Either solution would be satisfactory.

⁸⁵ No query is included as to the criminal responsibility of a commanding officer of a vessel whose negligence results in the death of another, for such situation is covered by 18 U.S.C. § 1115, which was originally enacted in 1838 and which provides: "Every captain, engineer, pilot, or other person employed on any steamboat or vessel, by whose misconduct, negligence, or inattention to his duties on such vessel the life of any person is destroyed . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

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