

1. Sally and Rob looked at each other. Should they buy the car, a 2008 model, or not. The salesman Ralph was continuing, “ And, not only has it been through our repair shop before we put it out on the lot, as all our cars do, this one has never been in an accident at all. In fact, if Ralph had bothered to read the whole file that came with the car from a dealership in Williams Lake, he would have seen that the vehicle had been in a serious accident when the owner fell asleep and ran off the road into some trees causing serious front end damage to the car. The driver was discovered dead in the driver’s seat. He was 72 at the time of death and the hospital recorded the cause of death as heart attack/inconclusive because although he had serious bruising from the air bag it did not seem enough to kill him. He had suffered a mild heart attack 8 months before the accident. The conclusion that he had fallen asleep at the wheel, came from his wife who survived the accident in the front passenger seat. She had noticed him nodding off a few miles before the accident and sharply rebuked him. ‘Open your window!’ she said. But he said No because he felt the cold bad since his heart attack and instead wiped his face with a damp ‘toilette’ cloth to refresh himself.
2. Rob bought the car, and, 3 weeks later the two of them set out from Prince George with Sally’s 12 year old daughter Beth, to visit Sally’s mother Ruby in Calgary.
3. Sally and Rob were planning to be married in just 6 weeks when they set out on their trip. On the advice of a friend Rob, who had never previously made a will, grabbed a will kit from the stationers on the morning before they left. “I’ll just leave everything to you.”, he said. “ We can fix it up better when we have more time.”
4. Rob got his brother, Dennis, to come over and act as one witness when he signed the will and got Sally to sign as the other witness. Dennis was named as the executor.
5. As of the day they set out on their trip, Sally and Rob had lived together for 18 months and had dated each other for 9 months prior to that. Although they often slept together at his place or hers when Beth went to visit her birth father on weekends, Rob and Sally did not move in together until they had been dating for 9 months. Sally had said, “ You are not moving in until I know that this is forever. I won’t do that to Beth.”
6. Beth and Rob had gotten along well right from the start. Rob spent most of his time at Sally’s house when they were dating, but he always left before Beth went to bed. They were engaged at the end of that 9 months of courting and Rob moved in with Sally and Beth at that time. Rob rented his place to his brother Dennis.
7. Rob worked late into the night on the night before their trip to get everything done so that they could leave. So he was sleep deprived when they started out. But he was only 36 years old and could get by on a lot less than 8 hours sleep when he had to.
8. The road was sloping down with a bend or corner at the end of the slope. There was no sign indicating the bend in the road or that vehicles ought to slow down for it. The car swept passed a rest stop. Mildred sat on a bench at the rest stop. She said, “Oh

God!” and put her hand to her mouth as the car went by. It wasn’t slowing for the corner.

9. Inside the car Sally had fallen asleep. Beth, in the back seat, knew this because she saw her mother slump forward against her seat belt. She looked at Rob from behind. He seemed to be staring straight ahead. Then she realized that he wasn’t slowing down. Then she screamed “Rob!”, but the car just kept going in a straight line. It went off the road, over the bank, down, down, rolling twice before coming to a stop against a boulder.

10. Mildred and her friend Jack were the first people to get to the car. Rob was conscious and hysterical.” Sally, Beth!” he was crying. “ I fell asleep, I fell asleep. Oh God, I fell asleep.” His head pounded with pain but there was no significant injury to his head. His legs were broken, his hip was fractured. But he was alive. Sally was unconscious. She had suffered a serious head injury. Beth was terrified but unhurt. The windshield and both front windows were smashed out.

11. Six months later:-

i) Beth was living with her father. She had recurring nightmares of the accident; she had flashbacks of the seconds before the accident and of Rob, apparently staring straight ahead.

ii) Sally was in a long-term care home. She had suffered a serious brain injury and had lost the capacity to take care of herself. She was only partially verbal.

iii) Rob had received surgery on his legs and hip, was in constant pain, was debilitated by guilt and remorse and expected further surgery. He was also charged with Criminal Negligence Causing Bodily Harm and faced prison if he was convicted. When the police officer Burt Wickham interviewed Rob at the hospital, Rob unambiguously waived his right to a lawyer, and gave the police officer a statement in which he admitted that he had fallen asleep and that he knew that he was sleep deprived before he set out on the trip and, he admitted, they (Rob and Sally) had talked about pulling over for a rest at her suggestion, but that he said he was OK and wanted to push on while there was still light left in the day.

iv) Mildred was seeing a psychiatrist. She told her psychiatrist that she was crying a lot, weepy even when she wasn’t crying, and could not get her mind off her memory of the car sailing on past the rest stop and then going off the road and, what she saw and hear when she and her friend Jack arrived at the scene at the bottom of the hill where the car had come to stop.

12. For the purpose of the Criminal trial, the car was seized by the RCMP and examined for mechanical defect. In particular the brakes and steering were checked and no defect was found. In addition the throttle system was checked out and there was no

evidence of malfunction.

13. Police Cst. Burt Wickham retrieved the file on the car from the dealership in Prince George. He noted that the car had been in a previous accident outside Williams Lake and had been repaired before it was sold to the dealership in Prince George. He seized the records of the repair from the Williams Lake dealership.
14. Burt contacted the Williams Lake detachment of the RCMP and asked them to send up a copy of the file respecting the accident that car had previously been in. Why, they wanted to know. Hadn't the vehicle been repaired? Just being careful, Burt had told them - "Please send it up!"
15. Burt was due to be transferred to Nelson six (6) weeks before Rob's trial. He, Burt, expected to come back to testify in Rob's trial. In particular he expected to testify as to Rob's confession that he had been sleep deprived, had declined a suggestion to pull over and rest and had fallen asleep.
16. Three days before he was scheduled to leave for Nelson, Burt received the materials from the Williams Lake detachment. He read it over. There it was - the driver had fallen asleep.
17. Burt took the file to Corporal Morley who would be handling the matter after Burt left. "Ready for trial, is it?", the Corporal Morley asked. Burt told him about the material just received from Williams Lake. "Second time the driver fell asleep in that car!", he said. "Yup", said Morley, "Well see you back here for the trial. Good luck in the Kootenays."
18. Burt returned for the trial and gave his evidence. Nothing further was done with the information from Williams Lake, indeed it wasn't even disclosed to the Crown as the Corporal regarded it as being irrelevant to the issues at trial. At the end of the trial there was legal argument about whether Rob's behavior amounted to a wanton disregard for the safety of Sally and Beth. The trial judge found that Rob knew he might get sleepy because he knew he was short on sleep, that he had deliberately taken a chance and that to do so was criminally negligent. He sentenced Rob to six months in jail.
19. Rob hired a new lawyer for an appeal of conviction and in the meantime went to jail to serve his sentence. The lawyer sought and obtained a copy of the file from Rob's counsel at trial. He also asked to see the police file. What, he was asked, did he expect to find there that had not been previously disclosed. "I don't know," the lawyer said, "Let's look and see!"
20. The Appeal Lawyer (Daniel Kiefer) found the Williams Lake file. He phoned Burt Wickham in Nelson. "Why did you want this file?", he asked. "I don't know, just being nosy, I guess." Burt answered. "Did you find anything that interested you?" Kiefer asked.

There was a silence on the other end of the phone. The first guy to speak loses, Kiefer thought.

Then Burt Wickham cleared his throat. "Well, the other guy fell asleep too."

21. Kiefer started work. Nothing, nothing, yes - there it is. Upon a retesting of the blood samples taken from both Rob and Sally at the hospital, elevated levels of carbon monoxide (Chemical symbol CO), which extrapolated back to the accident scene were sufficient to cause a loss of consciousness. The car was now too badly damaged to ascertain whether there had been an exhaust leak dating back to the Williams Lake incident but Dan Kiefer knew he didn't need that. Where else could the CO have come from?

22. The Crown agreed to Rob's release pending the appeal. At the appeal, the CO evidence was tendered by affidavit. The fierce lady who was the senior justice on the panel of three, addressed the Crown, "Well, don't we have to send this back for a new trial? We can't let this stand can we?"

"Well my Lady, I ..."

"No, we can not. It's alright, we can take it from here. Thank you."

*Those are the facts that you need to be familiar with for the final. Law suits are about to start flying. There is, as you might suspect, at least one more unhappy event to record, but we must get to that. You are an articled student at Mr. Kiefer's firm. You will assist him. He is about to hand you a memo requesting that you answer a number of legal questions. You will receive that memo shortly.*