

## **Paradigm-Based Preparation and Trial of a Railroad Crossing Case**

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### INTRODUCTION

John Steinbeck, author of *The Grapes of Wrath* and *Of Mice and Men*, had a close friend named Ed Ricketts upon whom he based a character in the novels *Sweet Thursday* and *Cannery Row*. Following the death of his friend, Steinbeck wrote *About Ed Ricketts* and told of his death as follows:

Just about dusk one day in 1948, Ed Ricketts stopped work in his laboratory in Cannery Row. He covered his instruments and put away his papers and filing cards. He rolled down the sleeves of his wool shirt and put on the brown coat which was slightly small for him and frayed at the elbows.

He wanted a steak dinner and he knew just the market in New Monterey where he could get a fine one, well-hung and tender.

He went out into the street that is officially named Ocean View Avenue and is known as Cannery Row. His old car stood at the gutter, a beat-up sedan. The car was tricky and hard to start. He needed a new one but could not afford it at the expense of other things.

Ed tinkered away at the primer until the ancient rusty motor coughed and broke into a bronchial chatter which indicated that it was running. Ed meshed the jagged gears and moved away up the street.

He turned up the hill where the road crosses the Southern Pacific Railways track. It was almost dark, or rather the kind of mixed light which makes it very difficult to see. Just before the crossing the road takes a sharp climb. Ed shifted to second gear, the noisiest gear, to get up the hill. The sound of his motor and gears blotted out every other sound. A corrugated iron warehouse was on his left, obscuring any sight of the right of way.

The Del Monte Express, the evening train from San Francisco, slipped around from behind the warehouse and crashed into the old car. The cow-

catcher buckled in the side of the automobile and pushed and ground and mangled it a hundred yards up the track before the train stopped.

## PARADIGMS

“Paradigm” was originally a concept originally limited to scientific theory. The term “paradigm” was coined and popularized by Thomas S. Kuhn in his book entitled *The Structure of Scientific Revolutions*, University of Chicago Press, 1962. Kuhn’s paradigm consisted of a belief system about the way things work. Any given paradigm included a specific set of characteristics, beliefs, and preconceptions that were maintained by a specific scientific community. However, the word “paradigm” was also used to encompass the specific scientific community which subscribed to those beliefs (e.g., Darwin’s evolutionists vs. Creationists).

Since the introduction of paradigms in the late 1950’s and early 1960’s, the concept of paradigms has expanded its application to virtually all human activities. Social science, business analysis, and numerous other disciplines use paradigm-based analyses to organize their thinking.

Paradigms are beneficial to the analysis of human behavior for several reasons:

1. Paradigms attempt to make sense of all facts and perceptions that are believed to be true at any given time;
2. Paradigms establish relationships between things and events, so that all things and events appear orderly;
3. Paradigms give us a framework within which we can intake, analyze, and categorize new information; and
4. Paradigms serve as a blueprint for making predictions.

However, paradigms are not constant. They evolve gradually in some instances and abruptly in others. Thomas R. Kuhn reflected on his concept of paradigms in the book, *The Essential Tension*, University of Chicago Press, 1997, wherein he discussed the changing paradigm in scientific terms as follows:

Some revolutions are large, like those associated with the names of Copernicus, Newton, or Darwin, but most are much smaller, like the discovery of oxygen or the planet Uranus. The usual prelude to changes of this sort is, I believe, the awareness of anomaly, of an occurrence or set of occurrences that does not fit existing ways of ordering phenomena. The changes that result therefore require “putting on a different kind of thinking-cap,” one that renders the anomalous law-like but that, in the process, also

transforms the order exhibited by some other phenomena, previously unproblematic.

Your job, as a trial lawyer facing the task of analyzing, preparing, and trying a railroad grade crossing case, involves the need to recognize paradigms, shift paradigms and capitalize upon the paradigms.

#### THE CURRENT PARADIGM: OPERATION LIFESAVER

(Safety Program or Jury Tampering)

Over the last several years I have made a conscious effort to discuss Operation Lifesaver with as many railroad employees, law enforcement officers, jurors, and ex-railroad employees as possible. I have watched railroad presentations of Operation Lifesaver and reviewed written materials associated with this program. One thing is certain; it is effective. The people of our country have been hearing the phrase “stop, look, and listen” for decades. The railroad industry, its various associations, and any governmental entity willing to work with the railroads have inundated the people of this country with Operation Lifesaver propaganda. This massive campaign to “educate” the public cannot be ignored. As trial lawyers, we need to accept the fact that Operation Lifesaver has embedded many false concepts into the minds of potential jurors and has become a highly effective form of covert tampering. Jurors have been conditioned to believe that all reasonable drivers should "stop, look, and listen" before crossing a railroad track. This is true despite the fact that every study on the subject shows that a vast majority of drivers do not stop, look, or listen.

Potential jurors have a deep-rooted belief that anybody who has been involved in a grade crossing collision with a train must have been “trying to beat the train” or grossly negligent through failure to maintain a proper lookout. Decade after decade of propaganda has been disseminated by the railroads on a national scale. The longevity of this campaign has spanned many generations. We are now confronted with multi-generation propaganda that has woven its way into the very thread of our belief system. **WE CANNOT IGNORE THE FACT THAT OPERATION LIFESAVER IS EMBEDDED INTO THE MIND OF EVERY PERSON IN THIS COUNTRY.** Police officials and the federal government lend support and credibility to the teachings of Operation Lifesaver.

Although circumstances have changed since the time when railroads owned many politicians and symbolized progress, the message from Operation Lifesaver has remained the same. It is our duty as trial lawyers

to recognize this anomaly and educate each and every prospective juror about this situation. We must acknowledge that there is a part in each of us which recalls early “teachings” based upon the concepts of Operation Lifesaver. However, we must reveal that those “teachings” originated from the railroad industry itself. A critical analysis of Operation Lifesaver with each juror can cast an entirely new light on the true purpose behind that program.

There are innumerable responsibilities placed upon a railroad at public grade crossings. Unfortunately, none of these concepts have ever been included in the teachings of Operation Lifesaver. Given this simple point for consideration, jurors will readily recognize the self-serving nature of Operation Lifesaver. They need to be asked if they have ever seen a railroad post a 1-800 number to gather information on how their conductors and engineers are performing their safety duties. All of those jurors have seen semi-trailer trucks which bear notices requesting information about the safety practices of their drivers. No juror will likely have any personal knowledge of a railroad doing anything to enhance the safety of the motoring public. In fact, you need to challenge jurors by asking about their knowledge of any safety programs instituted by railroads. There are none other than Operation Lifesaver, which continues with the mindless chant that “ it is always the motorist’s fault.”

The insurance industry has made concerted efforts to tamper with potential jurors in this country through the manufacture of our “insurance crisis.” Operation Lifesaver makes the efforts of the insurance industry pale in comparison. It is due time for us to quit ignoring the fact that Operation Lifesaver is a form of mass jury tampering. We need to reveal the fraud. Spread the truth about Operation Lifesaver as far and wide as potential juries will listen. It is a time to shift this paradigm.

#### SEARCHING FOR A NEW PARADIGM

On October 25, 1995, a school bus approached a railroad crossing on Algonquin Road in Fox River Grove, Illinois. The driver stopped the bus, opened the door, looked both ways, and proceeded only after ascertaining that there was no train. It was shortly after 7:00 a.m. as the bus proceeded slowly through the crossing and stopped for the red traffic light at U.S. Highway 15. When the bus dutifully stopped at the white stop line preceding the intersection as required by law, the driver had no clue that the last couple feet of the bus had not cleared the tracks. The bus was

struck by a commuter train traveling at 65 miles per hour. Thirty-five students were headed to school that day. Twenty-eight now live with physical and emotional scars, seven families grieve, and a small community looked on in shock. The national media responded and questions concerning railroad grade crossing safety suddenly became a national topic.

October 8-10, 1996, the Fourth International Symposium on Railroad Grade Crossing Research and Safety in Knoxville, Tennessee, brought together experts from around the world to discuss railroad grade crossing safety issues. The printed proceedings from that conference are probably the best source of information about current issues of safety at rail-highway grade crossings. It was quite an honor for me to be given an opportunity to speak at that conference. Appendix B contains a copy of my presentation at that symposium on the subject of Recreating the Visual Aspects of a Crossing Collision. Vanity and immediate access are the reasons for inclusion of that presentation as an appendix to this outline. However, the bound proceedings of the entire conference is a great resource for anybody attempting to litigate a grade crossing case.

On April 20, 1997, the Kansas City Star ran a front-page story entitled "Killer Crossings." That story contained information concerning recent accidents and the associated questions concerning railroad grade crossing safety. Appendix A contains two tables printed in that Kansas City Star article. Those tables are quite revealing. In the United States there are 5.4 times more people killed in train crossing accidents than in commercial airline disasters. Airlines are required to have smoke detectors in lavatories and cargo holds, but there is no requirement that railroads do anything to warn motorists of a train approaching a grade crossing. In fact, only 14% of the grade crossings in Kansas are protected by active warning signals such as lights and gates.

The February 1998 issue of Reader's Digest featured a Special Report by Bob Trebilcock entitled "America's Dangerous Railroad Crossings." That report began as follows:

In America today, a train collides with a vehicle almost every two hours. There were 4054 such collisions in 1996, resulting in 415 deaths and 1554 injuries. Yet the media and general public take little notice. "Since it's usually just one or two lives at a time, it only captures local attention," says

Gary Long, a transportation engineering coordinator at the University of Florida.

After discussing several tragic crossing cases, including the Fox River Grove bus collision, the author asks: "WHAT ELSE CAN BE DONE?"

**BEGIN WITH THE DRIVER'S PARADIGM**

**DON'T PUT THE CREW ON TRIAL: IT'S THE RAILROAD'S FAULT**