

Fatal attraction: Pedestrians and trains

Protecting pedestrian rights; a look at railway accidents involving pedestrians

By Joseph Sayler & Nathan Karlin

Pedestrian railroad incidents are the leading cause of death on America's railways. (FRA Report to Congress, National Strategy to Prevent Trespassing on Railroad Property, October 2018, ROA 6310005.) Hundreds of pedestrians are killed or seriously injured by railroads every year. In 2023 alone, there were 1,334 pedestrian-rail causalities, including 718 deaths and 664 injuries. (FRA TenYearIncidentAccident/Overview, https://safetydata.fra.dot.gov/Officeof Safety/publicsite/Query/TenYearAccident IncidentOverview.aspx). Over the last 10 years, pedestrian (trespasser) fatalities and injuries have increased by over 50 percent. (*Ibid*.) Suburban sprawl and population growth is likely to lead to even more pedestrian incidents in the coming decade.

Because railroad tracks often cut neighborhoods and cities in half, those killed and injured most often are pedestrians that walk across or along railroad tracks to get to their destination. Children who live in neighborhoods bisected or adjacent to tracks are another class of people drawn to railroad rights-of-way. Railroad companies are quick to paint these pedestrians and ordinary people as "trespassers" in hopes of vilifying them. The truth is that the relationship between pedestrians and railroad tracks is complicated, as recognized by the Federal Railroad Administration (FRA) and industry leaders.

The reality is that many people are faced with walking miles out of their way to get to work or school to cross at designated vehicular crossings. Adequately protected pedestrian crossings are extremely scarce. Almost all pedestrians make the logical choice of using well-worn pathways that others in their neighborhoods have been using for decades, thereby cutting their commutes down dramatically. Others may be engaged in recreational activities. Children, a vulnerable class of people who are naturally drawn to railroad tracks and trains, also utilize pedestrian crossings on their commute to school or play activities. The industry's lack of safety measures and the inherent curiosity of children can make for a tragic combination.

History of the problem

Pedestrian casualties on railroad rights-of-way are a major safety problem in the United States, but it is not a new problem. In 1990, the number of trespassers who died on rail rights-of-way exceeded 500, with total casualties of more than 1,000. (FRA, Trespass Prevention Research Study, available at www.fra.dot.gov/Elib/Document/3943 (2008).) Since 1996, trespasser fatalities have made up the largest category of railroad-related deaths, exceeding grade-crossing accidents. (*Ibid*.)

California has a long history of being statistically the number one state for pedestrian rail casualties (fatalities and injuries). (See, https://safetydata.fra.dot.gov/officeofsafety/publicsite/query/castally4.aspx.) This perennial number one ranking can be attributed to many things, including its large population and aggressive suburban sprawl over the decades coupled with expansive rail lines running up and down the coastline and heavily populated urban centers.

For decades, the response to pedestrian fatalities was the same as it was to grade-crossing incidents, a stated policy of "3 Es," namely education, enforcement, and engineering. Practically speaking, "educating" the public through rail industry-backed organizations such as Operation Lifesaver was the only approach in practice, again mirroring the industry's strategy concerning grade-crossing vehicle accidents.

But like grade-crossing accidents, "educating" the public has proven ineffective when not accompanied by engineering solutions. Tellingly, grade-crossing crash causalities began to dramatically decrease once Congress stepped in and set aside over $200 million a year for engineering improvements (lights and gates) to eliminate hazards at grade-crossings by 23 USC 130 (commonly referred to as Section 130 funds). The opposite trend has occurred with pedestrian casualties where railroads have largely refused to implement engineering solutions. This trend is acutely felt in California, where FRA statistics show there were 148 pedestrian-rail casualties recorded in 2005. But by 2023, that figure had risen to 348 pedestrian-rail casualties. (https://safetydata.fra.dot.gov/officeofsafety/publicsite/query/castally4.aspx)

The general response from railroads themselves has been that "engineering" solutions, such as fencing, do not work because people will go over, under, or cut through fences to get to where they want to go. This blanket assessment, however, is not based on any actual

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research, defies FRA recommendations and research, and contradicts other industry practices.

The railroad industry is fully aware of this national problem

Beyond statistics, railroads are well aware that their rights-of-ways are a dangerous place for pedestrians. In 1972 – and possibly earlier – the FRA made recommendations to address pedestrian casualties. (D.O.T., Rail-Highway Safety Part II: Recommendations for Resolving the Problem. Report to Congress from Secretary of Transportation (1972).) Pedestrian casualities continued to rise over the next several decades despite several safety reports and recommendations. To address the nationwide safety concerns posed by railroad rights-of-way, the FRA organized three industry wide workshops, one each in 2008, 2012, and 2015 (collectively "the Workshops").

The stated purpose of the Workshops was "to identify and recommend new and existing strategies that the rail industry could pursue to assist in reducing the number of pedestrian and trespasser casualties." Major freight and passenger railroads were represented, including delegates from the Class I Railroads and Amtrak, as well as many other regional and local freight and passenger railroads.

The Workshops discussed some important facts that are well known within the industry, including that (1) trespassers will take the most direct route; (2) barriers such as fencing need to be utilized; and (3) safety must not be compromised for aesthetics or convenience. (Darren Gilbert, CPUC Rail and Transit Hazard Management Program, 2012). A general consensus from the workshops was that fencing should be placed to abate trespassing and channel pedestrians to protected pedestrian crossings that are placed at reasonable intervals.

Despite these conclusions, the railroads themselves have largely been defiant of implementing engineering solutions. Curiously, however, every major railroad also has policies requiring others to provide fencing or barriers – at their own expense – when public or private entities want something like a trail near its tracks. In those situations – when other entities are funding the barriers – railroads consider them an effective deterrent and critical safety measures.

Advocating for a safer tomorrow by litigating pedestrian issues

Industry research consistently shows that fencing and other economical engineering solutions are a highly effective deterrent. The Journal of Accident Analysis and Prevention conducted a study in Finland to track countermeasures to right-of-way trespass. (Anne Silla, *Accident Analysis and Prevention 43*, 1089-1094 (2011).) The study measured the impact of three trespass mitigation strategies at highly trespassed areas: fencing, landscaping barriers, and signage. The largest reduction in the number of trespasses was found for fencing (94.6%), followed by landscaping (91.3%). Signage reduced trespassing by 30%, but the study concluded that this drop would be temporary unless the signage was strictly enforced. In short, physical barriers like fencing are highly effective in reducing rights-of-way casualties.

The rail industry clearly views pedestrian casualties on railroad rights-of-way as the deadliest problem in the railroad industry, which it is. Equally clear, the railroad industry and the FRA view fencing as an effective and important tool in preventing right-of-way casualties. Despite this, most railroads have refused to incorporate any of these recommended practices, despite attending the Workshops and representing adherence to the recommended actions.

Today, pedestrians being killed on railroad rights-of-way is the leading cause of rail-related deaths in America. While crossing accidents have long highlighted the need for safety improvements, more pedestrians are killed in non-crossing accidents than are in motor-vehicle crossing accidents. Nationally, more than 700 pedestrian fatalities occurred last year, and nearly as many are injured. Although far less publicized, more pedestrians are killed on railroad tracks than are killed in crossing collisions. The vast majority of these deaths are preventable.

Litigating railroad-related pedestrian cases raises significant hurdles and challenges. Some of the same issues that are present in crossing collision cases are equally present in pedestrian "trespasser" cases. For example, furtive industry efforts to label pedestrians as trespassers – a legal label tied to historical premises liability cases – and "educating" the public and law enforcement that the pedestrians themselves are always at fault.

Can you hear it?

Similar to the railroad industry's public-relations indoctrination that motorists should always be able to hear the train, railroads have worked actively for decades to instill into the minds of potential jurors that trains are loud and can always be heard. Numerous studies have disproven this industry mantra. (See, e.g., Daren Orf, How Trains Can be Silent Killers, Popular Mechanics, https://www.popularmechanics.com/technology/infrastructure/a3134/how-trains-can-be-silent-killers-16627219/; Mary Wisniewski, Trespassing has become Top Railroad Safety Issue, https://www.chicagotribune.com/columns/ct-train-safety-getting-around-20160918-column.html; Rosen Reports, How Long it Can Take to Hear a Train Coming, https://www.today.com/video/rossen-reports-update-see-how-long-it-can-take-to-hear-a-train-coming-911815235593.)

When litigating a railroad-pedestrian case, it is important to determine if the horn was blown at all, and if so, whether it was timely blown so that a pedestrian could detect the horn and take appropriate action. Tragically, a frequent scenario is the train horn only being blown a few seconds prior to the collision.

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Even if blown, as industry research indicates, train horns are not a reliable warning device. Studies have demonstrated that train horn detectability can be masked by a variety of incident-specific conditions. Train speeds, ambient noise, environmental factors (air pressure, humidity, wind direction), topography, and insertion loss due to headphones can all affect the audibility of a train horn.

The preemption arguments

Pedestrian cases at or near crossings may be faced with similar preemption arguments made in crossing cases. (See, e.g., *Murrell v. Union Pac. R. Co*. (D. Or. 2008) 544 F.Supp. 2d 1138, 1150.) Similar to crossing cases, special attention should be paid to whether the pedestrian crossing complied with CPUC general orders, industry standards and guidelines, the approved design and installation, and federal regulations.

For pedestrian cases not at crossings, attention should be paid to evidence of frequent pedestrian usage and whether there were engineering improvements to prevent or deter individuals from accessing the railroad property. In *Carter v. Amtrak*, the court noted that before 1968, "it was generally settled throughout the country that railroads had no duty to fence access to their tracks in order to prevent injury to unauthorized entrants." (*Carter v. Nat'l R.R. Passenger Corp*. (N.D. Cal. 2014) 63 F. Supp. 3d 1118, 1147 (citation omitted).)

But since those early decisions, California premises liability law had developed and new standards applied, as recognized by *Rowland v. Christian* (1968) 69 Cal.2d 108. As *Carter* noted, California courts had "found no authority subsequent to *Rowland* holding that a railroad has no duty as a matter of law to fence its tracks." (*Id*. at 1029.) *Carter* explained that railroads owed a duty to use reasonable care to protect individuals on the land from dangerous conditions that could reasonably be expected to harm them, including a duty to install fencing, depending on the specific facts of a case. (*Id*. at 1151.) Consistent with *Carter* and *Rowland*, then, special attention should be paid to establishing frequent pedestrian usage.

Practically speaking, establishing easy access to tracks and frequent pedestrian usage also combats the frequent railroad excuse of claiming that they cannot fence all of their thousands of miles of right-of-way off from pedestrian use. Often, railroads point to having thousands of miles of track in rural and mountainous areas where there are few or no people as evidence of the impracticality of fencing its right-of-way.

But under the *Carter* and *Rowland* legal framework, such an excuse is irrelevant and ignores the fact that almost all of these incidents occur in unfenced urban areas and/or locations that draw the public to cross railroad tracks. Rather, the inquiry is whether – at certain locations and types of locations – it is foreseeable that pedestrians are frequenting a railroad's right-of-way. When that occurs, the railroad has a duty to act and cannot ignore the occurrence of what is widely known as a public-safety issue.

Another consideration available in some, but not all states are railroad-fencing statutes. Most states long ago passed statutes requiring railroads to fence their rights-of-way, usually to deter both pedestrians and livestock from crossing tracks. Courts interpret these statutes wildly differently depending on the state. In Minnesota, for instance, it has long been established that strict liability applies in cases where the railroad did not erect or maintain fencing, but strict liability only attaches if a fence would have deterred a child (adults are exempt from the protection of the statute altogether). As a court recognized, "[i]t is not a mere fence law, but a police regulation designed for the benefit of the public." (*Rosse v. St. Paul D. R. Co.* (1897) 68 Minn. 216, 218.)

Indeed, Minnesota has expressly, and repeatedly, held that the fencing statute mandates strict liability when a railroad fails to build or maintain a fence and a child is injured. Conversely, in California, the Court of Appeal has held that its fencing statute simply does not create any duty at all. (*Silva v. Union Pac. R.R. Co*. (2000) 85 Cal.App.4th 1024, 1028 (citing *Di Caprio v. New York C.R. Co.* (1921) 231 N.Y. 94, 131 N.E. 746.)

Several other unique issues present themselves in pedestrian cases, such as specific premises liability schemes. California has abrogated the three-tier categories of persons in a premises liability case into a general duty of reasonable care. (*Hoffmann v. Young* (2022) 13 Cal.5th 1257, 1267, 515 P.3d 635, 641 (citing *Rowland v. Christian* (Cal. 1968) 443 P.2d 561, 562.)

But California courts seem to treat the duty owed to pedestrians differently based on the facts of a case. (Compare, *Christoff v. Union Pacific Railroad Co*. (2005) 134 Cal.App.4th 118, 120 [holding railroad owed no duty to warn of obvious danger when adult pedestrian was on railroad bridge, knew trains used the tracks, testified he heard and saw oncoming train, but did not take any evasive action] *with*, *Monzon v. S. California Reg'l R.R. Auth*. (Cal.Ct.App. Mar. 14, 2012) No. B231921, 2012 WL 837097, at *7 [reversing summary judgment and holding obviousness of danger a fact issue when evidence showed area where incident occurred was frequented by pedestrians, it was adjacent to a park used by pedestrians, and there were no fences, barriers, or lights to warn pedestrians the rail track was active].)

Pedestrian cases also have a disproportionate impact on those in lower-income areas, because these individuals are often walking instead of driving out of necessity and face massive increases in commutes if they were to only use designated crossings (which are nearly all grade crossings for vehicles). The areas of cities where unfenced railroad tracks commonly cut neighborhoods in half are often lower-income neighborhoods, which compounds the problem.

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There are myriad unique issues in pedestrian railroad cases, only a few of which are mentioned here. Nationally, the number of non-crossing pedestrian casualties has increased over the last decade. Conversely, crossing causalities have decreased significantly with the continued implementation of engineering solutions like gates and lights. These issues can vary widely depending on the facts. Unfortunately, until railroads become serious about implementing known engineering improvements, the pedestrian casualty trends will likely not change anytime soon.


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