1983

A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault

Saul Levmore

Jeffrey O'Connell

Recommended Citation

A REPLY TO LANDES: A FAULTY STUDY OF NO-FAULT'S EFFECT ON FAULT?

JEFFREY O'CONNELL* AND SAUL LEVMORE**

In her Article, *Insurance Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*,[1] Elizabeth Landes reaches three conclusions:

1. Assuming (a) the insurance industry acts as a single competitive firm, thereby inducing individuals to assume all damage to others, and (b) all individuals are identical, then compulsory first-party no-fault insurance, whereby drivers insure themselves for their own losses, including payments for pain and suffering, can serve as a substitute for a rule whereby drivers are liable for damage they cause to third parties. Conversely, a rule of no liability for third parties will result in less care and more accidents if the compulsory first-party insurance does not cover payment for pain and suffering.[2]

2. No-fault laws that restrict third-party liability for injuries arising from automobile accidents will lead to increased accident rates. The more restrictive these laws are, the greater the increases.[3]

3. The effect of restricting liability will be lower in states where the automobile insurance industry is more concentrated.[4]

As to the first conclusion, the assumptions are so rigorous and unrealistic that, while they may be of theroretical interest to some economists, the results from employing them are unlikely to be of much interest in the practical debate over whether to adopt (or repeal) no-fault auto insurance laws. The utility of the converse of the first finding, postulating no payment for pain and suffering, is also undermined, since all no-fault auto laws, while admittedly not requiring no-fault payments for pain and suffering, preserve many third-party claims for pain and suffering. These claims are usually related to the level of no-fault benefits; the lower the level of no-fault benefits, the more claims for pain and suffering are preserved. In practice, therefore, much pain and suffering is still compensated under no-fault insurance

---

*   John Allan Love Professor of Law, University of Virginia.

**   Assistant Professor of Law, University of Virginia.

1. Landes, *Insurance Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault Accidents*, 25 J.L. & ECON. 49 (1982).

2. *Id*. at 51, 56.

3. *Id*. at 57.

4. *Id*.

649

MISSOURI LAW REVIEW

laws.[5] Admittedly, Landes attempts to deal with the effect of eliminating some pain and suffering claims under point two above, but this is a different point.

As to the third conclusion, Landes's findings are, as she indicates, extensions of the second conclusion.[6] We turn, therefore, to an examination of this second conclusion as the key one in Landes's article. Landes's study hypothesizes and tests for rationality on the part of motorists in no-fault states; if a driver or potential tortfeasor does not expect to pay for damages, then some rational drivers can be expected to drive with less care and, eventually, to be involved in more accidents than if these drivers expected to be financially responsible for all damages. Thus, no-fault may "underdeter" unsafe driving.[7] Note that a no-fault automobile plan appears to generate less underdeterrence than, for example, a hypothetical no-fault pollution plan; drivers, unlike most polluters, must take care to prevent their *own* bodily harm.[8] Still, Landes hypothesizes—and it is sensible to consider the possibility—that on the margin at least some drivers will be less careful and more accident-prone if they are not charged with all damage done.

Landes, however, tests the sensitivity of drivers' behavior or accident frequency to liability rules by connecting state medical expense tort thresholds—the minimum medical expenses that must be exceeded before the no-fault system in question permits a fault-based tort suit—to fatality rates. The study purports to find an exact correlation between the size of the medical expense threshold and the frequency of accidents. Thus, for example, drivers will drive less carefully under a no-fault system permitting tort suits only for injuries involving $1500 or more in medical expenses than under a no-fault system permitting tort suits for injuries involving only $500 in medical expenses. There is also an exact correlation in between those figures, such that there are more fatal accidents as the medical threshold increases from $500 to $750 to $1,500 to $2,000.[9] But why measure drivers' care with reference to *fatal* accidents under such systems? Fatal accidents generate

---

5. J. O'CONNELL & R. HENDERSON, TORT LAW: NO-FAULT AND BEYOND 281-84 (1975).

6. Landes, *supra* note 1, at 57.

7. Note that positing superrational drivers under no-fault might lead to even more underdeterrence. Not only does the faulty driver not pay other's losses but, unlike at common law, he is paid for his own losses. *But see* note 8 *infra*.

8. Even "full" recompense for all economic and non-economic loss would leave the driver with the anguish of personal injury itself. O'Connell, *A Proposal to Abolish Contributory and Comparative Fault, with Compensatory Savings by also Abolishing the Collateral Sources Rule*, 1975 U. ILL. L.F. 591, 593-94.

9. Landes, *supra* note 1, at 61-63. A "medical expense threshold of $500 implies about a 4 percent increase in fatal accident rates; a medical expense threshold of $1500 implies an increase in fatal accidents of *more than 10 percent!*" *Id.* at 62 (emphasis in original). Left unexplained is Landes's finding that a $1,000 threshold is associated with a level of fatal accidents *lower* than that generated by a $500 to $750 threshold. *Id.* at 63.

tort suits under *all* no-fault statutes because *all* stated thresholds are thereby exceeded; in every no-fault state, then, a driver carelessly causing death remains subject to normal tort liability.[10] The superrational driver, therefore, knows that he will be responsible for causing fatal accidents and ought to take as much care in preventing fatalities whether or not a no-fault system is in effect. Thus, the pertinent study (though one for which the data, as Landes indicates, is much harder to work with)[11] would focus on accidents in parking lots or other locations in which the thresholds and boundaries of no-fault statutes operate. But inasmuch as the no-fault statutes do leave the most serious accidents to tort law, a study that focuses on fatalities is not a study of no-fault systems. It is, instead, an exercise demonstrating that fatalities are not easily predicted by population densities[12] and other identifiable factors. The unexplained portion of fatality statistics cannot simply be tied to the prevailing liability rules without a more logically chosen connector.

One might be tempted to defend Landes's approach by insisting that (a) different medical expense thresholds do indeed yield different levels of driving care when these thresholds are operative, and (b) motorists who drive less carefully in parking lots drive less carefully even when fatalities are at stake—although the medical expense threshold is then strictly irrelevant. But there are grave difficulties in assuming that drivers are superrational and, at the same time, psychologically induced to be irrational. The hypothetical driver who carefully accounts for (or acts as if he so calculates) probabilities and thresholds and, with technical precision, discounts his own injuries, is hardly the same human who is fooled into causing fatalities by small changes in the medical expense threshold. To illustrate our point, driving techniques during bad weather, including choice of speed, are well within the control of drivers. Superrational drivers presumably will drive more carefully on freeways in order to avoid accidents beyond the threshold but will have less reason to drive more carefully when major accidents are unlikely, as in parking lots. Moreover, once Landes leaps away from the notion that complete liability for causing fatal accidents effectively deters such accidents and instead compares fatality statistics with other variables, there are still other variables that compete all the more for consideration.[13] Why consider only psychologically induced (and, as we have illustrated,

---

10. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 231, § 6D (West Supp. 1982). For a list of the threshold in every no-fault state, see J. O'CONNELL & R. HENDERSON, *supra* note 5, app. III, at 909, 913.

11. Landes, *supra* note 1, at 57-58.

12. For Landes's inclusion of this variable, see *id.* at 59.

13. For the construction of a valid study, then, one might prefer to study either fatal accidents under no-fault statutes that abolish tort actions for fatal accidents (but there are none, see note 10 and accompanying text *supra*) or nonfatal accidents under no-fault statutes that correspondingly abolish tort actions for nonfatal accidents. *See* note 9 and accompanying text *supra*.

techincally irrational) care in the quest to explain fatal accidents? How about variations in weather, police surveillance methods, road quality, driver training, effectiveness of hospitals, urban-rural differences, and myraid other variables that can lead to a rise or fall in fatal auto accidents?[14] Surely Landes's use of state and time dummy variables is not sufficiently precise to treat properly the important variables just mentioned.[15]

Similarly, Landes's implicit assumption that drivers freed from the burden of limited medical expenses will maneuver more recklessly at the margin and suffer increased fatalities begs for a more important study of the effect on accident rates of the magnitude of property damage deductibles under collision insurance—as well as the lack of any collision insurance at all. Non-compulsory collision insurance coverage, payable for damage to the insured's own car, without regard to fault, is sold subject to deductibles varying from small to large amounts, e.g., $50 to $1000. There are many accidents involving property damage alone for every one that also involves personal injury. Will not these same superrational drivers participate in varying numbers of fatal accidents depending on their purchase of collision insurance and the size of the deductible thereunder? To be sure, a collision insurance study would not be easy. Insureds may adversely select both collision insurance coverage and the size of deductibles—i.e., the choice of no coverage or a high deductible may be disproportionately the choice of safer drivers. On the other hand, purchase of collision insurance may well correspond more to wealth, age of car, or talent of insurance salesmen. Indeed this leads to our basic point:

It is encouraging to see empirical work that attempts to weigh the effect of legal rules on human behavior. But to be effective, such studies must often be awesomely complicated—as is true of a study on the effects of no-

---

14. A United States Department of Transportation study indicates that there has been no change in accident rates or severity from no-fault laws:

> [L]ooking at accident rates over the 1970-75 period for each of the 16 no-fault states, no discernible jump in accident frequency following the institution of the states' no-fault laws can be found. In fact, the accident rate trend for each state generally follows the gradual downward aggregate trends for the U.S. as a whole, as well as those trends for the U.S. urban highway and the U.S. rural highway accident rates.

U.S. DEP'T OF TRANSPORTATION, STATE NO-FAULT AUTOMOBILE INSURANCE EXPERIENCE, 1971-1977, at 60 (1977).

15. *See* Landes, *supra* note 1, at 59:

> The state dummy variables capture the effect of other important determinants of accident rates [besides state population and population density] which may vary considerably across states, such as the age, race and sex composition of the population. Similarly the time dummy variables will capture the effect on driving, and therefore on accidents, of the dramatic changes in the price of gasoline between 1967 and 1977.

A dummy variable is an open-ended variable that seeks to hold various influences constant while the specified variable is examined.

fault laws on safe driving. Some might find simpler, more manageable studies—such as Landes's—suggestive, but we must all be very wary of policy conclusions drawn from them.