Dr Hyman and Prof Silver’s article published in the Medical Ethics section of CHEST (January 2013) states that the system of resolving malpractice complaints is expensive. However, there was no discussion of the ethical dilemmas raised by the facts they present.

In medical ethics, the principle of justice is often used to discuss the distribution of resources. Our fault-based system starts with the premise that a person injured by negligence is entitled to more resources than a person with an identical injury due to bad luck. This reflects a value judgment, and the system that arises from that judgment is expensive.

The authors state that the direct costs of the malpractice system are about 2% of total health-care spending (i.e., 2% of perhaps $2.6 trillion). Mello et al. estimated that the cost of the malpractice system in 2008 dollars was $55.6 billion annually. The authors report that in a state of 25 million people (Texas) about 5,300 malpractice claims were made annually, and 20% resulted in payment, with an average jury verdict of $3 million. This means that about 1,060 claimants (0.0042% of the Texas population) were compensated by this system in Texas. So, our system spends $55.6 billion (a figure greater than the entire health-care budget in some developing countries) to benefit a very small proportion of the population.

There are a variety of reasons for the cost. However, one reason cited by the authors is potentially ethically troubling for physicians: the high cost of expert witnesses. This raises the question: Even if the market will allow it, is it ethical for a physician to charge more per hour for services as an expert in a malpractice case than he or she is paid per hour for patient care services?

Some might argue that no expense should be spared to compensate an injured patient, since no amount of money will ever be enough to make up for an injury. They might believe that $55.6 billion annually is too small an investment in the malpractice system. Others might suggest that the $55.6 billion could be better spent on improving public health or patient safety here in the United States or be spent on health care in resource-poor nations. Whatever your opinion, it is important to remember that the choices we make reflect our values.

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Response

To the Editor:

We are grateful for Dr Vest’s comments on our article in CHEST. He raises three issues. First, Dr Vest suggests that doctors may not ethically charge more when testifying as experts than they do when treating patients. We find this suggestion puzzling. The market price for expert services reflects the supply of qualified individuals willing to perform them. Prices are high because tort reform has restricted the supply of those who can be experts and because physicians actively discourage one another from providing such services. Dr Vest’s strategy of using ethics rules as price controls would restrict the supply even further. If we want to reduce the cost of medical experts, the ethical (and efficient) thing to do is to get rid of the constraints, rather than make them worse in the name of ethics.

Dr Vest also suggests that money spent compensating victims through the tort system might more wisely be used in other ways, such as to improve public health or patient safety. Analysts disagree on whether the costs of the current system exceed the benefits, but there is no credible reason to think that health-care providers would use the money currently consumed by malpractice premiums to improve their delivery systems if given the chance to do so. Why would they care more about patient safety if the (admittedly fairly limited) threat of being held legally accountable for errors were removed?

Finally, Dr Vest thinks the malpractice system is expensive partly because it is fault based. It is important to distinguish the high transaction costs our fault-based system generates from the total cost of compensating patients who are injured by medical treatment. Proposals to switch to a no-fault system routinely fail because any such system would, by definition, have to compensate many more injured patients, and, therefore, would be vastly more expensive. The fault-based system keeps total costs well below what they would be otherwise, because its high transaction costs discourage claiming.

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