Chapter 14
It's for the Judges to Decide: Allocation of Trial Costs in Israel Report on Israel

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14.1 Introduction

The law governing court and attorney fees (hereinafter "trial costs") is of utmost importance for the scope, shape and outcome of civil litigation, as well as for access to justice. The rules governing litigation costs affect all stages of litigation. First, they substantially influence whether a dispute will result in a trial or not. If, due to high costs, the case is not worth pursuing (trial costs equal or exceed the expected recovery in a monetary case), no litigation will ensue even if the claim is meritorious. And people who cannot afford the costs of litigation are unable even to bring a suit. For them, costs can completely block access to justice. Second, litigation costs influence the parties' litigation strategy – what steps they take, how much money they invest, what risks they bear – which affects the overall efficiency of litigation. Third, costs play an important role in determining the outcome of the litigation – whether the case is abandoned, settled, or pursued to its conclusion, as well as the accuracy of the trial's result.

14.2 The Basic Rules Governing Trial Costs: Who Pays?

The rules regulating trial costs and fees are specified in the Rules of Civil Procedure of 1984.[1] The fundamental rule (Rule 511) grants the court very wide discretion with regard to both the allocation and the amount of trial

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[1] Sections 511–519 to the Rules of Civil Procedure, 1984 (the "Rules").

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costs, subjecting it to only a limited set of rules (prescribed in Rule 512). These rules instruct the court to base its cost decision on, among other things, the amount or value of the relief asked for by the plaintiff and the remedy granted by the court. It also authorizes the court to take into consideration the behavior of the parties during the trial. Courts are not required to distinguish between the two components of trial costs (namely, court costs and attorney fees),[2] but may treat them jointly.

The Supreme Court has issued several important rulings dealing with trial costs. In 2005, the Supreme Court's registrar delivered a decision according to which judges should award the winning party its actual costs, unless such an award would unreasonably impair access to justice and equality or cause over-deterrence.[3] In a subsequent decision, the Supreme Court explained that awarding the winning party its actual costs is intended to prevent financial loss by the winning party, to deter potential plaintiffs from filing frivolous claims, and to discourage potential defendants from defending against a rightful suit. However, the Court continued, the award of actual costs is subject to their being "reasonable, proportional and necessary for the litigation." This limitation is intended to avoid over-deterrence, prevent inequality between rich and poor parties, inhibit inappropriate increases in the cost of litigation, and foster access to justice.[4] Another decision specified some of the factors judges should consider when awarding litigation costs: the character of the suit and its complexity, the relief sought, and the proportionality between it and the relief granted, the amount of work invested by the party on the litigation, the actual amount paid or payable as attorney fees, and the behavior of the party during the litigation.[5] Notwithstanding these decisions, it is clear to those acquainted with Israeli civil litigation that, in the majority of the cases, the awarded litigation costs do not reflect the actual costs expended on the litigation and a great deal of variation exists in the scope of trial costs that are awarded by different judges. This is so in part because courts do not know what the actual litigation costs were, since parties are not required, and rarely do, introduce into evidence of the actual costs and fees expended on the litigation.

In 2002 the Supreme Court's President, Justice Aharon Barak, issued administrative guidance regarding the award of attorney fees. According to the guidance, judges are *allowed* to take into account when calculating attorney fees, the written retainer agreement between the party and her

[2] Rule 512(a) of the Rules of Civil Procedure.

[3] H.C. 891/05 *Tnuva v. The Authority for the Licensing of Imports* (delivered on 31.3.2005). It should be noted that due to the status of the registrar as a magistrates' court judge his rulings are not binding on trial court judges.

[4] R.C.A 6793/08 *Luar v. Meshulam Levinshtein Handasa Vekablanut* (delivered on 28.6.2009).

[5] C.A. 9535/04 Siat "Biyalik 10" v. Siat "Yesh Atid Biyalik", P.D. 60(1) 391 (2005).

attorney, introduced into evidence by the attorney in the course of the trial or as an annex to the written summations. The second part of the guidance qualifies this instruction by saying that attorneys are by no means obligated to introduce retainer agreements into evidence and courts are not obligated to take them into account when calculating the fees.[6] Later on, the succeeding President, Justice Dorit Beynish, issued an amendment to the administrative guidance stating that "as a general rule, the attorney fees to be awarded should approximate the actual costs expended on the litigation, subject to their being reasonable, proportional and necessary under the circumstances. In this regard, each party is allowed to introduce, alongside the summation, the written retainer agreement between that party and her attorney, as well as proof of any money paid as attorney fees". The second part of the administrative guidance remained as it was.[7] These administrative guidelines on the books have not changed the practice on the ground and retainer agreements are rarely introduced into evidence. This is so probably due to lack on incentives on the part of the lawyers to reveal information about their fees with no benefit to them (since attorney fees are awarded to the clients).

Historically, courts have tended to disregard the actual amounts expended by winning parties when awarding costs. This led to substantial under-compensation. In recent years, however, following the "constitutional revolution"[8] that began with the enactment of the Basic Law: Human Dignity and Liberty and the constitutionalization of civil procedure, the awards of trial costs tend to be higher, thus probably *more* in line with actual costs,[9] although in most cases they still do not reflect the full costs expended on the litigation. Awards of trial costs in appeal proceedings are treated in the same manner.

Trial costs are subject to fierce criticism. In 2008, the Israel Bar's standing committee on civil procedure and evidence issued a proposed amendment to the Rules of Civil Procedure that deal with litigation costs. The opening statement of the proposal states as follows: "the problem with regard to the ruling on court costs and attorney fees is very well known. Although the decided ruling is that the amounts awarded as litigation costs should reimburse the winning party for its actual expense on the litigation, subject to it being "reasonable, proportional and necessary" to the litigation, in fact courts do not follow this ruling. There is a great divergence

[6] *See* Administrative Guidance of the President of the Supreme Court 1/98, Calculating Attorney Fees (17/11/2002).

[7] See Chief Justice Instructions: Carrying Guidelines, State of Israel Judicial Authority website, available at http://elyon1.court.gov.il/heb/dover/html/hanchayot_new.htm.

[8] Aharon Barak, Interpretation in Law (Vol. III – Constitutional Interpretation) (1994).

[9] Shlomo Levin, The Theory of Civil Procedure: Introduction and Basic Principles (Second edition, 2008) 48.

in ruling on court costs and attorney fees between different courts that prevents predictability. Usually the amounts awarded are not realistic, even when the expenditure on the litigation was reasonable. In such cases, the winning party comes out with a financial loss. Sometimes courts even refrain from awarding litigation costs to the winning party without providing any explanation."

In addition to court costs and attorney fees, the costs of taking evidence can also be quite high and a burden on the parties in certain types of cases, such as tort litigation involving bodily injury as well as other cases in which expert testimony is essential.[10] Each party bears its own costs of collecting evidence, including expert testimony. One important exception is court-appointed experts, the costs of which are allocated by the court. Under Section 513(1) of the Rules of Civil Procedure, the parties' outlays on experts are a component of trial costs and, as such, are treated in the manner described above.

A high percentage of civil cases are settled out of court, whether through direct negotiation or via court-affiliated ADR mechanisms.[11] In such cases, the parties typically reach an agreement regarding the manner in which trial costs will be allocated among them. When agreement on this issue cannot be reached, the parties may turn to the court for a ruling specifically on this matter.

14.3 Exceptions and Modifications

There are a number of regulatory exceptions to the requirement to pay court fees, which are based either on the party's financial need or on the nature of the proceedings. Courts will exempt plaintiffs in full or in part on a showing of economic inability to pay.[12] This provision is applied narrowly, and the applicant must demonstrate not only inadequate personal financial resources but also the unavailability of access to financial assistance from other sources (such as family members). Exemptions based on the nature of the proceedings include such cases as prisoner petitions,[13] claims for damages for bodily harm, and governmental takings,[14] as well as many others listed in Section 20 of the Court Rules (Court Fees). In all such cases, the exemption from payment of court fees may be partial.

[10] Special rules govern proof of medical matters in which expert testimony is required. See Rule 127. In order to contest such testimony, counter expert testimony must be submitted. See Rule 128.

[11] For statistics on mediations conducted in the year 2008 see http://www.israelbar.org.il/article_inner.asp?pgId=79649&catId=178.

[12] Section 14 of the Court Rules (Court Fees), 2007.

[13] Section 9 of the Court Rules (Court Fees), 2007.

[14] Section 3(8) of the Court Rules (Court Fees), 2007.

In 2008 the Rules of Civil Procedure were amended to incorporate mandatory introductory mediation meetings in most types of civil cases (above a certain monetary threshold). Mandatory pre-litigation procedures impact trial costs both formally and informally. Formally, plaintiffs may be reimbursed for court fees if such mediation is successful.[15] Informally, courts take into account the parties' willingness to engage in mediation when ruling on trial costs. Since mandatory pre-litigation mediation is a recent development, it has not yet been fully implemented so that the full scope of its impact remains unclear.

Parties are permitted to represent themselves in civil cases,[16] and in small claims proceedings, self-representation is mandated while attorney representation is greatly restricted.[17] In cases of self-representation, trial costs are calculated as if the party were a witness on his or her own behalf.[18] Statistical data on the prevalence of self-representation are not available, but one may assume a negative correlation between the value of the claim and the incidence of self-representation.

14.4 Encouragement or Discouragement of Litigation

Rules governing trial costs are interpreted by judges as intended to affect a party's decision to litigate. Court fees are designed, among other things, to decrease the incidence of frivolous claims. Court fees are set as a percentage of the value of the relief sought, and thus serve as a disincentive to overstating a plaintiff's claim.[19] This is counterbalanced by restricting reimbursement of trial costs to amounts that are "reasonable, proportional and necessary," the intent of which is to prevent over-deterrence in filing suits, as well as to facilitate more equal access to justice.[20]

Court fees are paid in two installments: the first half upon filing the claim, and the second half 20 days prior to the date set for the opening of trial.[21] The court is authorized to order the plaintiff to deposit a security to insure the future reimbursement of the defendant's costs of trial in case she loses. The security is usually deposited at the initial stages of trial.[22] This mechanism is rarely used by the courts, and is usually restricted to

[15] Section 6(b) of the Court Rules (Court Fees), 2007.

[16] Rule 472 of the Rules of Civil Procedure.

[17] Section 63 of the Courts' Act, 1984.

[18] Rule 516 of the Rules of Civil Procedure.

[19] R.C.A. 2623/02 **Sys v. Bezek**, P.D. 57(1) 717, 720 (2002); C.A. 10537/03 **State of Israel v. Yesh Gad Industries**, P.D. 59(1) 642, 648 (2004).

[20] R.C.A. 6793/08 **Luar Ltd. V. Meshulam Levinstein Engineering** (decided 6.28.2009).

[21] Rule 6(a) of the Court Rules (Court Fees), 2007.

[22] Rule 519 of the Rules of Civil Procedure.

foreign plaintiffs. Attorney fees are paid pursuant to the agreement that is reached between the lawyer and the client which can take a variety of forms (including, but not limited to, retainer agreements). No data exists as to the prevalence of upfront fee payments, which constitute a de facto barrier to access to the courts.

14.5 The Determination of Costs and Fees

As a rule, court fees in the general civil courts amount to 2.5% of the value of the relief sought, with a minimum threshold updated periodically.[23] For any claim exceeding a certain upper limit, the court fees drop to 1% of the amount in controversy.[24] There are particular rules governing court fees in specific types of cases such as declaratory relief, contempt of court, derivative claims, among others. In addition, specialized courts and tribunals (such as family courts, labor courts, small claims courts, etc.) are governed by special rules with respect to court fees.

In principle, attorney fees are established by agreement between the lawyer and the client. There is also some regulation, although much of it comes in the form of soft law. The Israel Bar Act authorizes the Bar to issue recommendations for minimal attorney fees,[25] and the Bar has issued such non-binding recommendations for various categories of legal services.[26] In addition, the Minister of Justice is authorized to declare that with respect to particular types of legal services, a cap on attorney's fees is required, in which case the Bar's national council will set the maximum fees permitted.[27] Such fee caps currently apply pursuant to the context of the Compensation for Victims of Car Accidents Act.[28]

According to Rule 511 of the Rules of Civil Procedure, the court has broad discretion in deciding both the size and allocation of trial costs. Rule 512(a) restricts the court's discretion by mandating that the attorney's fee component should be no less than the minimal fee recommended by the Bar unless special circumstances exist, in which case such circumstances must be specified in the ruling on costs.

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[23] As of May 2011, the minimum amount is set at 711 NIS. *See*: Second Supplement (item 1) of the Court Rules (Court Fees), 2007.

[24] As of May 2011, the amount is set at 22,749,919 NIS. *See*: Second Supplement (item 8) of the Court Rules (Court Fees), 2007.

[25] Section 81 of the Israel Bar Act, 1961.

[26] Israel Bar Rules (Recommended Minimal Fees), 2000.

[27] Section 82 of the Israel Bar Act, 1961.

[28] Section 16(b) of the Compensation for Victims of Car Accidents Act, 1975.

14.6 Special Issues: Success-Oriented Fees, Class Actions, Sale of Claims, and Litigation Insurance

The basic rule governing attorney fees permits monetary compensation only.[29] Success-oriented fees are allowed in civil cases,[30] conditioned on an explicit written agreement to that effect between the attorney and the client.[31] Contingency fee arrangements are quite common, especially in tort cases.

The law provides for regulation of success-oriented fees. The Bar is authorized to intervene in an agreement between an attorney and the client, and to lower the agreed-upon fee if it finds the amount asked by the lawyer to be excessive.[32] In addition, specific regulatory restrictions can be found in the Compensation for Victims of Car Accidents Act, under which the amount a lawyer can charge for a successful outcome is capped, based on the manner in which the case was concluded (out-of-court settlement prior to filing a suit, 8%; out-of-court settlement after the suit was filed, 11%; trial verdict, 13%).[33]

The sale of tort claims is prohibited by statute.[34] As regards other types of suits, the situation is more ambiguous. The champerty doctrine applies in Israel and prohibits the sale of claims to third parties. However, over the years this principle has been eroded by the courts, which now draw a distinction between the selling of the right to sue (which is prohibited), and the selling of the right to collect damages (which is allowed). Courts are also more likely to permit such a transfer when the purchaser of the right to sue has some property interest in the claim.[35]

In class action suits, special rules apply both with respect to courts fees and to attorney fees. The Class Action Act of 2006 requires the regulation of court fees by the Minister of Justice.[36] These regulations are still pending. In the meantime, courts usually require class action plaintiffs to pay court fees only with respect to their personal claim (which is typically very small). Attorney fees are regulated by the Act, which requires the court's approval of the amount charged, even when the suit is settled out of court.[37] The general rules governing the imposition of trial costs on the losing party also apply to class action suits. Courts use their discretion

[29] Rule 9(a) of the Israel Bar Rules (Professional Ethics), 1986.

[30] Rule 9(b) of the Israel Bar Rules (Professional Ethics), 1986.

[31] R.C.A. 4723/05 **Levi, Adv. v. Brosh** (decided 12.09.2005).

[32] Section 84(b) of the Israel Bar Act, 1961.

[33] Section 16(a) of the Compensation for Victims of Car Accidents Act, 1975.

[34] Section 22 of the Tort Ordinance [New Version], 1968.

[35] R.C.A. 2077/92 **Sheldon Adelson v. Reif**, P.D. 47(3) 485 (1993).

[36] Sections 44 of the Class Action Act, 2006.

[37] Sections 18 and 23 of the Class Action Act, 2006.

cautiously (perhaps too cautiously) in order to achieve the goals underlying the class action mechanism and they impose high costs on the plaintiffs only when the action is considered frivolous.[38]

There is no legal prohibition on legal expenses insurance. However, such insurance is not common.

14.7 Legal Aid

Israel provides publicly funded legal aid for the indigent. Since 1975, the Legal Aid Department of the Ministry of Justice has provided legal assistance in civil matters for low-income individuals with meritorious claims. Legal aid includes both counseling and representation in court by attorneys appointed by the Legal Aid Department.[39] Numerous NGOs, law school clinics, and private law firms provide legal aid pro bono. The Israel Bar Association established a pro bono program ("Schar Mitzva") in 2002. According to sources of the Bar, over 3000 lawyers are currently volunteering in this program.[40] All law schools have established clinics offering legal aid in a variety of matters. Nonetheless, demand greatly exceeds supply, and many people in need are unable to receive legal aid. Litigation costs thus remain a serious barrier to access to the courts not only for the indigent but also for individuals of average income.

14.8 Conclusion

Litigation costs in Israel are a barrier to access to justice, especially for low and middle class individuals, as well as for small businesses. Judicial discretion in cost allocation is broad, resulting in unpredictability. Moreover, in most cases fees awarded do not reflect actual costs expended on the litigation. This fact, supplemented by the tendency of appellate courts not to intervene in costs awarded by the trial courts, means that there are no "cost wars" of the type existing in the England and Wales.

There is some hope that litigation expenses in Israel will decline, or at least not rise, in the future because lawyer fees are likely to become cheaper. Over the last 15 years, the number of lawyers per capita in Israel has increased dramatically, and is expected to reach 1 in 160 within three years. The downside is the concern that the quality of legal services will suffer accordingly.

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[38] B.S.C. (Tel-Aviv) 14471/01 **Azualus v. The American-Israel Gas Corp.** (decided 12.19.2006).

[39] http://www.justice.gov.il/MOJHeb/SiuaMishpati/.

[40] Nurit Rot, *Schar Mitzva: Over Three Thousand Lawyers in Fifty Three Centers,* The Marker (5.26.2011) (http://www.themarker.com/law/1.647185).