
ARTICLE

ATTORNEYS' FEES IN A LOSER-PAYS SYSTEM

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Attorneys' fees fuel litigation, yet little is known about fees. Fee data are rarely available in the United States or in English rule, loser-pays jurisdictions. This Article analyzes fee awards in Israel, which vests judges with discretion to award fees, with loser pays operating as a norm. The 2641 cases studied constitute nearly all cases terminated by judgment in district courts in 2005, 2006, 2011, and 2012. Given many fee denials and fees that are well below client payments to attorneys when awarded, the Israeli fee system could reasonably be characterized as being more American than English. Moreover, judges use their discretion in a manner that reflects redistributive sensitivity. Fees were awarded to prevailing parties in 72.8%

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of cases. Judges often exercised their discretion to protect losing litigants, especially individuals, from having to pay fees. In tort cases won by individuals against corporate defendants, corporations paid their own fees plus plaintiffs' fees in 99% of the cases; corporate defendants that prevailed in such cases paid their own fees 48% of the time. Asymmetry between plaintiffs and defendants existed. In cases with fee awards, the mean and median fee paid to prevailing plaintiffs was 110,000 shekels (NIS) and 31,000 NIS, respectively; the mean and median fee paid to prevailing defendants was 49,000 NIS and 25,000 NIS, respectively. Plaintiffs prevailed in 54.8% of cases between individuals but received 90% of the fees. Expected award amounts varied by case category and party status. Fees were significantly correlated with damages recoveries in plaintiff victories and with time on the docket. In contract and property cases, but not in tort cases, fees declined as a percent of recovery as the recovery increased.

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We are in deep mourning at the premature passing of Theodore Eisenberg, the Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University Law School, who died after this Article was sent to the press. Ted was an eminent scholar and our greatly admired colleague and friend. As the forefather of quantitative legal research and the founder of the *Journal of Empirical Legal Studies*, Ted changed legal discourse worldwide. In the last five years of his life, he devoted research efforts to the Israeli legal system, and his studies were welcomed by the Israeli legal community, including the Israeli Supreme Court. Ted became an academic leader in Israel, inspiring numerous academics and students to follow in his footsteps. We were very fortunate to be part of this endeavor and to co-author several articles with this brilliant scholar, prolific writer, and passionate intellectual. But what we learned from Ted extends far beyond legal research. Ted represented to us exactly how one ought to live life. We were astounded by Ted's extraordinary kindness, the way he touched the lives of people, his endless wisdom, great optimism, and enormous zest for life. In the midst of the terrible grief we are now experiencing, we also feel profoundly privileged to have wonderful memories of Ted. We feel incredibly lucky to have gotten to know a person as outstanding and kind as Ted in our lifetime. This article is dedicated to his memory and to Ted's wonderful family: Lisa, Kate, Aaron, Dylan, Ollie, Annie, and Tommy Eisenberg.

* * *

INTRODUCTION

On the seventy-fifth anniversary of the Federal Rules of Civil Procedure, it is appropriate to recall the core principle of these Rules “to secure the just, speedy, and *inexpensive* determination” of cases.¹ The litigation expense theme pervades the Rules,² and the key litigation expense item is attorneys’ fees, although the Rules do not specify generally applicable fee rules. The Rules, like all of litigation, nevertheless operate in the shadow of methods for paying attorneys. However, except for isolated pockets of legal activity,³ little systematic knowledge exists of the fee patterns in the United States or other countries. In the United States, this is in part because the default American rule is that each party pays its own fees and fee amounts usually remain private. Most other countries follow the English rule, under which the losing party pays its opponents fees. In these countries, little quantitative study of fees exists.

Despite this dearth of fee information, proposals to shift from the American rule to the English rule often emerge as a way to reduce expense and questionable litigation.⁴ The implications of such a shift for the operation of the Rules, and the entire litigation process, are substantial. It is therefore helpful to examine fees in a legal system, such as Israel’s, in which a loser-pays norm exists. The benefits of such an examination are at least fivefold. First, systematic knowledge about actual fee practices in any

¹ FED. R. CIV. P. 1 (emphasis added).

² *E.g.*, FED. R. CIV. P. 11, 16(f)(2), 23(g)-(h), 26(b)(2),(g), 41, 42, 54(d)(2), 58(e) & 68.

³ These include automobile accident cases in the United Kingdom and class action settlements, civil rights cases, and bankruptcy cases in the United States. *See generally* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248 (2010) [hereinafter Eisenberg & Miller (2010)]; Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) [hereinafter Eisenberg & Miller (2004)]; Paul Fenn & Neil Rickman, *Fixing Lawyers’ Fees Ex Ante: A Case Study in Policy and Empirical Legal Studies*, 8 J. EMPIRICAL LEGAL STUD. 533 (2011); Lynn M. LoPucki & Joseph W. Doherty, *The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases*, 1 J. EMPIRICAL LEGAL STUD. 111 (2004); Stewart Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719 (1988). Early studies of fees are referred to in Herbert M. Kritzer, *Empirical Legal Studies Before 1940: A Bibliographic Essay*, 6 J. EMPIRICAL LEGAL STUD. 925 (2009).

⁴ *See, e.g.*, Theodore Eisenberg, Talia Fisher & Issi Rosen-Zvi, *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452, 1455 (2013) (stating that the difference in actual operation between the American and English rules is sufficiently blurred to call the dichotomy into question); Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis* (arguing that “[t]he world of cost and fee allocation in civil procedure is much better described as a broad spectrum” than a dichotomy), in COST AND FEE ALLOCATION IN CIVIL PROCEDURE 3, 9 (Mathias Reimann ed., 2012).

jurisdiction is rare despite fees' obvious importance. Second, information about a loser-pays system's operation informs the vast majority of countries since they use such systems. Third, since loser-pays proposals often are on the U.S. reform agenda, information from Israel can illuminate how such a system might operate in the United States. Fourth, within Israel, little systematic knowledge exists about how the attorneys' fee system operates. The Israeli bar and policymakers should have a direct interest in such a study. Fifth, in Israel, judges have full discretion with regard to fee awards and denials. This judge-centered allocation system can serve as an alternative to both the American and English rules. Interest in how a judge-centered system actually functions should transcend the countries using it. Its functioning should interest countries concerned about fees and how they might be reduced, made more certain or more flexible, or made fairer.

This Article reports the results of a study of four years of attorney fee awards for nearly all district court cases litigated on the merits in Israel, a total of 2641 cases. Three outcomes are of primary interest: the patterns of fee grants and denials to winning and losing parties, the amount of fees when awarded, and the relation between the awarded fee and the client recovery in cases when plaintiffs prevailed and fees were awarded.

To summarize our findings, Israeli judges often exercised their discretion in a way that protects losing litigants, especially individuals. Israeli judges denied fees to prevailing defendants in 29% of cases and to prevailing plaintiffs in 26% of cases. In cases in which individual defendants lost, fees were denied to successful plaintiffs 31% of the time, compared with 17% denials in cases lost by corporate defendants. The fee denial rate to winning plaintiffs was lowest in tort cases and was highest for winning defendants in tort cases. Protection of individuals was common in tort cases between individual plaintiffs and corporate defendants. In non-automobile accident tort cases brought and won by individual plaintiffs, corporations had to pay their own fees plus the plaintiffs' fees 99% of the time. In cases won by the corporate defendants, the defendants had to pay their own fees 48% of the time. In one judicial district, Nazareth, individual plaintiffs were denied fees in 82% of the property cases they won against individual defendants.

The mean fee award to winning plaintiffs was 113,000 shekels (NIS) (1 NIS equals approximately \$0.27) compared to 49,000 NIS for winning defendants. The median fee award to winning plaintiffs was 35,000 NIS compared with 25,000 NIS for winning defendants. Excluding tort cases, in which contingency fees are the norm for plaintiffs, these differences decrease, with the winning plaintiff median equal to 26,000 NIS and the

winning defendant median equal to 25,000 NIS. Fee amounts were significantly correlated with recovery amounts and with the time a case took to resolve.

Part I of this Article reviews relevant prior literature on fee rules and describes our expectations about the results. Part II provides background information about Israel's legal system and its rules governing fees. Part III describes our study's data and our research methodology. Part IV reports our results, which are discussed in Part V.

A preliminary word on terminology may be helpful. Legal systems sometimes have different rules for amounts paid to attorneys (fees) and for other litigation expenses, which are often referred to as costs. We use the term "fees" for convenience, but the amounts we report are for the combined amounts of fees and costs.

I. PRIOR LITERATURE AND HYPOTHESES

The theoretical literature on attorneys' fees has been reviewed elsewhere.⁵ That literature supplies few consistent predictions or prescriptions,⁶ and we instead focus on prior empirical results.

A. Rates of Fee Denials to Prevailing Parties

With the exception of our prior work on a smaller two-year Israeli sample,⁷ empirical literature does not address the quantitative pattern of fee awards and denials in the mass of civil cases. A core motivation behind allowing fee denials is the perceived negative effect of a loser-pays rule on potential litigants with lower incomes.⁸ Litigants' status as individuals, corporations,

⁵ See Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 334-39 (2013) (reviewing theories developed with respect to attorneys' fees clauses).

⁶ *Id.* at 339 ("Taken as a whole, the theoretical literature is indeterminate as to the practical effects and social utility of attorney-fee regimes.").

⁷ See Eisenberg, Fisher & Rosen-Zvi, *supra* note 4.

⁸ A loser-pays rule has been described as "a crude exclusion device the burden of which falls disproportionately on individuals and community groups which do not have the same deep pockets as governments and corporations." Camille Cameron, *The Price of Access to the Civil Courts in Australia: Old Problems, New Solutions: A Commercial Litigation Funding Study*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE 59, 60 (Mathias Reimann ed., 2012) (footnote omitted); see also Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 740-41 (2010) (stating that low- and middle-income individuals are often "barred from pursuing their rights" under the American rule). Limited litigation cost shifting may be superior to a full loser-pays system. See Emanuela Carbonara & Francesco Parisi, *Rent-Seeking and Litigation: The Hidden Virtues of the Loser-Pays Rule* 13-14 (Univ. of Minn. Law Sch., Research Paper No. 12-39, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144800 (finding that the English rule is more

public corporations, or governmental entities can be a rough proxy for ability to pay. On average, corporations have a greater ability to pay than individuals. Public corporations, on average, likely have greater resources than private corporations or individuals. We therefore expect judges to protect individuals more than corporations from fee awards and to protect public corporations least of all. The government likely has greater ability to pay than almost all other litigants, but it also differs from other litigants in its financial incentives and in its litigation behavior.⁹ Therefore, we do not have a clear expectation about how judges will treat the government in allocating fees.

Our prior work did not analyze data on amounts of fees or client recoveries. The probability of a fee denial may decrease as the level of damages awarded to plaintiffs increases. This is because damages are a measure of the degree of harm caused by the defendant, and it is reasonable to believe that the greater the harm caused, the greater the sentiment toward making the plaintiff more fully whole by awarding fees as well as damages. This conjecture finds tangential support in U.S. punitive damages data. Although punitive damages are infrequently awarded to prevailing plaintiffs, a strong association exists between the amount of compensatory damages and the probability of a punitive damages award.¹⁰ At the highest end of compensatory awards (those exceeding \$10 million), the probability of a punitive damages award when the plaintiff won at trial and sought punitive damages was about 82%.¹¹ Whether through punitive damages or awards of attorneys' fees, decisionmakers may impose additional costs on defendants that cause more harm.

The case category may also be associated with fee denial rates. Tort cases have two distinctive features that may influence judges to make successful tort plaintiffs whole by not denying them fees. First, tort plaintiffs usually are victims in an accident involving a party with whom they did not seek to deal. Unlike most contract and property interactions, little opportunity

effective than the American rule at encouraging "socially valuable litigation," in which legal uncertainties are resolved).

⁹ See, e.g., Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94, 95 (2003) ("Government litigants, who need not worry about profitable performance in the same manner as private litigants, and who operate in a different institutional structure, are likely to have costs, broadly defined, that differ from private litigants.").

¹⁰ Theodore Eisenberg, Michael Heise, Nicole L. Waters & Martin T. Wells, *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. LEGAL ANALYSIS 577, 617 (2010) ("Punitive damages were rarely sought in tried cases, were frequently awarded when requested, and were significantly associated with the level of the compensatory award.").

¹¹ *Id.* at 599.

exists *ex ante* to avoid dealing with a counterparty. Second, tort plaintiffs are on average less well off than contract and property plaintiffs. District court plaintiffs in contract and property cases are usually people with means. Otherwise they would not be in district court litigating contracts worth more than 2.5 million NIS (the jurisdictional amount minimum)¹² or fighting over the ownership of real property. Tort plaintiffs, on the other hand, are people who were injured badly (or they would not have filed their claim in district court) and not necessarily people with substantial assets. The institutional makeup of plaintiffs across case categories supports the contention that tort plaintiffs likely have less wealth. Our data revealed that about 85% of district court tort plaintiffs are individuals compared to 53% of contract plaintiffs and 75% of property plaintiffs. We expect the involuntary nature of tort transactions, the lesser wealth of tort plaintiffs, and the nature of their injury to leave judges more inclined to make successful tort plaintiffs whole.

B. Levels of Fee Awards

With respect to award amounts, we expect them to vary based on the time and effort in a case, the degree of success, and the plethora of factors that courts and the legislature consider relevant in assessing fees.¹³ A central determinant of fees should be the effort expended by the attorneys. The 1983 Civil Litigation Research Project (CLRP) reported the hours devoted by lawyers to cases in five federal courts and five state courts in the same locales for cases terminated in 1978.¹⁴ The data are based on interviews with

¹² See *infra* Section II.A.

¹³ For Israel's list of factors incorporated in the Rules of Civil Procedure and legal doctrine, see *infra* Section II.B. A frequently cited list of such factors in the United States is in *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717-19 (5th Cir. 1974) (listing twelve factors for assessing the reasonableness of an attorney's fees award), *overruled in part by Blanchard v. Bergeron*, 489 U.S. 87 (1989) (holding that the *Johnson* factors were useful but that an attorney's private fee arrangement was not a dispositive factor in determining whether a fee award was reasonable). In statutory fee-shifting cases, the Supreme Court has shifted the focus almost exclusively to reasonable hours worked times reasonable hourly fee. See *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1670, 1672-73, 1676-77 (2010) (reversing 75% enhancement of attorney's fees as essentially arbitrary, and holding that enhancements require specific evidence that the lodestar fee would not have been adequate to attract competent counsel); *City of Burlington v. Dague*, 505 U.S. 557, 565-66 (1992) (giving unenhanced lodestar under fee-shifting environmental statutes). See generally 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1803-1803.2 (3d ed. 2005) (detailing the power courts have to award fees in class actions and under what circumstances).

¹⁴ 2 DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT PART A at II-70, II-70 tbl.II-4-C (1983) [hereinafter CLRP] ("Cases with higher stakes tend to require and justify a greater investment of lawyer time.").

719 lawyers in 564 separate cases.¹⁵ Cases with higher stakes required greater expenditures of time for both hourly and contingent fee lawyers.¹⁶ A similar relation was observed in United Kingdom automobile accident cases.¹⁷

Additional reasons support expecting a positive correlation between client recoveries and attorneys' fees. First, higher recoveries may be associated with attorneys' relative performances in cases. Higher recoveries may reflect both greater success than lower recoveries and greater investment of time. A strong association between fees and client recovery has repeatedly been found in class action settlements, in which the court must approve the reasonableness of the attorneys' fees to plaintiffs' counsel.¹⁸ The increase in fee awards as recoveries increased was so regular in United Kingdom automobile accident cases that the empirically observed correlation became the basis for setting a mandatory fee schedule based on the recovery amount.¹⁹

Second, from a psychological perspective, the presence of higher recoveries and damages in a case may have an anchoring effect. Exposure to larger numbers, whether relevant or not to the task at hand, can induce the production of higher numbers in many contexts.²⁰ In the legal context, amounts of economic and noneconomic damages are highly correlated, as are amounts of punitive and compensatory damages.²¹ Whether or not

¹⁵ *Id.* at II-12 (describing the study's methodology).

¹⁶ *Id.* at II-71, II-71 tbl.II-4-D ("The more complex a case, the more time lawyers are likely to spend on it.").

¹⁷ Fenn & Rickman, *supra* note 3, at 549-52 (suggesting that Britain's "Fixed Recoverable Cost Scheme" has "resulted in an increase of around 50 percent in the likelihood of litigation over noncost matters").

¹⁸ Eisenberg & Miller (2010), *supra* note 3, at 279 ("[The percentage fee method for awarding fees in class actions] appears to be the dominant de facto method used and best explains the pattern of awards."); Eisenberg & Miller (2004), *supra* note 3, at 76 ("The single most important factor determining the fee is the size of the client's recovery."); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 845 (2010) (finding that district courts typically calculate fee awards using the "highly discretionary percentage-of-the-settlement method," and such awards "were strongly and inversely associated with the size of the settlement").

¹⁹ Britain adopted its "Fixed Recoverable Costs Scheme for Low Value Road Traffic Accidents" in response to concerns about increasing legal costs. Fenn & Rickman, *supra* note 3, at 534 (describing the Fixed Recoverable Costs Scheme, which determines the costs available to successful lawyers in road traffic accident claims under £10,000).

²⁰ See, e.g., Valerie P. Hans & Valerie F. Reyna, *To Dollars from Sense: Qualitative to Quantitative Translation in Jury Damage Awards*, 8 J. EMPIRICAL LEGAL STUD. 120, 143-45 (2011) (arguing that anchors have an impact on jury assessments of damages).

²¹ See *id.* (finding that the amount of economic damage serves as a "guidepost for jurors" and that there is a "strong connection between compensatory and punitive damages").

judges are less affected by anchoring than nonprofessionals, evidence exists of anchoring effects on judges.²²

The case category may also be associated with factors influencing fee awards. In the CLRP lawyer survey, there was no meaningful difference in the median hours spent by hourly lawyers across tort, contract, and property cases.²³ But contingent-fee lawyers expended more than twice the median hours on tort cases than they expended on property cases,²⁴ even though contingent-fee and hourly lawyers spent about the same amount of time on tort cases.²⁵ Contingent fees are said to be as common in Israel as they are in the United States and to be primarily used in the same areas of law, mostly tort.²⁶ Given the risk and extra hours associated with contingency fees, we might expect higher fees for plaintiffs in tort cases than in other cases. The standard contingency fee rate in Israel is 20%-25%, with 20% being the most common rate,²⁷ which should influence the relationship between fee and recovery. Israeli law also has a specific rule relating to fees in automobile tort cases. The law caps the contingency fee at 13% of the recovery if the case reaches judgment.²⁸ Therefore, one needs to account separately for automobile cases.

Work by the National Center for State Courts (NCSC) also helps inform expectations about fee award levels across case categories. Based on a 2012 survey of the American Board of Trial Advocates, the NCSC reported fees of cases litigated to trial for several case categories.²⁹ A definite hierarchy emerged. Median fees were highest in professional malpractice cases (\$122,000), followed by contract cases, employment cases, real property

²² See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 790-94 (2001) (outlining results of a study that demonstrate that judges were impacted by the presence of an anchor condition when evaluating damage awards).

²³ See CLRP, *supra* note 14, at II-70 tbl. II-4-C (showing approximately 30 hours for each area of law).

²⁴ See *id.* (finding that contingent fee lawyers spent a median of 30.3 hours on tort cases and 12.5 hours on property cases).

²⁵ See *id.* (finding that contingent fee lawyers spend a median of 30.3 hours on tort cases and that hourly lawyers spent a median of 29.6 hours).

²⁶ See Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 254 (2010) ("Contingent-fee arrangements are as prevalent in Israel as they are in the United States and are regularly used in the same areas of law.").

²⁷ *Id.* at 255 n.10.

²⁸ Road Accident Victims Compensation Law, 5735-1975, 29 LSI 311, § 16 (1974-1975) (Isr.).

²⁹ See Paula Hannaford-Agor & Nicole L. Waters, Na'l Ctr. for State Courts, *Estimating the Cost of Civil Litigation*, CASELOAD HIGHLIGHTS, Jan. 2013, at 1, 7, available at http://www.courtstatistics.org/OtherPages/Publications/-/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (showing cost of litigation by case type, such as automobile, employment, and malpractice).

cases, and premises liability cases.³⁰ Median fees were lowest in automobile tort cases (\$43,000).³¹ The NCSC data suggest that the specific area within tort law is a more important determinant of fees than the fact that a case is a tort case. Public corporations, private corporations, and individuals likely have differing capacities to pay fees. Their relative wealth might influence both the level of fee awards and whether fees are awarded.

C. Fees as a Percent of Recovery

A separate question from the relationship between the amount of client recovery and the fee amount is the issue of the fee as a percentage of the recovery. The recovery amount to fee amount relationship could be a constant percentage, similar to the oversimplified description of the one-third contingency fee in U.S. tort law. But the fee as a percentage of the recovery might also increase or decrease as the recovery grows. An increasing percentage gives the lawyer a stronger incentive to obtain the marginal recovery dollar. A decreasing percentage introduces an economy of scale, which is especially relevant, and frequently observed,³² in aggregate litigation such as class actions. The Israel Bar Association's suggested minimum tariff rates recommend a declining percentage as claims amounts increase.³³

II. BACKGROUND INFORMATION ABOUT ISRAEL'S LEGAL SYSTEM

Understanding Israel's relevant institutional framework is necessary to comprehend this study. This Article focuses on fees at the trial court level in Israel's district courts, and thus we limit the institutional description of Israel's court system to those aspects that are most relevant to this study. We then describe Israel's rules on the allocation of fees.

A. Israel's Trial Court System

Israel is a unitary state with a single system of courts of general jurisdiction.³⁴ Among the courts of general jurisdiction, Israel's judiciary law establishes a hierarchy of three levels with the Israel Supreme Court (ISC)

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., Eisenberg & Miller (2010), *supra* note 3 (showing that, due to scaling effects, fees as a percent of recovery decrease as the recovery amount increases).

³³ See *infra* text accompanying notes 66-68.

³⁴ Unless otherwise noted, this description of the Israeli judiciary is based on Eisenberg, Fisher & Rosen-Zvi, *supra* note 4.

at the top, district courts below it, and magistrates' courts at the bottom.³⁵ District courts and magistrates' courts function as trial courts, while the ISC functions both as an appellate court and as the High Court of Justice (HCJ).³⁶ In its HCJ capacity, the court operates as a court of first and last instance, primarily in areas relating to government behavior.³⁷

Twenty-nine magistrates' courts operate as Israel's basic trial courts and serve the locality and district in which they sit. They have civil jurisdiction over matters involving up to a specified monetary amount—currently 2.5 million NIS—as well as over the use, possession, and division of real property.³⁸ District courts have residual jurisdiction over matters not within the sole jurisdiction of another court. The six district courts sit in Jerusalem, Tel Aviv, Haifa, Be'er-Sheva, Nazareth, and Petah Tikva (since 2012, in Lod).³⁹ District courts have civil jurisdiction over matters with more than 2.5 million NIS in dispute and commonly adjudicate cases involving business companies and partnerships, arbitration, and prisoner petitions. District courts also serve as administrative law courts.⁴⁰ Generally, a single district court judge presides over trial.⁴¹ This study is limited to cases originating in the district courts.

Court filing fees in Israel can be much more substantial than in the United States.⁴² Higher fees, which impose higher ex ante litigation costs,

³⁵ See generally Courts Law (Consolidated Version), 5744-1984, 38 LSI 271 (1983-1984) (Isr.) (outlining civil law procedure regulations).

³⁶ See Menachem Hofnung & Keren Weinshall-Margel, *Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice*, 7 J. EMPIRICAL LEGAL STUD. 664, 669 (2010) (noting that the HCJ's "original and final" jurisdiction in matters beyond the jurisdiction of other courts paves the way for litigation between the public and policymakers).

³⁷ *Id.* at 669-70 (noting the court's jurisdiction over "petitions concerning national security where the respondents are almost always cabinet ministers, agencies entrusted with security powers, or the Israeli army").

³⁸ Magistrates' courts also serve as traffic courts, municipal courts, family courts, and small claims courts. Generally, a single judge presides over each case unless the President of the Magistrates' Court directs that a panel of three judges should hear a particular case. See generally Courts Law (Consolidated Version), *supra* note 35, § 47.

³⁹ The Petah-Tikva court was established in 2007 and moved to Lod in 2012. Ordinances of Courts (Establishment of The Central District Court), 2007, KT 6585, 824 (Isr.).

⁴⁰ District courts also hear appeals from judgments of the magistrates' courts.

⁴¹ A panel of three judges hears appeals from magistrates' court judgments and also sits when the President or Deputy President of the District Court so directs. See Courts Law (Consolidated Version), *supra* note 35, § 37. Our data do not include any cases with a three-judge panel.

⁴² Civil case filing fees in the United States tend to be relatively small. The filing fee to commence a civil action in federal court is \$350. See 28 U.S.C. § 1914(a) (2012). For a list of state court filing fees, see NAT'L CTR. FOR STATE COURTS, CIVIL FILING FEES IN STATE TRIAL COURTS, APRIL, 2012, <http://www.ncsc.org/information-and-resources/budget-resource-center/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Civil%20Filing%20Fees%20April%202012.ashx>.

likely exert greater influence over the nature of cases that are filed in court than do fees in the United States. Filing fees for monetary claims in Israeli general civil courts are 2.5% of the value of the relief sought, including a minimum fee that is currently 758 NIS, approximately 217 U.S. dollars. For claims over 24,235,382 NIS, the filing fee percent declines to 1% of the claim.⁴³ Thus, filing fees in monetary damages cases can be several thousand dollars. Filing fees in nonmonetary relief cases—such as suits for declaratory relief, contempt of court, or derivative suits—as well as in personal injury suits, are fixed by the Court Rules (Court Fees) of 2007 and are updated from time to time.⁴⁴ Several exceptions to the requirement to pay filing fees exist and are based either on a litigant's financial hardship or on the nature of the claim filed. For example, courts will exempt plaintiffs in full or in part on a showing of financial inability to pay the fee.⁴⁵ Courts apply this exemption narrowly, however, and an applicant for relief must demonstrate not only inadequate personal financial resources, but also the unavailability of financial assistance from other sources, such as family members.⁴⁶ Exemptions from, or reductions of, filing fees based on the nature of the claim filed include such cases as prisoner petitions, government takings and many others.⁴⁷

B. *Israel's Law on Attorneys' Fees*

Israeli law governing fees differs from that of most countries except South Africa and, to some extent, India,⁴⁸ in that allocation decisions are left almost entirely to the court's discretion.⁴⁹ The rules regulating attorneys' fees⁵⁰ are specified in the 1984 Rules of Civil Procedure (RCP).⁵¹ The

⁴³ Second Supplement of the Court Rules (Court Fees), 2007, § 8 (Isr.).

⁴⁴ *See id.* at § 2 (filing fee for bodily injury cases filed in magistrates' court is 6592 NIS); *id.* at § 3 (filing fee for declaratory relief cases filed in magistrates' court is 633 NIS); *id.* at § 9 (filing fee for bodily injury cases filed in district court is 41,203 NIS); *id.* at § 10 (filing fee for declaratory relief cases filed in district court is 1115 NIS). Specialized courts and tribunals—such as family courts, labor courts, small claims courts, and the like—are governed by special rules with respect to filing fees.

⁴⁵ *See id.* § 14.

⁴⁶ *See* TA 511/98 Fuks v. Discount Bank LTD (unpublished, June 9, 1999) (Isr.); BS 494/95 Shimoni v. Shimoni (unpublished, Mar. 23, 1995) (Isr.).

⁴⁷ *See* Second Supplement of the Court Rules §§ 3, 9 & 20.

⁴⁸ *See generally* Reimann, *supra* note 4 (undertaking a comparative view of litigation costs, particularly for attorneys involved in “transboundary cases”).

⁴⁹ Although there are several supreme court cases, discussed below, that purport to guide the judges to use certain criteria in awarding fees, district courts mentioned such guiding cases in less than three percent of our sample.

⁵⁰ Although the Rules of Civil Procedure treat court costs and attorneys' fees jointly using the term “expenses,” the supreme court has urged judges to rule separately on court costs and

fundamental litigation fee allocation rule, Rule 511, grants courts wide discretion concerning whether to award fees and the amount awarded and subjects this discretion to a limited set of guidelines prescribed in Rule 512. Israel does not have a developed market for insurance to protect against attorneys' fees a party may have to pay in litigation.

The rules instruct courts to base their fee rulings on, among other things, the amount or value of the relief asked for by the plaintiff and the remedy granted by the court. They also authorize the courts to consider the parties' behavior during trial. Although not mandated by law, judges in practice usually follow the loser-pays rule.⁵² Judges can, and sometimes do, order winning parties to pay losing parties' fees.⁵³ In terms of the amounts awarded, many believe that a transformation has taken place over time. Historically, courts tended to disregard completely the actual amounts expended by winning parties, leading, in all likelihood, to undercompensation.⁵⁴ In recent years, following the "constitutional revolution,"⁵⁵ which constitutionalized to a certain extent civil procedure, both those within and without the judicial system have increasingly argued that fees awarded should be more in line with parties' actual fees.⁵⁶

attorneys' fees, because one must add value-added tax (VAT) to attorneys' fees, which should not be included in the amount payable as court costs. See CA 9535/04 Siat "Biyalik 10" v. Siat "Yesh Atid Lebiyalik," 60(1) PD 391 [2005] (Isr.). It should be noted, however, that not all judges follow the Supreme Court's recommendation. In cases in which fees were denied, the prevailing party received neither costs nor fees.

⁵¹ See generally Rules of Civil Procedure, 1984, KT 4685, 2220 (Isr.).

⁵² See URI GOREN, CIVIL PROCEDURE ISSUES 721-22 (11th ed. 2013).

⁵³ See, e.g., CA (Jer) 35178-09-12 Morgenstern v. Drinking Bottles Collection Corp. 1, 15 (unpublished 2013) (Isr.).

⁵⁴ This is our impression of the prevalent supposition in the legal community. See also LOVELLS, AT WHAT COST? A LOVELLS MULTI JURISDICTIONAL GUIDE TO LITIGATION COSTS 110-11, <http://m.hoganlovells.com/files/Publication/c940bb4b-a67f-4e63-a5b8-ced6198b2125/Presentation/PublicationAttachment/fff33267-29d5-4230-a140-cf2eeb7d4a05/LitigationCostsReport.pdf> (displaying results of a study of 50 jurisdictions and their associated costs, including recoverability of costs and interest on costs).

⁵⁵ See Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 ISR. L. REV. 299, 310 (2003-2004) ("The enactment of the 1992 basic laws [Basic Law: Human Dignity and Basic Law: Freedom of Occupation] underlies the claim that Israel has undergone a 'constitutional revolution,' transforming it from a parliament-supremacy type democracy (similar to the UK) to a constitutional democracy (like most other Western democracies) where human rights serve as powerful 'trumps.'").

⁵⁶ See SHLOMO LEVIN, THE THEORY OF CIVIL PROCEDURE: INTRODUCTION AND BASIC PRINCIPLES (2008).

A 2005 Israel Supreme Court (ISC) Registrar⁵⁷ decision, though not binding, instructed judges to award winning parties their actual fees unless the award would unreasonably impair access to justice and equality or cause over-deterrence.⁵⁸ A subsequent ISC decision explained that awarding the winning party its actual fees 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.⁵⁹ However, the court continued that the actual fees must be subject to them being “reasonable, proportional and necessary for the litigation.”⁶⁰ 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.⁶¹

Another ISC decision specified some of the factors judges should consider when awarding fees: the character of the suit and its complexity, the requested relief and its proportionality to the relief actually granted, the amount of work invested by the award recipient in the litigation, the actual amount paid or payable as attorneys' fees, and the behavior of the requesting party during the litigation.⁶²

Notwithstanding these decisions, it is clear to those acquainted with Israeli civil litigation that fee awards do not reflect the parties' actual expenditures during the litigation in the majority of the cases.⁶³ This is in part because courts do not know what the parties' actual fees were. Parties requesting an award of fees are not required to, and rarely do, introduce evidence of the actual amounts they had to expend on the litigation.⁶⁴ In

⁵⁷ The ISC Registrar is a magistrate court judge who sits at the ISC and handles certain procedural issues, such as requests for filing fee exemptions, petitions to join parties, and questions of appellate jurisdiction.

⁵⁸ See HCJ 891/05 Tnuva Cent. Coop. for the Mktg. of Agric. Produce in Isr. Ltd. v. The Auth. for the Licensing of Imports 1, 5 [2005] (Isr.).

⁵⁹ See CA 6793/08 Loare Ltd. v. Meshulam Levinshtein Contracting & Eng'g Ltd. 1, 12 [2009] (Isr.).

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² See CA 9535/04 Siat “Biyalik 10” v. Siat “Yesh Atid Lebiyalik,” 60(1) PD 391 [2005] (Isr.).

⁶³ See LOVELLS, *supra* note 54, at 110-11 (providing questions and answers on the topic of fee recovery in Israel).

⁶⁴ In 2002, the ISC's president, Justice Aharon Barak, issued administrative guidance regarding the award of attorneys' fees. According to the guidance, judges, when calculating attorneys' fees, are *allowed* to take into account the written retainer agreement between the party and her attorney that was introduced into evidence by the attorney during trial or as an annex to the written summations. The second part of the guidance qualifies this instruction by stating that attorneys are by no means obligated to introduce retainer agreements into evidence nor are courts obligated to take them into account when calculating fee awards. See SUPREME COURT ISR., ADMINISTRATIVE GUIDANCE OF THE PRESIDENT OF THE SUPREME COURT 1/98, CALCULATING

our data, a fee agreement with a client was submitted in only four cases.⁶⁵ These common practices seem to limit implementing the more recent emphasis on awarding actual fees to parties.

The Israel Bar Association has a schedule of recommended, but not binding, minimum tariffs. For monetary claims in courts, the recommended minimum starts at 15% of the claim amount.⁶⁶ For claims above 91,140 NIS up to 895,630 NIS, the recommendation is 10% of 91,140 NIS plus 4% of the claim amount above 91,140 NIS.⁶⁷ For claims above 895,630, the amount is as agreed between attorney and client but not less than 41,690 NIS.⁶⁸ For tort claims with contingent fees, other than road accidents, the recommended minimum starts at 15% of the recovery and has a top rate of 10% of the adjudicated amount for recoveries above 342,650 NIS.⁶⁹ For roadway accidents, the Compensation for Victims of Road Accidents Law imposes a maximum fee of 13% of the amount awarded by judgment.⁷⁰

In summary, the RCP and other guidance provided to Israeli judges embody considerations similar to those in theoretical discussions of optimal litigation cost allocation rules—considerations such as avoiding financial loss to prevailing parties, deterring frivolous litigation, promoting defendant

ATTORNEY FEES (2002). In 2010, Justice Barak's successor, President Justice Dorit Beinisch, issued an amendment to the administrative guidance:

[A]s 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 . . . the written retainer agreement between that party and her attorney, as well as proof of any money paid as attorney fees.

SUPREME COURT ISR., GUIDELINES OF THE CHIEF JUSTICE OF THE SUPREME COURT (2010), available at http://elyon1.court.gov.il/heb/dover/html/hanchayot_new.pdf. The second part of the Barak administrative guidance remained in place, however. *See id.*

⁶⁵ This is consistent with conversations we held with numerous attorneys and judges suggesting that, in practice, retainer agreements are rarely introduced into evidence.

⁶⁶ ISRAEL BAR ASS'N, BAR ASSOCIATION RULES (RECOMMENDED MINIMUM TARIFF) 2000, available at [www.israelbar.org.il/uploadFiles/Bar_Association_Rules_\(Recommended_Minimum_Tariff\)_english_nov_2008.pdf](http://www.israelbar.org.il/uploadFiles/Bar_Association_Rules_(Recommended_Minimum_Tariff)_english_nov_2008.pdf). Amounts are to be adjusted for inflation.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See* Road Accident Victims Compensation Law, 5735-1975, 29 LSI 311, § 16 (1974-1975) (Isr.); *see also* LOVELLS, *supra* note 54, at 110 (“[T]he Bar Association Regulations determine the maximum fee rates in motor vehicle accident claims . . . [such as] 13% of [the] amount awarded by judgment.”).

reasonableness, promoting fair access to the justice system, avoiding over deterrence, and making awards correspond to effort expended.⁷¹

III. DATA AND DESCRIPTIVE STATISTICS

A. *Data and Methodology*

The data used here consist of civil cases filed under the original jurisdiction of the five district courts that existed in Israel in 2005 and 2006, and the six district courts that existed in 2011 and 2012.⁷² We included only civil cases that reached final decisions on the merits. The study includes every case decided in the four years for which an opinion was available online via the Dinim website.⁷³ Dinim is a private company that offers attorneys and other paying clients access to case information. Using the Dinim database led us to focus our inquiry on 2005 and 2006 because these are the first two years for which the database is supposedly comprehensive regarding district court decisions.⁷⁴ Prior to those years, we could not be sure that the selection of cases by Dinim did not generate selection bias. The more recent years substantially increase the sample size and allow us to assess change over time. Our sample consists of 2641 cases.

We tested the comprehensiveness and accuracy of the Dinim database by comparing it with data obtained from Israel's official court system website Net Hamishpat.⁷⁵ Although Net Hamishpat does not provide information relating to all district courts operating in 2005 and 2006, the partial data that it does provide suggest that the data obtained from the Dinim website are indeed comprehensive and accurate. The data thus provide a complete picture of district court civil case activity in the periods covered and a sound basis for assessing how the courts rule with respect to fees in civil cases.

The data are subject to some limitations. First, the study covers only final decisions in civil matters, thus omitting cases terminated via settlement, dismissal, or judgment by way of settlement under § 79A of the

⁷¹ See, e.g., Avery Wiener Katz, *Indemnity of Legal Fees* (discussing "whether a move to fuller indemnification would raise or lower the total costs of litigation . . . [or] better align those costs with any social benefits they might generate"), in 5 *ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION* 63, 64-65 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

⁷² See *supra* note 39 and accompanying text (referring to the 2007 establishment of the Petah Tikva court).

⁷³ DINIM, <http://www.dinimveod.co.il> (last visited May 12, 2014).

⁷⁴ Telephone interview with Adv. Michal Vinograd, General Manager, Dinim (June 2011).

⁷⁵ NET HAMISHPAT, <https://www.court.gov.il/NGCS.Web.Site/HomePage.aspx> (last visited May 12, 2014).

Courts' Act.⁷⁶ Second, the study excludes interlocutory decisions. This exclusion is significant because often judges award fees to parties who prevail in interlocutory decisions and, therefore, looking only at final decisions provides a partial picture of fees awarded in tried cases. Third, the study includes only district court cases and excludes magistrates' courts, ISC cases, and cases from specialized courts such as family courts, rabbinical courts, labor courts, and military courts.

Student research assistants coded cases, which were randomly sampled for accuracy by a second tier of more experienced students. Prior to the student coding, the Authors designed a data form to structure the coding. The performance of the form and the students were reviewed in an initial set of cases, the form was revised in light of that experience, and a final form was constructed. The students used that revised form to code the cases under the supervision of the Authors.

B. *Descriptive Statistics*

To explore the relations among the outcomes of interest—denials of fee awards, amount of fee awards, and the relation between recoveries and fee awards—we account for several factors about the cases and the parties. Case characteristics include the case category, the recovery amount in cases won by plaintiffs, time on the docket, whether the parties had counsel, and the court that adjudicated the case. For case categories, we used the first claim in a case to characterize the case as one of ten civil case categories. For parties, we coded for whether plaintiffs and defendants were individuals, corporations, or government entities, as well as the ethnicity of individual litigants as Arab or Jewish. We used the first named plaintiff and defendant to code party status. For time on the docket, we used docket numbers to estimate the date of filing. Since the district court docket numbering system changed during the years studied, we used different estimation methods to exploit the information embodied in the varying docket number systems.⁷⁷

⁷⁶ See Courts Law (Consolidated Version), 5744-1984, 38 LSI 271, §79A (1983-1984) (Isr.) (outlining civil law procedure regulations).

⁷⁷ For newer style document numbers, we used the year a case was filed and determined the month a case was filed from its docket number, which includes the month of filing. We estimated the date of filing using the order and the number of filings in a district in a month. This method was used for 633 cases. For earlier style docket numbers, which do not include the month of filing, we estimated the date of filing by using the docket numbers, which are sequential within each district and year. We thus know the order in which the cases were filed but not the exact date. For years in which the number of civil filings was known, we estimated the date of filing using the order and number of filings in a district in a year. To illustrate, if the data included one case filed in a district in a year, we assigned it a mid-year filing date. If the data included two cases filed in a

In 5.1% of the cases, a fee was or may have been awarded to a losing party. These cases fall into three categories. The first consists of cases in which the winning party's misbehavior led the court to award the losing party fees.⁷⁸ The second includes cases involving multiple parties with the plaintiff or plaintiffs having succeeded as to some defendants but not as to other defendants. Since we analyzed the data at the case level rather than the individual litigant level, some of these cases may be ones that should be counted as following a loser-pays rule, but they also may be ones in which a losing party received a fee. The third contains cases in which it is not clear-cut who the winning party actually was. These are cases in which the court accepted the winning party's claims only in (sometimes small) part. It is not clear whether in such cases courts should be characterized as not applying a loser-pays rule. By characterizing the second and third categories of cases as ones in which a loser may have received a fee, we slightly understate the rate at which the loser-pays rule was applied. That leaves us with unambiguous outcomes of loser pays or no one pays for 95% of the cases. We leave further analysis of the 5.1% of the cases with possible payments to losing parties for future work. For purposes of summarizing fee amounts, we exclude the 2.95% of cases in which no defense was offered on the merits and report summary statistics that exclude cases with no fee awards to the prevailing party and cases in which the losing party may have received a fee.

Table 1 reports descriptive statistics for the variables in the study. The table shows the number (via the mean value of the case category variables) of cases in each category. About 84% of the sample consists of three major civil case categories, coded as contract, property, and tort (including automobile cases). These and most other case categories involve the kinds of cases brought in most legal systems, but some reflect distinctive features of Israeli law.

Since 2000, most cases that deal with administrative law are under the jurisdiction of either Israel's specialized administrative courts or the ISC in its HCJ capacity. Our sample does not include ISC or HCJ cases. Regular

district in a year, we assigned the first case a filing date one-third into the year and the second case a filing date two-thirds into the year. If the data included fifty cases filed in a district in a year, we assigned equally spaced filing dates, beginning with the seventh day of the year (365/50, rounded) as the first filing date. This method was used in 1121 cases. For years in which the number of civil filings was not known, we estimated the date of filing using the order and number of filings in the cases in our data in a district in a year. This method was used in 859 cases. For 11 cases filed and terminated in the same year, the estimation of the day of case filing yielded negative time on the docket. In those cases, the time on the docket was replaced by the mean time on the docket for the 145 cases in our data that had positive time estimates and were filed and terminated in the same year (0.33 years). The data contained the date of termination so no estimation of that date was needed.

⁷⁸ For an example of such a case, see *supra* note 53.

civil courts, including district courts, have residual administrative law jurisdiction and deal mostly with restitution claims in administrative matters. These claims are a small minority of cases on the administrative docket.

With respect to arbitration cases, the Arbitration Act of 1968 allows the parties to arbitration to resort to court during the arbitration process or following its conclusion. During the arbitration, the court has the power to intervene in various procedural aspects of the arbitration.⁷⁹ But the most significant and prevalent jurisdiction of courts is to invalidate a final arbitration decision for reasons specified in the Arbitration Act.⁸⁰

Expropriation cases involve government condemnation of property and the usual structure of the case is for an individual or corporation to sue a government to contest the matter. This party structure accounts for about 87% of the expropriation cases. Nonmonetary relief was sought in 50.8% of the cases, which helps account for the number of cases in which a recovery amount and fee percent were not observed.

Distribution of case categories varied between districts. Contract cases dominated in Tel Aviv (comprising 37% of the docket), tort cases (including auto cases) dominated in Jerusalem (comprising 35% of the docket), and property cases dominated in Nazareth and Petah Tikva (comprising 58% and 35% of the docket, respectively). In Haifa, tort and property cases each accounted for about 33% of the docket. Cases were most evenly distributed across the major case categories in Be'er-Sheva, where the major categories ranged from about 25% to 28% of the docket.

Table 1: Descriptive Statistics

	Obs.	Mean	Median	Std. Dev.	Min.	Max.
<i>Outcomes</i>						
Fee denied to winner	2528	0.272	0	0.445	0	1
Fee amount	1167	83,144	30,000	216,740	1017	4,000,000
Fee as percent of recovery	307	19.5	13.1	28.5	0.8	250.3
Recovery amount	731	1,806,317	872,488	2,841,958	1498.2	35,800,000
Plaintiff won	2641	0.611	0	0.488	0	1
Plaintiff prevailed in whole	2641	0.329	0	0.470	0	1
<i>Case characteristics</i>						
Admin. Law	2641	0.017	0	0.131	0	1
Arbitration	2641	0.025	0	0.155	0	1

⁷⁹ Arbitration Law, 5728-1968, 22 LSI 210, § 16 (1967-1968) (Isr.) (outlining potential action a court may take during an arbitration).

⁸⁰ See *id.* § 24 (listing ten bases for setting aside or modifying an arbitration award).

Banking	2641	0.020	0	0.142	0	1
Contract	2641	0.272	0	0.445	0	1
Corporations	2641	0.038	0	0.192	0	1
Expropriation	2641	0.017	0	0.131	0	1
Other	2641	0.045	0	0.207	0	1
Property	2641	0.298	0	0.457	0	1
Tort	2641	0.174	0	0.379	0	1
Tort, auto	2641	0.093	0	0.290	0	1
Years on docket	2613	4.08	3.78	2.76	0.003	22.8
Pltf. Represented	2637	0.937	1	0.242	0	1
Deft. Represented	2639	0.823	1	0.382	0	1
<i>Plaintiff-Defendant characteristics</i>						
Ind. v. Ind.	2638	0.329	0	0.470	0	1
Ind. v. Corp.	2638	0.246	0	0.431	0	1
Ind. v. Govt.	2638	0.110	0	0.312	0	1
Corp. v. Ind.	2638	0.079	0	0.270	0	1
Corp. v. Corp.	2638	0.139	0	0.347	0	1
Corp. v. Govt.	2638	0.055	0	0.229	0	1
Govt. v. Ind.	2638	0.022	0	0.147	0	1
Govt. v. Corp.	2638	0.014	0	0.116	0	1
Govt. v. Govt.	2638	0.006	0	0.075	0	1
Public corp. pltf.	2641	0.044	0	0.205	0	1
Public corp. deft.	2641	0.101	0	0.302	0	1
Foreign corp. pltf.	2641	0.032	0	0.176	0	1
Foreign corp. deft.	2641	0.011	0	0.106	0	1
<i>District</i>						
Be'er-Sheva	2641	0.054	0	0.226	0	1
Haifa	2641	0.298	0	0.458	0	1
Jerusalem	2641	0.133	0	0.339	0	1
Nazareth	2641	0.091	0	0.287	0	1
Petah Tikva	2641	0.070	0	0.255	0	1
Tel Aviv	2641	0.354	0	0.478	0	1
<i>Year case ended</i>						
2005	2641	0.223	0	0.417	0	1
2006	2641	0.209	0	0.406	0	1
2011	2641	0.304	0	0.460	0	1
2012	2641	0.264	0	0.441	0	1

Note: Fee amount and fee percent include cases in which the winning party was awarded fees in which a defense was offered. Fee percent includes only cases with nonzero fee awards and nonzero recovery amounts. Amounts are in 2012 NIS.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

IV. RESULTS

We first report results for denials of fee awards and then report results for the amount of fees, conditional on the award of fees. Accounting for which party prevailed at trial is important because fee denial rates are

highly correlated with whether plaintiffs or defendants win.⁸¹ Where relevant, we therefore present results stratified by the winning party.

A. Denials of Fee Awards

Table 2 shows substantial asymmetries in the rates of fee denials to winning parties. Of the three large case categories, contract and tort cases had higher rates of fee denial in cases where defendants won than in cases where plaintiffs won. The difference in tort cases is striking, with fee denials to winning defendants in 40% of the cases and fee denials to winning plaintiffs in only 9% of the cases. The pattern is similar in the largest subcategory of tort cases, automobile cases. In property cases, the difference reverses, with winning plaintiffs denied fees at a higher rate than winning defendants. Automobile cases also have a noticeably different win rate, in which defendants won only 11% of adjudicated cases due to the no-fault regime that governs such cases. The 89% success rate for plaintiffs is due to their having to prove damages rather than liability. In such cases, even if the plaintiff receives much lower damages than requested, it is coded in our data as a win for the plaintiff.⁸²

Table 2: Rate of Fee Denial by Case Category and Prevailing Party

Category	Defendant won			Plaintiff won			Total cases
	Number won	% won	Proportion of fee denials of cases won	Number won	% won	Proportion of fee denials of cases won	
Admin. Law	25	54.4	0.32	21	45.6	0.33	46
Arbitration	32	49.2	0.13	33	50.8	0.45	65
Banking	28	51.9	0.04	26	48.2	0.24	54
Contract	310	43.1	0.30	409	56.9	0.24	719
Corporations	42	41.6	0.24	59	58.4	0.40	91
Expropriation	17	37.0	0.36	29	63.0	0.24	46
Property	271	34.5	0.25	515	65.5	0.42	786
Tort	224	48.7	0.40	236	51.3	0.09	460

⁸¹ Eisenberg, Fisher & Rosen-Zvi, *supra* note 4, at 1473-79.

⁸² Some automobile cases involve a dispute about whether the claim involves an "automobile accident" as defined by the Road Accident Victims Compensation Law, 5735-1975, 29 LSI 311, § 1 (1974-1975) (Isr.).

Tort, auto	27	11.0	0.41	218	89.0	0.06	245
Other	52	43.7	0.25	67	56.3	0.33	119
Total	1028	38.9	0.29	1613	61.1	0.26	2641

Note: The numbers of observations for the "Proportion of fee denials" columns are fewer than the numbers shown in the table due to a small portion of the cases in which fee outcomes could not be definitively ascertained.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

Table 3 reports rates of fee denial by year and judicial district. Petah Tikva and Tel Aviv consistently denied fee awards more frequently to winning defendants than to winning plaintiffs. Nazareth, with its large proportion of property cases, consistently denied fee awards more frequently to winning plaintiffs than to winning defendants. Nazareth judges denied fees to plaintiffs in 68% of the property cases they won, with even higher denial rates in cases between individuals. They denied fees to prevailing defendants in only 16% of cases. In other districts, denial rates to prevailing property case plaintiffs did not exceed 40%, and fee denial rates to prevailing defendants were all higher than in Nazareth. The other three districts did not have a consistent pattern favoring plaintiffs or defendants. Change in category mix does not appear to explain the changes. The difference between fee denial rates in defendant wins was not statistically significant. The differences in rates of fee denials in plaintiff wins did significantly differ, with Nazareth as the source of the difference. Excluding Nazareth, results for plaintiffs did not significantly differ by district ($p=0.148$). Over the four years of the study, rates of fee award denials did not significantly differ for plaintiff wins ($p=0.169$) or for defendant wins ($p=0.316$).

Table 3: Rate of Fee Denial by Judicial District, Prevailing Party, and Year

Judicial District	Year of decision	Rate		Judicial District	Year of decision	Rate	
		Rate when defendant won	Rate when plaintiff won			Rate when defendant won	Rate when plaintiff won
Be'er-Sheva	2005	0.36	0.29	Nazareth	2005	0.28	0.55
Be'er-Sheva	2006	0.40	0.17	Nazareth	2006	0.31	0.69
Be'er-Sheva	2011	0.18	0.32	Nazareth	2011	0.11	0.46
Be'er-Sheva	2012	0.15	0.26	Nazareth	2012	0.27	0.57
Haifa	2005	0.47	0.14	Petah Tikva	2005	-	-
Haifa	2006	0.18	0.27	Petah Tikva	2006	-	-
Haifa	2011	0.33	0.35	Petah Tikva	2011	0.31	0.19
Haifa	2012	0.16	0.35	Petah Tikva	2012	0.22	0.18

Jerusalem	2005	0.34	0.15	Tel Aviv	2005	0.31	0.19
Jerusalem	2006	0.41	0.10	Tel Aviv	2006	0.28	0.17
Jerusalem	2011	0.25	0.29	Tel Aviv	2011	0.28	0.21
Jerusalem	2012	0.38	0.28	Tel Aviv	2012	0.34	0.20
Significance						0.780	<0.001

Note: The Petah Tikva district court was created in 2007. The significance levels in the table test for differences across districts, pool the data across years within districts, and account for the non-independence of decisions by the same judge.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

Because multiple factors may be associated with fee denials, regression analysis helps assess whether the above results persist when explanatory factors are taken into account simultaneously. Since the outcome variable “fee denial” is dichotomous, we employ logistic regression.⁸³ Tables 2 and 3 indicate that the prevailing party, case category, and district are all associated with fee denials. In the regression models, we add further controls for plaintiff–defendant status (including public corporate status and foreign or domestic status), the size of the recovery in cases won by plaintiffs, the time a case took to resolve, and representation by counsel.⁸⁴ Since RCP Rule 512 instructs courts to base their litigation cost rulings in part on the amount or value of the relief requested and the remedy granted by the court, we also included a variable for whether a plaintiff prevailed in whole or in part. Table 1 shows that the government was the plaintiff in relatively few cases. We therefore combined the government-plaintiff categories into a single category of government as plaintiff without distinguishing among defendants by party status. We included dummy variables for years to assess time patterns, with 2012 as the reference year. The sample contains decisions by 170 different district court judges, and we clustered the standard errors by judge to account for the nonindependence of a judge’s decisions. We modeled fee denials separately for cases in which plaintiffs prevailed and cases in which defendants prevailed.

Table 4 reports the regression results. It supports using separate models, as it shows that covariates often differ in size and significance based on the prevailing party. Models (1), (3), and (5) include only cases won by plaintiffs and models (2), (4), and (6) include only cases won by defendants. The defendant-win models cannot include the recovery or “claim fully accepted” variables as the recovery is always zero and the claim is never accepted. The table reports the marginal effects of the explanatory variables on the

⁸³ See generally A. COLIN CAMERON & PRAVIN K. TRIVEDI, MICROECONOMICS USING STATA 459–60 (rev. ed. 2010) (discussing logistic regression).

⁸⁴ Parties can be awarded fees even when not represented by counsel.

outcome variable. Marginal effects are interpretable as the change in the probability of a fee denial given a one-unit change in an explanatory variable. For categorical explanatory variables, this change in probability is in comparison to a reference category—that is, a value of the explanatory variable against which changes in the outcome probability are measured. The reference category for the plaintiff–defendant/prevailing–party combinations, for example, is individual versus individual. This means that the coefficients for the other plaintiff–defendant/prevailing–party combinations in Table 4 indicate how much more or less likely a fee denial becomes compared to the baseline case of a suit between two individuals. Jerusalem is the reference category for judicial district in all four models. In models (1) and (2), tort is the reference category for case categories.

Because Table 2 shows that tort cases are distinctive, we also constructed models limited to nontort cases to assess whether the large group of tort cases drives our results using the full sample. In models (3) and (4), which exclude tort cases, the reference case category is the residual category “other.” Model (5), which is limited to tort cases won by plaintiffs, shows that fees were less likely to be denied to individuals prevailing against corporations than to those prevailing against other individuals. Model (6), limited to tort cases won by defendants, confirms the favorable treatment of individuals: fees were least likely to be denied to individual defendants who won against corporations (denial in one of twelve cases).

Table 4: Logistic Regression Models of Fee Denial to Winning Party

	(1) Pltf. won, all case categories	(2) Def. won, all case categories	(3) Pltf. won, nontort	(4) Def. won, nontort	(5) Pltf. won, tort only	(6) Def. won, tort only
Recovery (log ₁₀)	-0.032***		-0.030***		-0.009	
Claim fully accepted	-0.212***		-0.139***		-0.011	
Years pending (log)	-0.014	-0.009	-0.018	-0.004	0.006	-0.107
Pltf. represented	-0.181***	-0.010	-0.123**	-0.013		
Def. represented	-0.107**	-0.129*	-0.096**	-0.130*		
Administrative law	0.198	-0.088	0.106	-0.005		
Arbitration	0.197**	-0.210***	0.152*	-0.154**		
Banking	0.239*	-0.262***	0.105	-0.231***		
Contract	0.144**	-0.087**	0.085**	-0.016		
Corporations	0.284***	-0.126**	0.192**	-0.063		

Expropriation	0.007	-0.038	-0.064	0.088		
Property	0.229***	-0.141***	0.181***	-0.061		
Tort, auto	-0.049	0.001				
Other	0.257**	-0.113**				
Be'er-Sheva	0.041	-0.031	0.009	-0.027	0.050	0.192
Haifa	0.058	-0.050	0.007	-0.023	0.015	-0.114
Nazareth	0.183***	-0.101	0.155**	-0.078	0.068	-0.059
Petah Tikva	-0.081**	-0.063	-0.083**	0.007	-0.008	-0.230*
Tel Aviv	-0.013	-0.019	-0.024	0.045	-0.014	-0.185
Ind. v. Corp.	-0.073**	-0.004	-0.032	-0.053	-0.124***	0.082
Ind. v. Govt.	0.148**	0.015	0.192***	-0.053	-0.014	0.113
Corp. v. Ind.	0.014	-0.070	-0.030	-0.025	0.007	-0.296***
Corp. v. Corp.	-0.032	-0.060	-0.055	-0.061	-0.023*	-0.220*
Corp. v. Govt.	0.035	0.022	0.134*	0.028		-0.145
Govt. plaintiff	0.204**	0.014	0.184*	-0.002		0.062
Public corp. deft.	0.151**	-0.045	0.074	-0.005	0.171	
Public corp. pltf.	-0.004	-0.196***	0.000	-0.158***	-0.015	
Foreign corp. pltf.	-0.168***	0.278*	-0.143***	0.218		0.180
Foreign corp. def.	0.160	0.165	0.357**	0.054		0.337***
Case ended 2005	-0.013	0.085	-0.011	0.059	0.012	0.231**
Case ended 2006	-0.020	0.008	-0.030	0.015	0.060	-0.038
Case ended 2011	0.024	0.013	0.030	0.013	0.013	-0.006
Observations	1485	1009	1256	790	230	219
PRE	0.270	0.020	0.381	0.014	0.048	0.182
Pseudo r-sq.	0.232	0.052	0.223	0.045	0.225	0.107

Note: Dependent variable is whether winning party was denied attorneys' fees. Standard errors, not shown in the interest of space, are clustered by judge. PRE equals proportionate reduction in error. * indicates $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

In the first two plaintiff-win models ((1) and (3)), the size of recovery is negatively and significantly associated with fee denials. As damages increase, defendants were more likely to be ordered to pay fees. The coefficient on "claim fully accepted" in model (1) indicates that full acceptance of a plaintiff's claim, in contrast with partial acceptance or denial of the claim, is strongly and statistically significantly associated with a court ordering payment of fees. Full acceptance of a claim decreases the probability of a litigation cost denial by 21% in model (1) and by 14% in the sample of nontort cases. This result can be interpreted as judges implementing RCP Rule 512's instruction to consider the degree to which a prevailing party succeeded on its claims. An alternative measure of the degree of plaintiff

success is the ratio of monetary recovery to the amount requested in cases plaintiffs won. This variable is positively and statistically significantly associated with awarding fees but is substantially collinear (correlation coefficient > 0.50) with the recovery amount and is not included in the models. The presence of counsel for either plaintiff or defendant is associated with fees being awarded, but this effect is sizeable and significant only in the plaintiff win models. Neither the coefficients for time on the docket (years pending) nor those for the year dummy variables is significantly associated with fee denials in the models except for the tort case defendant-win model for cases ending in 2005.

1. Case Categories

In model (1), the coefficients for all nontort case category dummy variables are positive and most are statistically significant, indicating a higher probability of fee denials when plaintiffs win nontort cases than when they win tort cases. The sole negative case category coefficient is for a subcategory of tort cases, those involving automobiles. Model (2) shows that when plaintiffs lost tort cases they tended not to be assessed their adversary's fees. In model (2), all nontort case category coefficients are negative, and several are statistically significant. Model (4) shows that, excluding tort cases from the analysis, arbitration and banking cases were significantly less likely than the residual category (other) to deny fees.

2. Plaintiff-Defendant Combinations

When plaintiffs prevailed, the coefficients for the plaintiff-defendant combination variables were modest in model (1) with the exception of a significant 14.8% higher probability of fee denials when individual plaintiffs prevailed against governmental entities than when individuals prevailed against other individuals. This increased to 19.2% higher probability of denials when one excludes tort cases in model (3). The fact that the rate of fee denials is significantly lower when individuals prevailed against corporations is largely attributable to tort cases, since that effect shrinks to a 3.2% lower probability of denials that is insignificant when tort cases are excluded in model (3). The effect increases in magnitude to 12.4% and is significant in tort cases, as shown in model (5).

When defendants prevailed in the full sample, public corporate plaintiffs that lost were least likely to be absolved of paying fees. This effect persisted at a substantial level, 15.8%, and was significant in nontort cases, as shown in model (4). There were no instances of denials of fees when a public corporate

plaintiff lost a tort case and that variable dropped out of model (6); fees were allowed in all six such cases.

Models (1) and (3) show that when foreign corporate plaintiffs prevailed they were significantly less likely to be denied fees than when domestic parties prevailed. This result is based on a substantial number of cases. In model (1), foreign corporate plaintiffs were denied fees in only three of sixty cases; in model (3), there were denials in only three of fifty-two cases. Model (3) also shows that when plaintiffs prevailed against foreign corporate defendants they were significantly more likely to be denied fees. This result is based on fee denials in four of fifteen cases. Model (6) shows that when foreign corporate defendants won, they were significantly more likely to be denied fees than when plaintiffs won against domestic defendants. The significant foreign corporate defendant effect in model (6) is based on denials in three of five cases.

3. Districts

All three models of cases with prevailing plaintiffs suggest that the Nazareth district court was more willing to deny fees in such cases than other district courts, though the significance levels varied. This is consistent with Table 3, which showed Nazareth to have the highest rate of fee denials in all four years. The significance of this effect did not persist in the tort model. The high Nazareth denial rate largely stems from a 70.5% fee denial rate in property cases won by plaintiffs, a rate much higher than that of any other district. The denial rate variation across districts is smaller in property cases won by defendants. The rate ranges from a high of 30.8% in Be'er Sheva and 33.3% in Petah Tikva to a low of 16% in Nazareth. Petah Tikva's denial rate for winning defendants in tort cases was the lowest of any district, 25% of twenty cases, much lower than all districts other than Tel Aviv, which denied fees in 29.3% of seventy-five cases.

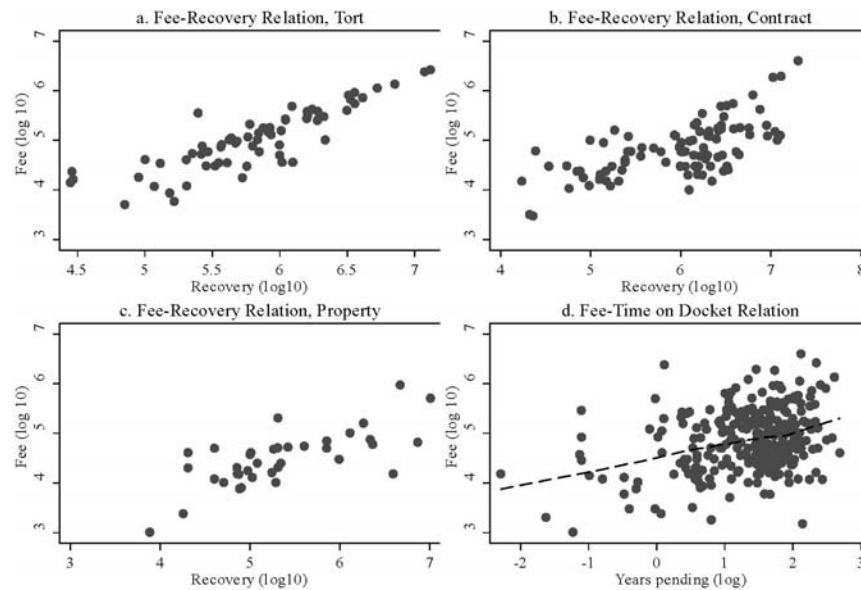
B. *Amount of Fee Awards*

Since the amount of fee awards outcome is a continuous variable, one can, for cases won by plaintiffs, use scatterplots to show the relation between fee awards and other continuous variables. We first show the relevant scatterplots, which support using linear regression models, and then present tables that show the relations among fee awards and categorical variables.

Figures 1a, 1b, and 1c show the relation between fees and recoveries for the three major case categories: tort, contract, and property. Figure 1d shows the relation between fees and time on the docket for all cases combined. All

amounts in the figure and elsewhere in this Article are in 2012 NIS adjusted for inflation. The first three subfigures are traditional scatterplots, and Figure 1d shows both a scatterplot and the locally weighted regression (LOWESS) line⁸⁵ that best fits the data. All of the subfigures show a positive relation with fees. As expected, courts tend to award higher fees when recoveries are higher and when cases take longer. The duration of cases served as our proxy for the effort lawyers expended.

Figure 1: Relation Between Fees and Continuous Variables



Note: Amounts are in 2012 NIS.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

Table 5 shows, by case category, the mean and median fee awards, and, in its last column, the median recovery. It shows similar median fee awards for plaintiffs and defendants in administrative law, arbitration, banking, contract, and property cases. Tort cases noticeably differ: mean fee awards to prevailing plaintiffs are more than double the mean fee awards to prevailing defendants, and median fee awards also substantially differ. In automobile tort cases, the difference was substantially more extreme. Although fees to

⁸⁵ See WILLIAM S. CLEVELAND, *THE ELEMENTS OF GRAPHING DATA* 18, 168-80 (rev. ed. 1994) (explaining the concept of a LOWESS line and its uses).

tort plaintiffs were the highest, median monetary *recoveries* for plaintiffs, shown in the last column, were higher in five of the ten case categories with median recovery data.

Table 5: Fee Awards and Recovery Amounts, by Prevailing Party and Case Category

Category	Defendant won			Plaintiff won			
	N with fee award	Mean fee (000)	Median fee (000)	N with fee award	Mean fee (000)	Median fee (000)	Median recovery (000)
Admin. Law	15	73	30	9	83	30	1681
Arbitration	26	19	12	14	8	8	NA
Banking	21	64	40	15	50	36	1499
Contract	161	53	35	193	110	35	1391
Corporations	25	66	41	22	39	21	368
Expropriation	7	46	18	16	40	33	96
Property	153	41	23	175	37	20	152
Tort	97	58	31	101	203	52	728
Tort auto	13	21	18	68	231	175	1309
Other	30	50	30	27	115	47	1932
Total	548	49	25	640	110	31	874

Note: Amounts are in thousands of 2012 NIS. The numbers of observations for the Median recovery column are fewer than the numbers shown in the table's N columns due to cases with nonmonetary relief. Amounts exclude cases in which there was no defense and cases in which fees may have been awarded to the losing party. The number of observations for the median recovery column differs from that number of observations shown for the fee awards.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

Table 6 shows mean and median fee awards for plaintiff wins and defendant wins, organized by district. Its last column shows the median recovery amounts in cases won by plaintiffs in which there was a monetary recovery. Mean fee awards were higher for prevailing plaintiffs than defendants in all districts. Median fee awards were higher for prevailing plaintiffs than defendants in four districts, were equal between plaintiffs and defendants in Tel Aviv, and were higher for prevailing defendants in Petah Tikva. Table 5 suggests that these differences are sensitive to the case category mix across districts, with tort cases being important in explaining the patterns. The differences in median fees across districts are statistically significant, as shown in the table's last row.

Table 6: Fee Award and Recovery Amounts, by District

Category	Defendant won			Plaintiff won			
	N with fee award	Mean fee (000)	Median fee (000)	N with fee award	Mean fee (000)	Median fee (000)	Median recovery (000)
Be'er-Sheva	36	27	18	39	141	40	999
Haifa	131	29	18	154	112	25	866
Jerusalem	63	59	25	63	128	47	1121
Nazareth	52	24	18	51	109	25	856
Petah Tikva	51	70	50	67	94	35	1820
Tel Aviv	214	64	41	246	111	41	1039
Total	547	49	25	621	113	35	1004
Significance	-	<0.001	<0.001	-	0.223	0.003	0.280

Note: Amounts are in thousands of 2012 NIS. The numbers of observations for the Median recovery columns are fewer than the numbers shown in table's N columns due to cases with nonmonetary relief. Amounts exclude cases in which there was no defense and cases in which fees may have been awarded to the losing party. Significance levels for means are based on a regression model of the fee as a function of district with standard errors clustered by judge. Significance levels for medians are based on bootstrap quantile regressions.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

Table 7 reports ordinary least squares regression results that model the fee award, in cases with an award, as a function of the variables in Figure 1, in Tables 5 and 6, and additional controls. Models (1) and (2) include all case categories, and models (3) to (8) are limited to specific case categories: tort, contract, and property. Models (1), (3), (5), and (7) are limited to cases won by plaintiffs and models (2), (4), (6), and (8) include only cases won by defendants. The recovery and "claim fully accepted" variables can be included only in the plaintiff-win models. Individual versus individual is the reference category for the plaintiff-defendant combinations. Jerusalem is the reference category for judicial district. Finally, in models (1) and (2), tort is the reference category for case categories. We again included dummy variables for years to assess time patterns, with 2012 as the reference year, and clustered the standard errors by judge to account for the non-independence of decisions by the same judge.

Table 7: Regression Models of Fee Amounts

	(1) Pltf. won, all case categories	(2) Def. won, all case categories	(3) Pltf. won, tort	(4) Def. won, tort	(5) Pltf. won, contract	(6) Def. won, contract	(7) Pltf. won, property	(8) Def. won, property
Recovery (log ₁₀)	0.064***		0.113***		0.054***		0.040**	
Claim fully accepted	0.019		0.013		0.060		0.024	
Years pending (log)	0.153***	0.084***	0.267***	0.078	0.073**	0.066	0.156***	0.118***
Pltf. represent- ed	0.104	0.035			-0.031	0.214	0.050	0.078
Def. represent- ed	0.011	0.094			-0.061	0.127	0.076	-0.076
Administrative law	-0.361**	0.176						
Arbitration	-0.359***	-0.241***						
Banking	-0.252	-0.082						
Contract	-0.135*	0.037						
Corporations	-0.190*	0.159*						
Expropriation	-0.326**	0.088						
Property	-0.217***	0.017						
Tort, auto	0.100	-0.192						
Other	-0.053	-0.015						
Be'er-Sheva	-0.068	-0.097	0.360	-0.417***	-0.109	-0.097	-0.164	-0.178
Haifa	-0.139*	-0.141*	-0.170	0.003	-0.058	-0.075	-0.127	-0.127
Nazareth	-0.055	-0.156**	0.346	-0.128	0.088	-0.269**	-0.137	-0.129
Petah Tikva	-0.007	0.153*	0.212	0.213	-0.056	0.194	-0.032	0.111
Tel Aviv	-0.086	0.085	-0.189	0.245*	0.046	0.047	-0.045	0.037
Ind. v. Corp.	0.098*	0.096*	0.197	-0.024	0.265**	0.081	-0.106	0.218**
Ind. v. Govt.	0.071	-0.133***	-0.042	-0.284***	0.387***	-0.371***	0.019	-0.038
Corp. v. Ind.	-0.101**	0.101	-0.466**	0.107	0.117	0.059	-0.043	0.190
Corp. v. Corp.	0.084	0.223***	-0.057	-0.004	0.189*	0.250***	0.166*	0.375***
Corp. v. Govt.	0.192*	0.052	-0.305	-0.080	0.490***	0.149	0.119	-0.108
Govt. plaintiff	-0.109	-0.075	-0.099	-0.337***	0.011	-0.018	-0.044	0.097
Public corp. def.	0.105	0.066	0.117	0.390**	-0.053	-0.037	0.424***	0.065
Public corp. pltf.	-0.045	0.031	0.135	0.004	-0.011	-0.045	-0.022	0.477
Foreign corp. pltf.	0.084	-0.008	0.638***		0.449		-0.096	-0.144
Foreign corp. def.	-0.257*	0.265	-0.305	0.206	-0.260	0.042	-0.227*	
Year=2005	-0.136**	-0.020	-0.372**	-0.011	-0.144	-0.084	0.069	0.048

Year=2006	-0.047	-0.021	-0.313*	-0.124	-0.088	-0.014	0.100	-0.046
Year=2011	-0.043	0.056	-0.107	-0.016	-0.116	0.059	-0.003	0.006
Constant	4.352***	4.188***	4.205***	4.342***	4.341***	4.103***	4.116***	4.242***
Observations	612	540	95	94	185	159	164	152
R-squared	0.435	0.306	0.564	0.419	0.373	0.327	0.388	0.302

Note: Dependent variable is the amount of the fee (log 10). Amounts exclude cases in which there was no defense and cases in which fees may have been awarded to the losing party. The plaintiff-win models include cases that plaintiff won in which no fee was awarded. Such cases have the fee award recoded as zero (after the log transformation). Standard errors, not shown in the interest of space, are clustered by judge. * indicates $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

All the plaintiff-win models confirm Figure 1's associations between the amount of the fee and the amount of the recovery, as well as between the amount of the fee and the time a case was pending on the docket. The only non-significant coefficients for the years-pending variable are for defendant wins in tort and contract cases (models (4) and (6)), and those coefficients are in the expected direction. The coefficients are conservative because the models include cases that plaintiffs won in which no fee was awarded. Such cases have the fee award recoded as zero (after the log transformation). In models limited to cases with positive fee awards, the subset of cases shown in the figures, the relationships between the continuous explanatory variables and the fee amount are substantially stronger. Unlike the models of the existence of a fee award, the plaintiff's claim being fully accepted is not significantly associated with the amount of the fee award. This finding makes sense because the category "claim being fully accepted" provides no information about the amount of the recovery, which, as discussed above, is significantly associated with the amount of the fee award.

1. Case Categories

Model (1) confirms that fee awards tend to be higher in tort cases won by plaintiffs, as suggested by Table 5. The negative sign on all of the nontort case category variable coefficients indicates that tort, as the reference category, has the highest fee awards after controlling for other factors such as recovery amount, time on the docket, plaintiff-defendant combination, and district. The other nontort case categories in model (1) do not significantly differ. Model (2) shows that the significantly higher fee awards in tort cases do not persist when defendants win. The low fee awards reflected by the coefficients for arbitration cases in both models (1) and (2) are likely attributable to those cases' simplicity and shorter time on the docket. Arbitration cases were pending on average 1.9 years compared to 4.1 years

for other case categories. Arbitration cases are often simpler than other cases in that they do not address the merits of cases but rather procedural flaws in the arbitration.

2. Plaintiff–Defendant Combinations

With respect to the fact of an award, Table 4 showed favorable treatment of individuals who succeeded against corporations compared to individuals who succeeded against other individuals. Model (1) shows a marginally statistically significant effect for this party combination with respect to the amount of fees. Model (3) shows that corporations that prevailed against individual defendants in tort cases received significantly lower fee amounts than individuals who prevailed against individual defendants. In the contract and property category-specific models of cases won by defendants, model (6) and (8), and in the pooled categories in model (2), fee awards were significantly higher for corporate defendants who prevailed against corporate plaintiffs. Model (5) indicates that, in contract cases won by plaintiffs, fee awards were highest against government defendants and the next highest when individual plaintiffs prevailed against corporations. These patterns of higher awards did not persist in contract cases won by defendants.⁸⁶

3. Districts

In cases won by plaintiffs, all district coefficients in the full sample are at most marginally statistically significant, and one cannot reject the hypothesis that they are jointly equal to zero. Model (2) shows that Petah Tikva had the highest fee awards when defendants won, as suggested by Table 6, and model (4) indicates that this is attributable to its high awards in tort cases (though Tel Aviv had higher defendant fee awards in tort cases). The higher awards are not attributable to cases that take longer. The median time on the docket in Petah Tikva tort cases is shorter than in any other district: 2.6 years compared to about 4.2 years for other districts.

In tort cases, a time trend exists for cases won by plaintiffs. Model (3) indicates that awards were lowest in 2005, higher in 2006 than in 2005, higher in 2011 than in 2006, and highest in 2012. However, no general increase in fee awards persisted across case categories.

⁸⁶ Model (3) in Table 7 suggests that when foreign corporate plaintiffs prevailed in tort cases, fee awards were significantly higher than in other cases. However, that estimate is based on only four cases won by such plaintiffs.

C. *Scale Effect*

Table 8 shows the fee as a percentage of the recovery for each case category. The median fee percent in contract cases was much smaller than that in the two other major categories (tort and property). The existence of a common rate of 20% in tort is confirmed by the table, and the standard deviation of the fee percent in tort is substantially smaller than that in contract or property. The tort standard deviation significantly differs from the property standard deviation ($p=0.021$) but not from the contract standard deviation ($p=0.203$).⁸⁷

Table 8: Attorneys' Fees as Percent of the Recovery, by Case Category

Category	Mean percent	Median percent	Std. dev.	N
Administrative law	3.8	1.8	3.5	5
Arbitration	-	-	-	0
Banking	8.9	2.8	11.9	9
Contract	16.3	7.5	30.9	97
Corporations	29.3	13.8	40.1	5
Expropriation	59.3	20.5	63.7	11
Property	25.8	13.5	38.7	36
Tort	21.2	20.0	19.6	68
Tort, auto	15.0	13.0	6.8	68
Other	15.8	8.4	22.0	8
Total	19.5	13.1	28.5	307

Note: This table excludes cases in which there was no defense and cases in which fees may have been awarded to the losing party.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

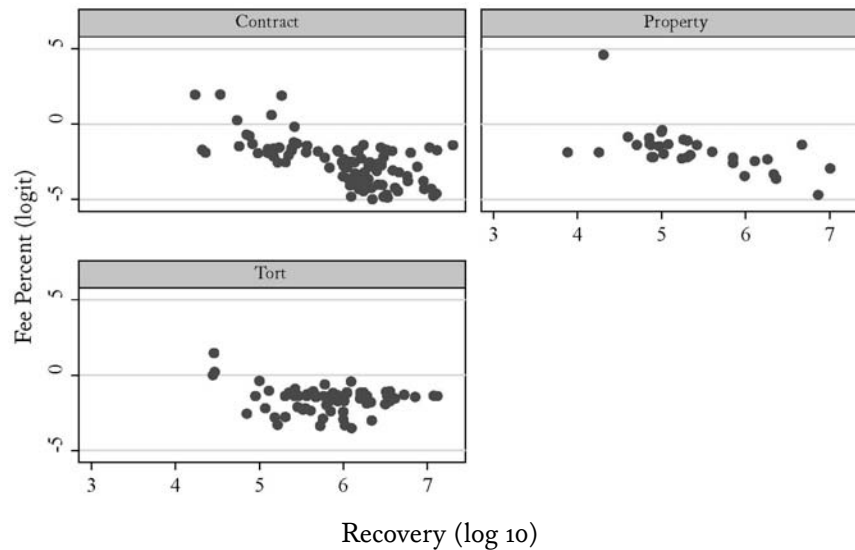
A natural question is whether attorneys' fees as a percentage of the recovery decrease as the recovery increases. A decrease has been observed in U.S. class actions.⁸⁸ But the fee and other dynamics of such litigation differ from the mass of cases, such as those studied here. If fees primarily reward effort, observing a declining fee percentage as the recovery increases is likely. Required effort may plateau in that the same effort may be needed to recover both an amount X and an amount substantially larger than X . The facts and law that must be marshaled likely do not always increase with the

⁸⁷ These significance levels are based on robust tests of the difference in the standard deviation of the means.

⁸⁸ See Eisenberg & Miller (2010), *supra* note 3, at 263-64 (explaining that the data revealed a scaling effect, or a fee percentage decrease as class recovery increases, in class actions). Our data contain 30 class actions, nine of which were won by plaintiffs, and three of which reported monetary recoveries.

stakes of a case. However, higher stakes may induce greater effort, which in turn may support a larger fee. Holding constant effort, does the fee decline or increase as a percent of recovery? Figure 2 shows the relationship between the percent and the recovery. The percent declines as the recovery increases, but the relation is absent in tort cases.

Figure 2: Fee Percent (logit)-Recovery Relation, by Case Category



Note: The logit transform is $\log(\text{proportion}/(1-\text{proportion}))$ where “proportion” is the fee divided by the recovery. Amounts are in 2012 NIS.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

The regressions in Table 9 model the fee, as a percentage of the recovery. They add to Figure 2’s information by controlling for effort through the case’s time on the docket. Time on the docket can be a problematic proxy for effort or complexity. A longer time can indicate manipulative procrastination on behalf of one of the parties (usually the defendant) or a heavy workload faced by the judge. Nevertheless, we expect that, on average, those cases that take longer require more effort. In addition, procrastination by defendants may require added effort by plaintiffs to seek orders requiring more expeditious action by defendants.

Preliminary models, not reported here, included the full array of plaintiff–defendant combination variables, district variables, and other variables. They do not materially differ from the more parsimonious models in Table

9. Time on the docket behaves as expected and is positive in all models. The coefficient on recovery is consistently negative and is statistically significant in three models. The scale effect is strongest in contract and property cases, as suggested by Figure 2. The tendency to award fixed percentages in tort may preclude model (2) from achieving statistical significance. In fact, except for a few low-recovery/high-fee percent cases, the tort pattern in Figure 2 shows no scaling effect. An unvarying fee percent cannot of course decline as the recovery increases.

Table 9: Regression Models of Fee as a Percent of the Recovery

	(1)	(2)	(3)	(4)
	All case categories	Tort cases	Contract cases	Property cases
Recovery (log10)	-0.956***	-0.338	-1.218***	-1.466***
Claim fully accepted	-0.222*	-0.186	-0.463*	0.093
Years pending (log)	0.213***	0.204	0.341*	0.296
Administrative law	-1.769***			
Banking	-1.262***			
Contract	-0.812**			
Corporations	-0.693			
Expropriation	-0.521			
Property	-0.507**			
Tort, auto	-0.042			
Other	-0.548			
Constant	3.746***	0.120	4.395***	5.048*
Observations	293	67	93	34
R-squared	0.425	0.087	0.439	0.424

Note: Dependent variable is a logit transform of the fee as a proportion of the recovery. Excludes cases in which there was no defense and cases in which fees may have been awarded to the losing party. Standard errors, not reported here, are clustered on judge. * indicates $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

V. DISCUSSION

We discuss two major issues in more detail. First is the issue with direct implications for all legal systems. How does the Israeli system, with the internationally dominant loser-pays norm, compare to the American rule? Second, we discuss additional details of the system's operation that should be of interest in fee studies. These details are the tendency to reward case

outcomes and effort and the system's features relating to case category, locale, and party status.

A. *Loser Pays or Closer to the American Rule?*

A major issue for loser-pays systems is whether they fully compensate prevailing parties. Some believe that awarded fees are insufficient to cover clients' actual attorneys' fees.⁸⁹ The 31,000 NIS median fee to plaintiffs and the 25,000 NIS median fee to defendants strongly support this perception. Quantitative comparison of fees with amounts related to litigation are striking. The 25,000 NIS median fee to defendants is approximately 1% of the jurisdictional amount threshold for filing a case in district court, and the plaintiff median is less than 2%. The plaintiff and defendant median fee awards are less than half of the filing fee, 62,500 NIS, for the smallest monetary claim (other than bodily injuries) that may be brought in district court. The loser-pays norm does not lead to full compensation of prevailing parties.

Although Israeli prevailing parties do not, on average, recover their full litigation fees, it is unlikely that a single reason explains the shortfall. We find little evidence that judges seek to undercompensate prevailing parties by approving nonzero payments below known fees. When they wanted to promote access to courts, judges had the simpler strategy of denying the prevailing party any fees. Our data provide evidence that, in some case categories, judges try to award the prevailing party (mostly plaintiffs) actual attorneys' fees. They did so in road accident claims when the plaintiff prevailed. In such cases judges know that, in all likelihood, the plaintiff paid his lawyer about 13% of the recovery as attorneys' fees,⁹⁰ and therefore they awarded the plaintiff 13% of the recovery as fees. The same phenomenon prevailed with regard to other tort claims in which judges appear to mimic the market and award prevailing plaintiffs fees of about 20% of the recovery (the routine retainer agreement in the market).⁹¹ In the four cases in which retainer agreements were submitted to the court, the requested fee amount was awarded.⁹² In the vast majority of cases, however, the judge lacked information about the prevailing party's fees, and so one cannot expect awards to match the actual fees. Underestimation may be the norm to avoid

⁸⁹ See LOVELLS, *supra* note 54, at 110 ("The legal fees ordered by the [Israeli] court are often considerably lower than the actual legal fees incurred by the parties.").

⁹⁰ See *supra* note 70 and accompanying text.

⁹¹ See *supra* note 26-27 and accompanying text.

⁹² See *supra* 65 and accompanying text.

windfalls to parties and, in the case of prevailing defendants, to avoid over-deterrence of litigation by parties with relatively low resources.

The substantial fraction of cases in which prevailing parties received no fee increases the gap between winning parties' fee expenditures and recoveries. This means that Israel's loser-pays system, like many others, is not as different from the American rule as a simple dichotomy suggests.

B. *Further Perspectives on the System's Operation*

Putting aside characterizing the system as most consistent with one rule or the other, Israel's fee system has several salient features of national and transnational interest.

The system in general rewards outcome and effort. The probability of denying fees to winning plaintiffs was inversely related to the size of recovery in cases won by plaintiffs and diminished when plaintiffs succeeded in whole. Fee denials were not associated with a case's time on the docket, but the fee amount increased with both the size of the recovery and the time on the docket. The denial decision was more associated with whether plaintiffs fully prevailed than with the time that a case took. The denial decision differed substantially for cases won by plaintiffs and defendants.

The fee system also has distinctive features relating to case category, locale, and party status. These include the prominent role of contingency fees in tort cases, the high rate of fee denials in Nazareth property cases, and the favorable fee award rate for foreign corporate plaintiffs.

Fees in tort cases were one of the most distinctive features of the Israeli system. When one accounts for win rates, plaintiff-defendant combinations, and the amount of fees awarded, judges' tendency to protect individual plaintiffs in tort cases becomes even clearer. Table 10 shows the sum of the fee award amounts in tort cases involving individual plaintiffs. Plaintiffs won varying percentages of tort cases, as shown in the third column. They prevailed in 55% of tort cases against individuals, 62% of cases against corporations, and 19% of cases against the government. The sum of fees awarded to plaintiffs always far exceeded the sum of fees awarded to defendants, as shown in the fifth column. The percentage of fees paid to plaintiffs consistently exceeded their percentage of wins. Plaintiffs received 90% of the fees in cases against individuals, 78.2% of the fees in cases against corporations, and 65.1% of the fees in cases against government entities. The last percentage is especially noteworthy because plaintiffs lost the overwhelming majority of cases against government defendants yet received almost two-thirds of the fees.

The dominance of contingent fees in tort cases likely led judges to rarely deny the fees when plaintiffs prevailed. The amounts judges awarded suggests that judges include a premium to reflect the risk of zero payment from a client when contingency lawyers lost. Both the high rate of granting fees to prevailing plaintiffs and the amount of fee awards likely relate to the contingency fee character of tort actions. Frequent denial of fees when tort defendants prevailed effectively promotes access to justice by individuals unlikely to be able to comfortably afford paying fees when they lose.

Table 10: Tort Case Fee Awards by Party and Winner

	Winner	Parties' win rates in cases with fee data	Number of cases won with fee data	Sum of fee awards (000)	Percent of fee award amounts to plaintiffs
Individual v. individual	Pltf.	54.8	23	7672	90.0
Individual v. individual	Def't.	45.2	19	852	
Individual v. corporation	Pltf.	61.7	37	8489	78.2
Individual v. corporation	Def't.	38.3	23	2363	
Individual v. government	Pltf.	18.9	7	1051	65.1
Individual v. government	Def't.	81.1	30	563	

Note: This table excludes cases in which there was no defense and cases in which fees may have been awarded to the losing party. Amounts are in 2012 NIS.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005, 2006, 2011, and 2012.

A second distinctive feature of the fee system was the high rate of fee denials in Nazareth property cases. Nazareth's ethnic composition may lead to different kinds of property disputes than the typical disputes in other districts. Nazareth has a higher proportion of Arab litigants and judges than other districts. The higher rate of fee denials in Nazareth persisted across all ethnic combinations of plaintiffs and defendants. When plaintiffs won in cases involving individual plaintiffs and defendants, the Nazareth fee denial rate was 75% for the 32 cases involving Arab plaintiffs and Arab defendants, 96% for the 25 cases involving Arab plaintiffs and Jewish defendants, and 71% for the 14 cases involving Jewish plaintiffs and Jewish defendants. No Nazareth cases with the necessary information involved Jewish plaintiffs and

Arab defendants. Each of these rates is higher than the corresponding rate in Haifa, the only other district with substantial numbers of Arab property litigants. Together, Haifa and Nazareth account for 89% of Arab plaintiff–Arab defendant cases and 77% of Arab plaintiff–Jewish defendant cases. For cases involving Arab plaintiffs and Jewish defendants won by plaintiffs, the Haifa fee denial rate was 14% (2 of 14 cases). The difference from the 96% Nazareth rate ($p < 0.001$) is statistically significant. These results suggest the need to dig deeper into the cause and nature of the property disputes in Israel.

A third notable result is the low rate of fee denials to foreign corporate plaintiffs, as shown in models (1) and (3) of Table 4. Such plaintiffs were denied fees in less than 15% of their wins. They were also highly successful in winning cases, as they prevailed in 69% of 13 contract actions, 83% of 42 property actions, and 80% of 10 tort actions. Their rate of success against individual defendants was 92% of 36 cases compared to 67% of 173 cases brought by domestic corporations. Their rate of success against corporate defendants was 75% of 44 cases compared to 59% of 324 cases brought by domestic corporations. Since the decision to bring a case likely differs for potential plaintiffs in a foreign forum than for potential plaintiffs in their home country, we do not interpret these results as evidence that Israeli courts favor foreign corporations. Such anti-local bias seems extremely unlikely. A more plausible explanation is that foreign corporations, fearing bias in an unfamiliar court system, are selective about the cases that they bring in foreign countries and thereby achieve high win rates.⁹³ Foreign corporate litigants likely also have higher than average resources and quality of lawyers.⁹⁴

As a procedural matter, the Israeli practice of not submitting documentation to inform the court about the time and effort spent on a case, despite the former ISC Presidents Justice Barak's and Justice Beinisch's administrative

⁹³ See Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1132–35 (1996) (explaining how data reflect the argument that foreigners are more selective of cases they file in U.S. courts). In the United States, findings of high foreign litigant success in one time period were not replicated in a later time period. See generally Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441 (2007).

⁹⁴ The roster of names of foreign corporate plaintiffs in our data suggest that they often are large sophisticated international companies such as Audemars Piguet Holdings Ltd., Christian Dior Couture, Daimler Chrysler AG, Disney Enterprises Inc., E.M.I. Records Ltd., Gianni Versace S.P.A., Lloyd's Underwriters, Levi Strauss & Co., Louis Vuitton Malletier, Microsoft Corp., Nike International Ltd., Smith Kline Beecham P.L.C., Time Warner Entertainment Company L.P., and Tommy Hilfiger Licensing LLC. We did not observe a similar high success rate by foreign corporate defendants, who, unlike plaintiffs, do not choose the cases in which they are involved.

guidance,⁹⁵ at first seems bizarre. One assumes that a judge cannot make an appropriate fee award without information about time and effort. A possible explanation is rooted in an agency problem against the background of a lawyer cartel: fee awards are granted to the parties and not to the lawyers. Thus, the lawyers do not stand to benefit from revealing the information regarding actual fees and may even be adversely affected by such public knowledge. Alongside this explanation for the phenomenon, one can also justify the absence of documentation in light of the extra work it would add. If the prevailing party submits information in support of a fee amount, the losing party should be entitled to submit information in support of a different, presumably lower, fee amount (for example, to prove that the requested amount is not “reasonable, proportional and necessary for the litigation”).⁹⁶ This could lead to a second round of litigation in many cases, with the dispute centered not on a case’s merits but instead on the appropriate attorneys’ fees. Secondary litigation became such a serious and costly issue in litigation in England that a fee award table, based on the amount recovered, was adopted to reduce fee litigation.⁹⁷

CONCLUSION

Attorney compensation fuels litigation, yet surprisingly little systematic knowledge exists about fee awards. Legal systems try to balance the desire to hold prevailing parties harmless through fee awards while promoting reasonable access to courts by not overly deterring reasonable claims. English rule systems do this through exceptions to loser-pays rules and through fee awards that do not cover the prevailing party’s actual fees. We present evidence that Israeli judges usually awarded fees to prevailing parties, often exercised their discretion to deny fees, and denied fees at the highest rate in tort cases brought by individuals. Higher recoveries and prevailing in whole were both associated with an increased probability of a fee award. The loser-pays norm was not followed in property cases in Nazareth, where fee denial to prevailing plaintiffs was the norm.

When fees were awarded, the median amount was equivalent to less than \$10,000. Prevailing parties thus usually do not receive their full litigation fees and must pay their attorneys substantial amounts above the court awarded fees. A loser-pays system with substantial rates of fee denials to

⁹⁵ See *supra* note 64 and accompanying text.

⁹⁶ See CA 6793/08 *Loare Ltd. v. Meshulam Levinshstein Contracting & Eng’g Ltd.* 1, 10 [2009] (Isr.).

⁹⁷ See Fenn & Rickman, *supra* note 3, at 534 (“The Fixed Recoverable Costs Scheme (FRCS) was itself a response to a growing concern about rising legal costs in England and Wales . . .”).

prevailing parties and low fee amounts when fees are rewarded may, in its actual operation, be closer to the American rule than to the English rule.

Both the pattern of fee denials and the amount of fee awards in tort cases suggest that judges took into account that contingency fees were the common method for funding tort litigation. Tort, contract, and property cases all showed a strong association between the size of the recovery and the amount of the fee award. Outside of tort, where fixed percentages of fees were the norm, fees declined as a percent of the recovery as the recovery amount increased.