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When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants

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When Courts Determine Fees in a System With a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants



Theodore Eisenberg
Talia Fisher
Issi Rosen-Zvi

ABSTRACT

Under the English rule, the loser pays litigation costs whereas under the American rule, each party pays its own costs. Israel instead vests in its judges full discretion to assess fees and costs as the circumstances may require. Both the English and the American rules have been the subjects of scholarly criticism. Because little empirical information exists about how either rule functions in practice, an empirical study of judicial litigation cost award practices should be of general interest. This Article presents such a study in the context of Israel's legal system. We report evidence that Israeli judges apply their discretion to implement multiple de facto litigation cost systems: a one-way shifting system that dominates in most tort cases; a loser pays system that operates when publicly owned corporations litigate; and a loser pays system with discretion to deny litigation costs in other cases. Although a loser pays norm dominates in Israel with litigation costs awarded to the prevailing party in 80 percent of cases, Israeli judges still often exercised their discretion to protect certain losing litigants, especially individuals, from having to pay their adversaries' litigation costs. In tort cases won by individual plaintiffs against corporate defendants, for example, corporations had to pay their own litigation costs plus plaintiffs' litigation costs 99 percent of the time. Even when the corporate defendants prevailed, they still had to pay their own litigation costs 52 percent of the time. When public corporations litigated and lost, a loser pays system dominated. Award patterns also varied by case category and judicial district. In property cases in one district, courts denied prevailing plaintiffs fees in about 75 percent of cases. Theorizing about optimal fee rules should account for the variety of fee outcomes observed in practice.

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INTRODUCTION

All legal systems encounter the fundamental issues of how to compensate litigating attorneys and how to allocate other litigation expenses. Such compensation and expenses have received much recent scholarly attention.¹ They have even reached Europe's highest courts, where litigants have prevailed on claims that high court costs or the denial of legal aid violated fundamental rights under European law.² Litigation fees and expenses even provide a basis on which countries compete for legal business.³

Commonly, discussions about litigation costs (fees plus costs)⁴ proceed as if only two approaches existed to allocating these costs among litigating parties. These two approaches are usually labeled the English rule and the American rule.⁵ In the state of Alaska and in most Western legal systems other than the United States, the prevailing norm is the English rule, under which the losing party is required to pay the reasonable litigation costs incurred by the winning party.⁶ The

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1. See, e.g., Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE 3, 5–6 (Mathias Reimann ed., 2012); Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 731–34 (2010).
 2. See Reimann, *supra* note 1, at 6–7.
 3. For example, the German federal minister of justice competes for legal business by invoking the predictability of Germany's litigation cost system: "As court and lawyer's fees are prescribed by law and are always based on the value of the matter in dispute, legal costs can be calculated from the outset." SABINE LEUTHEUSSER-SCHNARRENBARGER, LAW—MADE IN GERMANY 29 (2012), available at http://www.lawmadeingermany.de/Law-Made_in_Germany.pdf.
 4. Although terminology can vary in the literature, this Article uses fees to refer to compensation paid to litigating attorneys and costs to refer to filing fees and the like. In our analysis, we are usually interested in the collective of fees plus costs, which we refer to as litigation costs. Practices with respect to fees and costs are not always consistent within a country. See Reimann, *supra* note 1.
 5. See, e.g., 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, 328–29 (2013).
 6. See Werner Pfennigstorf, *The European Experience With Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37, 44–47; Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms From Class Actions*, 13 DUKE J. COMP. & INT'L L. 125, 128 (2003). For Alaska's rule on fees, see ALASKA R. CIV. P. 82, which requires the losing party to pay a percentage of the prevailing party's fees. A loser pays provision is also found in section 5-111(e) of the Uniform Commercial Code, pertaining to violations of obligations by issuers of letters of credit. U.C.C. § 5-111(e) (2011). Nevada allows an award of fees to a prevailing party when the prevailing party has not recovered more than \$20,000. NEV. REV. STAT. ANN. § 18.010(2)(a) (2008).

American rule, on the other hand, ordinarily requires each party to bear its own litigation costs regardless of the outcome of the case.⁷

Both systematic study of countries' litigation cost practices and empirical study of how private parties contract about litigation costs suggest the inadequacy of the English rule–American rule dichotomy. Mathias Reimann, for example, in summarizing a multicountry study of litigation cost practices, concluded that “[p]erhaps the most fundamental finding of this study is that such a dichotomy is hopelessly simplistic as well as virtually useless.”⁸ Even within the United States, a study of litigation cost clauses in contracts revealed that many such clauses do not fall neatly under either rule.⁹

Several practices blur the lines between methods of allocating litigation costs. In many systems that nominally follow a loser pays principle, for example, the losing party is only required to pay a statutorily or otherwise specified amount—regardless of the prevailing party's actual legal expenses—or only a percentage of the litigation costs.¹⁰ England often shifts litigation costs less than countries with such specified amounts or percentages.¹¹ It and other British Commonwealth countries regard a loser pays principle as “a general guideline, basic expectation, and usual practice outcome.”¹² But these countries grant some discretion to their

7. *See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245–47 (1975). An exception exists for vexatious litigation or litigation brought in bad faith, in which case the innocent party can recover litigation costs from the party acting in bad faith. *See, e.g., Chambers v. Nasco, Inc.*, 501 U.S. 32, 45–46 (1991).

8. Reimann, *supra* note 1, at 9.

9. *See Eisenberg & Miller, supra* note 5, at 352 tbl.2. Some such contract clauses are even statutorily validated in a number of American states, including, for example, by a California statute requiring a party to pay its adversary's fees if the party loses in litigation under a contract that specifies that the party is to receive fees from its adversary if it prevails. *See* CAL. CIV. CODE § 1717(a) (West 2009) (“In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.”). Washington and Oregon have statutes similar to California's. *See* OR. REV. STAT. § 20.096 (2011) (stating that if a contract provides for fees to one party, the prevailing party is entitled to fees); WASH. REV. CODE ANN. § 4.84.330 (West 2006 & Supp. 2012) (stating the same). New York has a statute to similar effect, but it is limited to landlord-tenant relations. *See* N.Y. REAL PROP. LAW § 234 (McKinney 2006) (requiring a landlord to pay a tenant's attorney's fees if a lease of residential property requires the tenant to pay the landlord's attorney's fees).

10. *See* Reimann, *supra* note 1, at 11 (reporting that a fixed cost schedule applies in Austria, Belgium, the Czech Republic, Finland, Germany, Italy, Netherlands, Poland, Serbia, Turkey, and Switzerland, and that a percentage limitation applies in Brazil, Mexico, Spain, and Venezuela).

11. *See id.* at 13.

12. *Id.*

courts in allocating litigation costs, and judges often exercise their discretion to require a prevailing party to “bear a considerable share of its own costs.”¹³

A plausible additional approach to allocating litigation costs is to vest full responsibility for assessing them in the institutional actor with case-specific expertise, with no affiliation with the litigating sides, and with a presumed interest in promoting justice as each individual case requires—the judge. Such a judge-centered system could, in theory, effectively address the problems associated with the litigation cost allocation methods already described. It might, for example, avoid the systematic underpayment of litigation costs in countries with fixed-amount or percentage-based reimbursement schedules since the judge can adjust the amount awarded as each case warrants. A judge-centered system might also avoid the harshness of litigating parties with reasonable but losing claims having to bear the full litigation costs of their opponents. Israel and South Africa have implemented such judge-centered allocation systems.¹⁴

Regardless of the strengths and weakness of a judge-based system, it is an obvious candidate as an alternative to loser pays and neither party pays rules. Interest in how a judge-centered system actually functions should transcend the countries using it. Its functioning should interest countries concerned about litigation costs and how they might be reduced, made more certain or more flexible, or made fairer. Since litigation costs are a near-universal concern,¹⁵ this Article’s empirical study of Israel’s experience with a judge-centered system should therefore be of broad interest.

Litigation costs is such a vast topic that one article can only focus on a few discrete questions. This Article reports our findings about when judges do not impose litigation costs on a losing party—that is, when they deny an award to the prevailing party—despite having the discretion to grant an award. The question of when to relieve a losing party from having to pay its adversary’s litigation costs is central to fee-shifting debates, which are usually framed in terms of a competition between only the English and American rules. In the United States, for example, some have argued for a change towards the English rule on the theory

13. *Id.*

14. See Talia Fisher & Issi Rosen-Zvi, *It’s for the Judges to Decide: Allocation of Trial Costs in Israel Report on Israel*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE, *supra* note 1, at 177, 177–78; Reimann, *supra* note 1, at 13. With respect to South Africa, see *Ferreira v. Levin* 1996 (2) SA 621 (CC) at 624 para. 3 (S. Afr.), which states that “the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and . . . the successful party should, as a general rule, have his or her costs.”

15. See Reimann, *supra* note 1.

that it more effectively deters the filing of frivolous lawsuits.¹⁶ Others, however, fear that the English rule exacerbates the already significant financial barriers that low- and middle-class individuals face in accessing the legal system.¹⁷

To summarize our findings, Israeli judges exercise their discretion in a manner that often protects losing litigants, especially individuals. Overall, Israeli judges denied litigation costs to prevailing defendants in 26.3 percent of cases and to prevailing plaintiffs in 16.3 percent of cases. For individual plaintiffs and defendants, denial rates exceeded one-third for defendants who prevailed against individuals and exceeded one-quarter for plaintiffs who prevailed against individuals. Denials of litigation costs operated to protect individual plaintiffs against awards more than corporations. In cases lost by individual plaintiffs, litigation costs were denied to successful defendants 29.9 percent of the time compared to denials in 18.0 percent of cases lost by corporate plaintiffs and 16.7 percent of cases lost by governmental plaintiffs. In cases lost by individual defendants, litigation costs were denied to successful plaintiffs 22.7 percent of the time compared to 9.8 percent denials in cases lost by corporate defendants and 21.2 percent denials in cases lost by government defendants. Protection of individuals was especially prevalent in tort cases between individual plaintiffs and corporate defendants. In cases brought by individual plaintiffs, corporations had to pay their own litigation costs plus plaintiffs' 99 percent of the time. In such cases won by the corporate defendants, they had to pay their own litigation costs 52 percent of the time. These general patterns, however, oversimplify a complex litigation cost allocation system that varied by prevailing party (plaintiff vs. defendant), party status (individual, government, corporation), case category (for example, tort, property, or contract), and judicial district. Our findings suggest that Israeli judges operate multiple *de facto* litigation cost systems: a one-way shifting system that dominates in most tort cases; a loser pays system that

16. See, e.g., CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 143, 145–46 (Ed Gillespie & Bob Schellhas eds., 1994) (claiming that the house Republicans' reform bill "penalizes frivolous lawsuits by making the loser pick up the winner's legal fees"); PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991), reprinted in 60 U. CIN. L. REV. 979, 993–94, 1002–03 (1992) (proposing to revise the federal offer-of-judgment rule to include the "additional costs of trial," presumably including attorney's fees, and recommending a loser pays rule for discovery motions and for federal court diversity cases but calling for a moratorium on one-way, plaintiff-favoring fee-shifting statutes); Op-Ed., *Loser Pays, Everyone Wins*, WALL ST. J., Dec. 15, 2010, <http://online.wsj.com/article/SB10001424052748703514904575602762974652860.html>. For a proposal to implement some form of a loser pays rule, see, for example, Attorney Accountability Act of 1995, H.R. 988, 104th Cong. § 2, proposing that a nonprevailing party must pay the prevailing party's attorney's fees in federal civil diversity litigation in which an offer of settlement has been made.

17. See, e.g., Rosen-Zvi, *supra* note 1, at 721–22.

operates when publicly-owned corporations litigate; and a loser pays system with discretion to deny litigation costs in all other cases. In one judicial district, Nazareth, a system that requires each party to pay its own litigation costs prevailed in most property cases.

It is important to track which party prevailed in trial court rulings because rates of litigation cost denials are highly associated with whether plaintiffs or defendants win. Tracking the prevailing party also allows us to present the first major empirical summary of who prevails in litigation pursued to conclusion on the merits in Israel's district courts.

Part I of this Article briefly reviews relevant prior literature on litigation cost allocation rules and also reports our expectations about what results should obtain in Israel's system. Part II provides necessary background information about Israel's legal system and its rules governing litigation costs. Part III describes our study's data and our research methodology. Part IV reports our results, which are discussed in Part V. We then offer concluding thoughts.

I. PRIOR LITERATURE AND HYPOTHESES

Although a vast theoretical literature exists on litigation costs, much of it need not be described here. The literature has been reviewed elsewhere and is of limited relevance to this study because it reaches few consistent predictions or prescriptions.¹⁸ Little, if any, prior literature focuses on outright denials of litigation costs—the topic of our inquiry. And no empirical literature exists on the pattern of litigation cost denials in the mass of cases in a court of first instance. Existing studies tend to examine litigation cost award amounts, not denials, in specific subsets of cases—such as class action settlements¹⁹ or automobile accident cases.²⁰ Class action litigation cost awards in the United States are somewhat analogous to Israel's allocation system in that the amounts of fee awards to class counsel are left almost completely to the discretion of the district judge.²¹ This judge-based corner of American class action law has produced a

18. See, e.g., Eisenberg & Miller, *supra* note 5.

19. See 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)].

20. See Paul Fenn & Neil Rickman, *Fixing Lawyers' Fees Ex Ante: A Case Study in Policy and Empirical Legal Studies*, 8 J. EMPIRICAL LEGAL STUD. 533, 539 (2011).

21. See, e.g., Eisenberg & Miller (2010), *supra* note 19, at 249 (arguing that the judge is the only actor who can protect the class's interest in setting the fee).

highly regular pattern of fee awards, in which the level of the award is largely determined by the amount of the class recovery.²²

Some literature reviewing actual litigation cost award practice provides guidance about what judicial behavior to expect in Israel's judge-centered system. As noted above, Reimann's review of dozens of legal systems found that many of those systems were reluctant to apply loser pays rules fully.²³ The perceived negative effect on potential low-income litigants seems to motivate the sentiment against full shifting of litigation costs.²⁴ Some theoretical law and economics analysis also suggests that limited litigation cost shifting, rather than full and unlimited reimbursement under a loser pays rule, may provide a superior litigation cost allocation system.²⁵

In response to such concerns about a firm loser pays rule, most English rule jurisdictions temper their rule. In Australia it is estimated that despite a loser pays rule, prevailing parties do not recover 40 to 50 percent of their litigation costs;²⁶ Belgium has a fixed reimbursement schedule but the amounts awarded to prevailing parties are regarded as small,²⁷ and Brazil has a low percentage cap on recoverable litigation costs²⁸ and exempts people who cannot afford the costs of litigation from the loser pays rule altogether.²⁹ Even Germany, the core jurisdiction that Reimann categorizes as a "major shifting" jurisdiction,³⁰ limits recovery of litigation costs to a statutorily prescribed amount.³¹ A winning party that agreed to pay its attorney higher fees than specified in the statute cannot

22. See *id.* at 253–54 (showing a strong linear correlation between fee amount and class recovery amount).

23. See *supra* note 8 and accompanying text.

24. A strict loser pays rule has been described, for example, 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, *supra* note 1, at 59, 60 (internal quotation marks omitted).

25. See Emanuela Carbonara & Francesco Parisi, *Rent-Seeking and Litigation: The Hidden Virtues of the Loser-Pays Rule 3* (Legal Studies Research Paper Series, Research Paper No. 12-39, 2012), available at <http://ssrn.com/abstract=2144800>.

26. Cameron, *supra* note 24, at 60.

27. See Ilse Samoy & Vincent Sagaert, "Everything Costs Its Own Cost, and One of Our Best Virtues Is a Just Desire to Pay It." *An Analysis of Belgian Law*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE, *supra* note 1, at 79, 83. For a fixed fee schedule in United Kingdom automobile accident cases, see Fenn & Rickman, *supra* note 20, at 555.

28. See Alexandre Alcino de Barros & Sílvia Julio Bueno de Miranda, *Major Shifting: The Brazilian Way*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE, *supra* note 1, at 89, 92.

29. See *id.* at 94.

30. Reimann, *supra* note 1, at 10.

31. See Burkhard Hess & Rudolf Huebner, *Cost and Fee Allocation in German Civil Procedure*, in COST AND FEE ALLOCATION IN CIVIL PROCEDURE, *supra* note 1, at 151, 151.

recover the excess from the losing party.³² The justification offered for this limited recoverability is that it reduces “the financial risk of civil litigation and thus protects the losing party.”³³ Many other countries described in Riemann’s volume on litigation cost allocation systems similarly limit the loser pays rule.³⁴

Dissatisfaction with the default American rule in the United States has led to many statutory mandates to shift litigation costs in certain types of cases.³⁵ But these statutes are often applied in such a way that litigation cost shifting occurs only in favor of prevailing plaintiffs. For example, in 1980, Florida enacted a statute regulating medical malpractice litigation under which a losing party had to pay the prevailing party’s litigation costs.³⁶ The state’s medical association supported the statute based on the belief that litigation cost shifting would discourage the pursuit of weak claims.³⁷ The law, however, contained a provision relieving insolvent parties of having to pay the prevailing party’s litigation costs, leading some practitioners to view the rule as evolving into one-way shifting scheme favoring plaintiffs.³⁸ The Florida legislature repealed the statute five years later, at the behest of the medical association that initially had sought its passage.³⁹

Evolution to one-way shifting also occurred under the main U.S. federal fee-shifting statute applicable to civil rights cases, enacted as part of the Civil Rights Act of 1976.⁴⁰ The statute authorizes a litigation cost award to the “prevailing party” in civil rights cases and thus does not expressly distinguish between plaintiffs and defendants.⁴¹ In practice, however, it is difficult for a prevailing defendant to recover litigation costs and the provision is regarded as

32. *Id.*

33. *Id.*

34. *See* COST AND FEE ALLOCATION IN CIVIL PROCEDURE, *supra* note 1.

35. *See, e.g.,* Rozen-Zvi, *supra* note 1, at 721.

36. FLA. STAT. ANN. § 768.56 (repealed 1985).

37. *See* Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 355–56 (1990). The new statute notwithstanding, however, the number of filed claims appeared to increase after passage of the shifting rule. *Id.* at 356.

38. *See id.*

39. *See id.* at 345, 355–56.

40. Civil Rights Attorney’s Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified as amended at 42 U.S.C. § 1988(b) (2006)).

41. 42 U.S.C. § 1988(b) (“[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs . . .”). In 1991, Congress amended the statute to permit the court, in its discretion, to allow expert fees as part of the attorney’s fee. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, § 113(a)(2), 105 Stat. 1071, 1079 (codified as amended at 42 U.S.C. § 1988(c)).

a one-way shifting statute under which plaintiffs recover their litigation costs if they prevail but need not pay the litigation costs of their adversaries if they lose.⁴²

So although loser pays countries and the United States differ in their default rules, most of either side's forays into litigation cost shifting reflect a similar sentiment: Full recovery is often regarded as unjust and as imposing too great a risk of stifling justified litigation by persons of limited means. Consequently, rules or judicial discretion often temper the negative effects of a pure loser pays system.

If Israeli judges share the sentiments reflected in international practice, we can expect them to use their discretion in allocating litigation costs to implement differential treatment based on the losing party's perceived ability to pay. Although our data lack detailed financial information about individual litigants, they do include litigants' status as individuals, corporations, public corporations, or governmental entities. We use this status as a proxy for ability to pay. We assume that, on average, corporations have a greater ability to pay than individuals do and that public corporations have a greater ability to pay than other corporations do. We therefore expect the Israeli pattern of litigation cost awards to protect individuals and nonpublic corporations over public corporations. The government clearly has greater ability to pay than almost all other litigants do. But it also differs from other litigants in its financial incentives and in its litigation behavior.⁴³ Therefore, we do not have a clear expectation about how judges will treat the government in allocating litigation costs.

II. BACKGROUND INFORMATION ABOUT ISRAEL'S LEGAL SYSTEM

Comprehending this study requires some understanding of Israel's relevant institutional framework. Our focus in this Article is on litigation costs at the trial court level in Israel's district courts, and thus we limit the institutional description of Israel's court system in Part II.A to those aspects most relevant to this study. In Part II.B, we then describe Israel's rules on the allocation of litigation costs.

42. Cf. *Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n*, 434 U.S. 412, 416–17, 421 (1978) (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)) (stating that only an unreasonable, frivolous, or groundless claim will support a fee award to a prevailing defendant in Title VII cases and that a prevailing plaintiff will receive a fee award unless there are "special circumstances [which] would render such an award unjust" (internal quotation marks omitted)).

43. 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).

A. Israel's Trial Court System⁴⁴

Israel is a unitary state with a single system of courts of general jurisdiction. Other authorities also exercise subject matter or person-specific jurisdiction. Among the courts of general jurisdiction, Israel's judiciary law establishes a hierarchy of three levels with the Israel Supreme Court (ISC) at the top, district courts below it, and magistrates' courts at the bottom.⁴⁵ District courts and magistrates' courts function as trial courts, while the Supreme Court functions both as an appellate court and as High Court of Justice (HCJ).⁴⁶ In its HCJ capacity, the ISC operates as a court of first and last instance, primarily in areas relating to government behavior.⁴⁷

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 shekels (NIS) (approximately U.S. \$675,000)—as well as over the use, possession, and division of real property. 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 a specific magistrates' court directs that a panel of three judges should hear a particular case.⁴⁸

District courts have residual jurisdiction over matters not within the sole jurisdiction of another court.⁴⁹ There are six district courts, which sit in Jerusalem, Tel Aviv, Haifa, Beer Sheva, Nazareth, and Petah-Tikva. The Petah-Tikva court was established in 2007.⁵⁰ District courts have civil jurisdiction over matters in which more than 2.5 million NIS are in dispute and commonly adjudicate cases involving companies and partnerships, arbitration, and prisoner petitions. They also hear appeals on tax matters and serve as administrative law courts. District courts also hear appeals from judgments of the magistrates' courts.⁵¹ Generally, a single district court judge presides over trial. A panel of three judges, however, hears appeals from magistrates' court judgments

44. Unless noted otherwise, this description of the Israeli judiciary is based on a similar description in Theodore Eisenberg et al., *Does the Judge Matter? Exploiting Random Assignment on a Court of Last Resort to Assess Judge and Case Selection Effects*, 9 J. EMPIRICAL LEGAL STUD. 246, 252–54 (2012).

45. *See generally* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271 (1983–1984) (Isr.).

46. *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).

47. *See id.*

48. *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271 (1983–1984) ch. 2, art. 3, § 47 (Isr.).

49. *See id.* ch. 2, art. 2, § 40(2).

50. Ordinances of Courts (Establishment of the Central District Court), 2007, KT 6585, 824.

51. *See* Courts Law (Consolidated Version), 5744-1984, 38 LSI 271 (1983–1984) ch. 2, art. 2, § 40(3) (Isr.).

and sits when the president or deputy resident of a district court so directs.⁵² Our data do not include any cases with a three-judge panel. This study is limited to cases originating in the district courts.

Civil case filing fees are infrequently discussed as a significant part of litigation costs in the United States because they tend to be relatively small.⁵³ In Israel, however, filing fees are much more substantial and, because they impose higher ex ante costs, likely exert greater influence over the nature of cases filed in court. Filing fees in the general civil courts for monetary claims are 2.5 percent of the value of the relief sought, including a minimum fee that currently stands at 744 NIS. Any claim over 23,800,859 NIS (about \$5.2 million), results in a filing fee reduced to 1 percent of the claim amount.⁵⁴ Thus, filing fees in monetary damages cases can be several thousand dollars. Filing fees in cases involving nonmonetary relief—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.⁵⁵ Several exceptions to the requirement to pay filing fees exist depending 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.⁵⁶ This exemption applies narrowly, however, and an applicant for relief must demonstrate not only inadequate personal financial resources but also the unavailability of access to financial assistance from other sources (such as family members).⁵⁷ Exemptions from, or reductions of, filing fees based on the nature of the claim filed include such cases as prisoner petitions and governmental takings, as well as many others.⁵⁸

52. *See id.* ch. 2, art. 2.

53. For example, the filing fee to commence a civil action in federal court is \$350. *See* 28 U.S.C. § 1914(a) (2006). For a list of state court filing fees, see NAT'L CTR. FOR STATE COURTS, CIVIL FILING FEES IN STATE TRIAL COURTS, APRIL, 2012 (2012), available at <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>.

54. Second Supplement of the Court Rules (Court Fees), 2007, sec. 8 (on file with author).

55. *See id.* sec. 2 (stating that the filing fee for bodily injury cases filed in magistrates' court is currently 6592 NIS (about \$1,780)); *id.* sec. 9 (stating that the filing fee for bodily injury cases filed in district court is currently 41,203 NIS (about \$11,125)); *id.* sec. 3 (stating that the filing fee for declaratory relief cases filed in magistrates' court is currently 633 NIS (about \$171)); *id.* sec. 10 (stating that the filing fee for declaratory relief cases filed in district court is currently 1115 NIS (about \$301)). 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.

56. *See id.* sec. 14.

57. *See* SA 494/95 Shimoni v. Shimoni (unpublished, Mar. 23, 1995); TA (Tel Aviv) 511/98 Fuks v. Discount Bank LTD (unpublished, June 9, 1999).

58. *See* Second Supplement of the Court Rules secs. 3, 9, 20.

B. Israel's Law on Litigation Costs

Israeli law governing litigation costs differs from almost all other legal systems in the world (except South Africa and, to some extent, India)⁵⁹ in that the court has almost complete discretion over allocation decisions. The rules regulating court costs and attorney's fees (which are treated jointly)⁶⁰ are specified in the Rules of Civil Procedure from 1984 (RCP).⁶¹ The fundamental litigation cost allocation rule—Rule 511—grants courts wide discretion with regards to both the allocation of litigation costs and the amount awarded, and subjects this discretion to only a limited set of guidelines prescribed in Rule 512.⁶²

The RCP instruct courts to base their litigation cost 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 take into consideration the behavior of the parties during trial. Although, in practice, judges usually follow the “loser pays rule,”⁶³ the law does not mandate this and judges can—and sometimes do—order winning parties to pay losing parties' litigation costs.⁶⁴ In terms of the amounts awarded, some transformation has taken place over time. Historically, courts tended to completely disregard the actual amounts expended by winning parties, leading, in all likelihood, to undercompensation.⁶⁵ In recent years, however, following the “constitutional revolution,”⁶⁶ which constitutionalized to a certain extent civil procedure, both those within and without the

59. See Reimann, *supra* note 1, at 1.

60. Although the Rules of Civil Procedure treat court costs and attorney's fees jointly using the term “expenses,” the Israeli Supreme Court (ISC) has urged judges to rule separately on court costs and attorney's fees, not the least because one must add a value-added tax (VAT) to attorney's fees, which should not be included in the amount payable as court costs. See CA 9535/04 Siat “Biyalik 10” v. Siat “Yesh Atid Biyalik,” 60(1) PD 391 [2005] (Isr.). It should be noted, however, that not all judges follow the ISC's recommendation. This Article's outcome variable of primary interest is whether litigation costs were denied. In such cases, the prevailing party received neither costs nor fees.

61. Rules of Civil Procedure, 1984, K.T. 5685, 2288 (Isr.).

62. *Id.*

63. URI GOREN, ISSUES IN CIVIL PROCEDURE (10th ed. 2009).

64. See, e.g., CA (Jer) 35178-09-12 Morgenstern v. Drinking Bottles Collection Corp. (unpublished, Feb. 11, 2013).

65. This is our impression of the prevalent supposition in the legal community.

66. 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 Liberty and Basic Law: Freedom of Occupation] underlies the claim that Israeli 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.’”).

judicial system have increasingly argued that litigation costs awarded to winning parties should be more in line with their actual litigation costs.⁶⁷

In 2005, the ISC's Registrar⁶⁸ delivered a decision instructing judges to award winning parties their actual litigation costs unless such an award would unreasonably impair access to justice and equality or cause overdeterrence.⁶⁹ In a subsequent decision, the ISC explained that the intent of awarding the winning party its actual litigation costs is 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.⁷⁰ The ISC, however, continued that this preference for awarding actual litigation costs is subject to the incurred costs being "reasonable, proportional and necessary for the litigation."⁷¹ This limitation is intended to avoid overdeterrence, to prevent inequality between rich and poor parties, to inhibit inappropriate increases in the cost of litigation, and to foster access to justice.⁷²

Another recent ISC decision specified some of the factors judges should consider when awarding litigation costs: the character of the suit and its complexity, the sought-after relief and the proportionality between it and the relief actually granted, the amount of work invested by the award recipient on the litigation, the actual amount paid or payable as attorney's fees, and the behavior of the requesting party during the litigation.⁷³

Notwithstanding these decisions, it is clear to those acquainted with Israeli civil litigation that, in the majority of the cases, the awarded litigation costs do not reflect the actual costs expended during the litigation. This is in part because courts do not know what the parties' actual litigation costs were. Parties requesting an award of litigation costs are not required to, and rarely do, introduce into evidence the actual costs and fees they had to expend on the litigation.⁷⁴

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

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

69. See HC 891/05 Tnuva v. The Authority for the Licensing of Imports (unpublished, June 30, 2005).

70. See RCA 6793/08 Luar v. Meshulam Levinshtein Handasa Vekablanut (unpublished, June 28, 2009).

71. *Id.*

72. See *id.*

73. See CA 9535/04 Siat "Biyalik 10" v. Siat "Yesh Atid Biyalik," 60(1) P.D. 391 [2005] (Isr.).

74. In 2002, the ISC's president, Justice Aharon Barak, issued administrative guidance regarding the award of attorney's fees. According to the guidance, judges, when calculating attorney's 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 not obligated to introduce retainer agreements into evidence and that courts are not obligated to take them into

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. Avoiding financial loss to prevailing parties, deterring frivolous litigation, promoting defendant reasonableness, promoting fair access to the justice system, avoiding overdeterrence, and making awards correspond to effort expended all appear in such theoretical discussions as well.⁷⁵ To the extent that Israeli judges strive to accommodate these multiple considerations, their behavior supplies evidence of how a more finely tuned litigation cost allocation system might function.

III. DATA AND DESCRIPTIVE STATISTICS

A. Data and Methodology

We use an original data set gathered for this study. The data consist of civil cases filed under the original jurisdiction of the five district courts that existed in Israel in 2005 and 2006. Because our topic is the award of litigation costs, we included only civil cases that reached final decisions on the merits. The study includes every case decided in 2005 or 2006 for which an opinion was available online via the Dinim website.⁷⁶ Dinim is a private company that furnishes attorneys and other paying clients with access to case information. Using the Dinim database led us to focus our inquiry on 2005 and 2006 in the first instance because these are the first two years for which the database is supposedly comprehensive regarding district court decisions.⁷⁷ Prior to those years, we could not be sure that the selection of cases by the people who operate Dinim did not generate selection bias. Under Israeli law prevailing in the study years, parties in civil pro-

account when calculating. *See* SUP. CT. ISR., ADMINISTRATIVE GUIDANCE OF THE PRESIDENT OF THE SUPREME COURT 1/98, CALCULATING ATTORNEY FEES (2002). Justice Barak's successor, President Justice Dorit Beinisch, issued in 2010 an amendment to the administrative guidance proclaiming that, "as a general rule, the attorney fees to be awarded should approximate the actual costs expended on the litigation, subject to their being reasonable, proportional and necessary under the circumstances. In this regard, each party is allowed to introduce . . . the written retainer agreement between that party and her attorney, as well as proof of any money paid as attorney fees." SUP. CT. 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.* Conversations we held with numerous attorneys and judges suggest that, in practice, parties rarely introduce retainer agreements into evidence.

75. *See, e.g.,* Avery Wiener Katz, *Indemnity of Legal Fees*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS: THE ECONOMICS OF CRIME AND LITIGATION 63, 64–65 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

76. DINIM, <http://www.dinimveod.co.il/Default.aspx> (last visited May 14, 2013).

77. Telephone Conversation with Michal Vinograd, Gen. Manager of Dinim (June 2011).

ceedings were permitted to file interlocutory appeals from every decision made by the court during trial.⁷⁸ We dropped such interlocutory appeals from the study. Our final sample consists of 1140 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.⁷⁹ Although Net Hamishpat does not provide information relating to all district courts operating during 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 litigation costs in civil cases.

The data are subject to some limitations. First, the study covers only final decisions in civil matters, thus omitting cases terminated in a different manner—via settlement, dismissal, or judgment by way of settlement under section 79A of the Courts' Law.⁸⁰ Second, the study excludes interlocutory decisions. Third, the study relates to the district court level only, excluding the magistrates' courts and the ISC. Fourth, the study covers only civil courts of general jurisdiction, thereby excluding specialized courts such as family courts, rabbinical courts, labor courts, and military courts. Fifth, since the study covers only a limited period, trends over time cannot be assessed. We thus examine only a small doctrinally important slice of a broader universe of court activity.

Student research assistants coded cases, which a second group of more experienced students randomly sampled for accuracy. Prior to the student coding, the authors designed a data form to structure the coding. The performance of the form and the students was 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. Because of the importance of case categories in understanding litigation outcomes,⁸¹ we coded cases into nine civil case categories based on the first claim listed in the petition. Table 1 shows the number of the 1140 cases in each case category, further subdivided by the districts that finally decided the cases.

Most case categories involve the kinds of cases one would expect in any legal system, but some require additional explanation in light of distinctive Israeli law.

78. In 2009, the Minister of Justice issued a decree limiting the scope of such interlocutory appeals under the authority granted to him by a 2008 amendment to the 1984 Courts Act. *See Courts Decree (Types of Decisions on Which No Interlocutory Appeal Would Be Granted) (2009)* (on file with authors).

79. NET HAMISHPAT, <http://www.hamishpat.co.il> (last visited May 14, 2013).

80. *See Courts Act § 79 A (Isr.)*.

81. *See, e.g.,* Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1138 (1992) ("Case categories are of central importance.").

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 cases from either of these courts. Regular 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 and only eight of them are in our sample. With respect to arbitration cases, the Arbitration Act of 1968 allows 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.⁸² But the most significant and prevalent jurisdiction of courts is to invalidate a final arbitration decision for reasons specified in the Act.⁸³ Expropriation cases involve government condemnation of property.

About 80 percent of the case sample consists of three major civil case categories which we coded as Contract, Property, and Tort. Substantial interdistrict variety existed in the distribution of case categories. Contract cases dominated in Tel Aviv, Tort cases in Haifa and Jerusalem, and Property cases in Nazareth. Cases were most evenly distributed across the major case categories in Beer Sheva.

82. *See* Arbitration Law, 5728-1968, ch. 2 (Isr.).

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

TABLE 1. Distribution of Sample Cases by Case Category and District

	Beer Sheva		Haifa		Jerusalem		Nazareth		Tel Aviv		Total	
	N	%	N	%	N	%	N	%	N	%	N	%
Administrative Law	3	3.9	4	1.1	3	1.8	0	0.0	12	2.8	22	1.9
Arbitration	11	14.5	39	10.3	1	0.6	0	0.0	3	0.7	54	4.7
Banking	1	1.3	9	2.4	2	1.2	1	1.1	14	3.2	27	2.4
Contract	14	18.4	53	14.0	42	25.3	19	21.3	166	38.5	294	25.8
Corporations Law	2	2.6	9	2.4	2	1.2	2	2.2	13	3.0	28	2.5
Expropriation	3	3.9	2	0.5	2	1.2	6	6.7	7	1.6	20	1.8
Property	19	25.0	76	20.1	43	25.9	48	53.9	78	18.1	264	23.2
Tort	21	27.6	160	42.3	64	38.6	6	6.7	109	25.3	360	31.6
Other	2	2.6	26	6.9	7	4.2	7	7.9	29	6.7	71	6.2
Total	76	100	378	100	166	100	89	100	431	100	1140	100

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

B. Descriptive Statistics

In addition to the district and case category variables described in Table 1, two other variables play a central role in our analysis: which party prevailed and the status of the parties as plaintiffs or defendants.

Parties who lose generally cannot expect to be awarded litigation costs and parties who win have some expectation of recovering such costs. It is therefore critical to track which party prevailed in a case. Of the 1140 case outcomes, plaintiffs prevailed fully in 320 cases, prevailed in part in 353 cases (by, for example, not recovering the full amount requested), and were denied relief in 467 cases. For

purposes of our analysis, we treat plaintiffs who prevailed in part as having won, though we also report whether this decision influences key results.⁸⁴

Table 2 reports the prevailing party for nine combinations of plaintiff and defendant party status. Party status throughout this Article is based on the first named plaintiff or defendant in each case and is divided into the three categories: Individual, Corporation, and Government. We did not distinguish among the various government entities that litigated.

TABLE 2. Prevailing Party by Plaintiff-Defendant Party Status Combination

Plaintiff-Defendant Combination	Defendant Won		Plaintiff Won		Total
	N	%	N	%	
Individual v. Individual	118	35.0	219	65.0	337
Individual v. Corporation	125	37.0	213	63.0	338
Individual v. Government	89	63.1	52	36.9	141
Corporation v. Individual	23	39.7	35	60.3	58
Corporation v. Corporation	66	39.5	101	60.5	167
Corporation v. Government	28	45.9	33	54.1	61
Government v. Individual	9	47.4	10	52.6	19
Government v. Corporation	7	50.0	7	50.0	14
Government v. Government	2	40.0	3	60.0	5
Total	467	41.0	673	59.0	1140

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

84. For a discussion on the ambiguities in defining case outcomes, see, for example, Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 676 (1987), which argues that formally successful actions might be de facto failures and formal losses may indirectly achieve desired goals.

Table 2 shows substantial variation in win rates for the plaintiff-defendant party status combinations. Individuals suing governmental entities were the least successful plaintiff-defendant combination with a substantial number of cases; plaintiffs prevailing in 36.9 percent of cases compared to an overall plaintiff success rate of 59.0 percent. This is the only combination in which plaintiffs prevailed at less than a 50 percent rate. Individuals suing other individuals and corporations suing individuals or other corporations all prevailed in 60.3 percent to 65.0 percent of cases. Table 2's win rates provide a baseline for the expected rate of litigation cost awards to various types of parties if Israel's judges always follow the loser pays rule.

The varying win rates across plaintiff-defendant party status combinations, combined with the known importance of case categories, suggests that understanding the relation between these factors is critical to understanding litigation cost award patterns. For example, an individual plaintiff suing a corporate defendant in tort may generate a different reaction from a judge awarding litigation costs than a corporate plaintiff suing a corporate defendant in contract.

Table 3 reports the number of cases in each case category for each plaintiff-defendant party status combination. Government plaintiff cases are not shown, both in the interest of space and because there were too few such cases to reasonably subdivide across case categories. The first row for each case category shows the number of cases for each plaintiff-defendant combination. The second row for each case category shows the column percentage for the particular combination. For example, the first entry in the first row shows that there was one Administrative Law case in which an individual sued another individual. The corresponding entry in the second row shows that this one case comprised 0.30 percent of all cases involving suits by individuals against individuals.

TABLE 3. Distribution of Cases by Case Categories and Plaintiff-Defendant Party Status Combination

Category	Individual Plaintiffs			Corporate Plaintiffs			Total
	Ind. Def.	Corp. Def.	Govt. Def.	Ind. Def.	Corp. Def.	Govt. Def.	
Administrative	1	0	9	0	0	10	20
Law	0.30	0.00	6.38	0.00	0.00	16.39	1.81
Arbitration	11	10	2	6	12	4	45
	3.26	2.96	1.42	10.34	7.19	6.56	4.08
Banking	0	9	0	7	10	0	26
	0.00	2.66	0.00	12.07	5.99	0.00	2.36
Contract	71	62	10	22	88	31	284
	21.07	18.34	7.09	37.93	52.69	50.82	25.77
Corporations	5	16	0	4	3	0	28
Law	1.48	4.73	0.00	6.90	1.80	0.00	2.54
Expropriation	0	1	16	0	1	0	18
	0.00	0.30	11.35	0.00	0.60	0.00	1.63
Property	126	56	40	7	24	5	258
	37.39	16.57	28.37	12.07	14.37	8.20	23.41
Tort	104	170	55	8	18	5	360
	30.86	50.30	39.01	13.79	10.78	8.20	32.67
Other	19	14	9	4	11	6	63
	5.64	4.14	6.38	6.90	6.59	9.84	5.72
Total	337	338	141	58	167	61	1102
	100	100	100	100	100	100	100

Note: This table excludes thirty-eight cases in which governmental entities were plaintiffs.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

Table 3 shows that Property cases constituted a substantially higher proportion of individual plaintiff cases than of corporate plaintiff cases. Property cases comprised 37 percent of cases filed by individuals against other individuals, 17 percent of cases filed by individuals against corporations, and 28 percent of cases filed by individuals against governmental entities. When corporations were plaintiffs, the percentage of Property cases was lower regardless of the party status of the defendant. Tort cases were most prominent in suits by individuals against corporations or governmental entities. For example, Tort cases comprised more than half of all actions filed by individuals against corporations. But Tort actions comprised

only a small fraction of cases filed by corporate plaintiffs. Contract actions were the most prevalent case category for corporate plaintiffs. Contract actions also constituted the highest percentage of all cases, regardless of defendant status, and accounted for more than half of all actions against corporate and government defendants.

IV. RESULTS

Assessing judicial behavior with respect to litigation cost awards requires a measure of that behavior. More than one award outcome is of potential interest. The amount of the award is of obvious importance, as is the relation of that amount to other factors, such as the amount at stake in a given case or the size of the recovery. But the question whether *any* litigation costs are awarded is logically antecedent to the amount of the award and that amount's relation to other factors. The basic dividing line between litigation cost award systems, however blurred that line may be in actual practice, is whether the prevailing party has a right to recover its litigation costs. We therefore employed whether litigation costs were denied to the prevailing party as our outcome measure and termed this outcome variable "litigation cost denial." We coded this variable as "1" when a judge awarded the prevailing party no litigation costs and as "0" when a judge awarded any litigation cost amount. We excluded forty cases from our analysis because they contained no information on whether litigation costs had been awarded. If perceptions about Israeli judges as generally applying a loser pays rule are correct, denials of litigation costs should be rare.

We first investigate the relations between our outcome variable "litigation cost denial" and explanatory variables of primary interest: plaintiff-defendant party status combination, case category, and judicial district. We then report the results of regression models that simultaneously account for the relations between denials and multiple explanatory variables.

A. Bivariate Results

Table 4 shows the denial rate for litigation costs as a function of case category and as a function of whether plaintiff or defendant prevailed. In cases won by defendants, the highest rates of litigation cost denials occurred in the categories of Tort, Administrative Law, and Expropriation. Prevailing defendants were denied litigation costs in 42 percent of Tort cases, 33 percent of Administrative Law cases, and 29 percent of Expropriation cases. By contrast, prevailing plaintiffs were never denied litigation costs in Expropriation cases and were rarely denied litigation costs in Tort cases. The highest rate of litigation cost

denials for prevailing plaintiffs was a 36 percent denial rate in Property cases, a rate that substantially exceeded the denial rates in the two other large case categories of Tort and Contract. Overall, prevailing defendants were denied litigation costs at noticeably higher rates than prevailing plaintiffs, though substantial variation across case categories counsels against putting too much weight on these aggregate figures. The significance levels in Table 4's last row report the results of tests of the hypothesis that litigation cost denial rates are independent of case category. The reported significance levels, which are less than $p=0.001$ for cases won by both plaintiffs and defendants, support rejecting the hypothesis of independence. Thus, statistically significant variation in denial rates exists across case categories for cases won by both plaintiffs and defendants.

TABLE 4. Litigation Cost Denial Rates by Case Category and Prevailing Party

Case category	Defendant Won	Plaintiff Won	Total
Administrative Law (n=22)	0.33	0.30	0.32
Arbitration (n=52)	0.04	0.33	0.19
Banking (n=26)	0.00	0.20	0.12
Contract (n=293)	0.28	0.15	0.21
Corporations Law (n=28)	0.25	0.25	0.25
Expropriation (n=17)	0.29	0.00	0.12
Property (n=254)	0.21	0.36	0.29
Tort (n=359)	0.42	0.04	0.16
Other (n=71)	0.09	0.16	0.13
Total (n=1122)	0.26	0.16	0.20
Significance	$p<0.001$	$p<0.001$	

Note: Reported significance levels account for the nonindependence of decisions by the same judge.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

Within the Tort category, automobile accident cases were by far the most numerous, comprising about 42 percent of the category.⁸⁵ They also showed slightly lower litigation cost denial rates for prevailing plaintiffs than other Tort

85. By comparison, in the United States in 2005, automobile accident cases constituted nearly 60 percent of state court tort trials. THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, NCJ 228129, CIVIL JUSTICE SURVEY OF STATE COURTS: TORT BENCH AND JURY TRIALS IN STATE COURTS, 2005, at 1 (2009). In our data, professional malpractice cases accounted for 16.7 percent of terminated Israeli tort cases. In the United States in 2005, medical malpractice cases comprised 15 percent of state court tort trials, and other professional malpractice cases comprised about 1 percent of such trials. *Id.* at 1–2.

cases. The 4 percent rate of denials in cases in which plaintiffs prevailed consists of a 6.9 percent denial rate in 116 nonautomobile Tort cases and a 1.5 percent denial rate in 134 automobile accident cases, a difference significant at $p=0.046$. In Tort cases in which defendants prevailed, the 42 percent litigation cost denial rate consists of a 40.9 percent denial rate in ninety-three nonautomobile cases and a 50 percent denial rate in sixteen automobile cases, a difference which is not statistically significant ($p=0.587$).

Table 4's results are largely insensitive to whether plaintiffs prevailed in whole or in part. Overall, prevailing plaintiffs were denied litigation costs in 14.4 percent of cases in which their claims were accepted in whole, compared to 18.1 percent of cases in which their claims were accepted in part. These low rates of denials persist in Tort and Expropriation cases regardless of whether plaintiffs' claims were accepted in whole or in part. High rates of denials persist in those two case categories in cases won by defendants, regardless of whether defendants prevailed in whole or in part. The one exception to this general pattern occurs in Contract cases won by plaintiffs. In Contract cases in which plaintiffs' claims were accepted in whole, litigation costs were denied to prevailing plaintiffs in only 6.9 percent of fifty-eight cases. In Contract cases in which plaintiffs' claims were only accepted in part, litigation costs were denied to prevailing plaintiffs in 19.4 percent of 103 cases.

Table 4 shows frequent litigation cost denials in some case categories and a natural question is what prompts judges to depart from the loser pays norm. Illustrative fact patterns can supply contextual background about denial rates. We therefore describe litigation cost denials that occurred in a Tort case and an Expropriation case—two classes of cases with high denial rates when defendants prevailed.

*Shuki Tal v. Migdal Insurance LTD*⁸⁶ was a Tort case in which the plaintiff was involved in a car accident that caused him extensive bodily injuries. The plaintiff filed a suit based on the Road Accident Victim Compensation Law of 1976 against his insurance company arguing that the accident had severely harmed his functional abilities and rendered him unable to work.⁸⁷ The suit was filed only days before the expiration of the statute of limitations period on the cause of action.⁸⁸ At first, the defendant insurance companies did not deny liability. But two years into the trial they changed course and argued that at the time of the accident the plaintiff was not covered by his insurance policy because his driver's license had been disqualified and was thus invalid. The central issues to be decided were (1) whether the plaintiff had a valid driver's license at the time

86. CC (TA) 1214/96 (unpublished, Nov. 5, 2006).

87. *See id.* para. 1.

88. *See id.* para. 3.

of the accident; (2) if he did not, whether he was aware that his driver's license was invalid; and (3) if he was, whether a court decision annulling the driver's license disqualification would apply retroactively. The court concluded that the plaintiff's driver's license had been invalid at the time of the accident, that he was aware of this fact, and that the annulment of the disqualification did not apply retroactively.⁸⁹ The court therefore ruled in favor of the defendants. In light of the circumstances and the conduct of the parties during the litigation, however, the court decided that each party would bear its own costs.⁹⁰

*Heirs of the Late Ahmad Mustafa Abed v. State of Israel*⁹¹ was an Expropriation case involving government condemnation of the plaintiffs' property in Nazareth. The plaintiffs were the sole heirs of the late Ahmad Mustafa Abed, who had been the prior owner of the property.⁹² Upon his death, the plaintiffs inherited the property, but the state expropriated the property in 1976.⁹³ The dispute revolved around the compensation amount the government should pay. The appraiser appointed by the state set the value of the property significantly lower than the value ascribed to it by the plaintiffs' appraiser.⁹⁴ The court accepted the state's appraisal, but it denied the government its litigation costs in light of the fact that the state had updated its appraisal prior to the commencement of the legal proceeding.⁹⁵

Table 5 shows the rate at which litigation costs were denied as a function of plaintiff-defendant party status combination and prevailing party. The lowest rate of denials for a combination with a substantial number of cases occurred in cases in which individual plaintiffs prevailed against corporations; litigation costs were denied in only 8 percent of such cases. When individual or governmental defendants prevailed in actions brought by governmental plaintiffs, courts never denied litigation costs. The small numbers of such cases, however, counsel against putting too much emphasis on this result.

The highest rate of litigation cost denials for a combination with a substantial number of cases was the 37 percent denial rate in cases won by the government as defendant against individual plaintiffs. When defendants prevailed, the three highest rates of denials for party status combinations with substantial numbers of cases all involved individual plaintiffs. This suggests that courts were more protective of individual plaintiffs who brought unsuccessful cases than of corporate plaintiffs who lost. Consolidating the nine possible party status combinations into

89. *See id.* para. 4–6.

90. *See id.*

91. CC (Nazareth) 1127/04 (unpublished, Apr. 2, 2006).

92. *See id.* para. 2.

93. *See id.* para. 3.

94. *See id.* para. 7.

95. *See id.* para. 13.

three combinations based on the individual, corporate, or governmental status of the plaintiff—regardless of the party status of the defendant—resulted in a statistically significant difference in denial rates based on the party status of the plaintiff in cases in which defendants prevailed, but not in cases in which plaintiffs prevailed. This suggests that the greater protection provided to losing individual plaintiffs through higher litigation cost denial rates was unlikely to occur by chance.

TABLE 5. Rate of Litigation Cost Denial, by Plaintiff-Defendant Party Status Combination and Prevailing Party

Plaintiff-Defendant Combination	Defendant Won	Plaintiff Won	Total
Individual v. Individual (n=333)	0.31	0.24	0.27
Individual v. Corporation (n=337)	0.24	0.08	0.14
Individual v. Government (n=131)	0.37	0.20	0.31
Corporation v. Individual (n=58)	0.09	0.17	0.14
Corporation v. Corporation (n=164)	0.23	0.13	0.17
Corporation v. Government (n=61)	0.14	0.18	0.16
Government v. Individual (n=19)	0.00	0.10	0.05
Government v. Corporation (n=14)	0.43	0.29	0.36
Government v. Government (n=5)	0.00	0.67	0.40
Total (n=1122)	0.26	0.16	0.20
Significance (9 Combinations)	p=0.052	p=0.016	
Significance (3 Plaintiff Categories)	p=0.025	p=0.551	

Note: Reported significance levels account for the nonindependence of decisions by the same judge. The significance level reported for three plaintiff categories is based on plaintiffs as individuals, corporations, or the government without regard to defendant status.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

Table 5's results are largely insensitive to whether one distinguishes between cases in which plaintiffs prevailed in whole or in part. Substantial differences in denial rates, however, emerged for some plaintiff-defendant combinations. In cases in which individual plaintiffs prevailed against the government and plaintiffs' claims were accepted in whole, for example, litigation costs were denied in 9 percent of cases (2 of 22). When individual plaintiffs' claims were accepted in part, on the other hand, litigation costs were denied in 29.6 percent of cases (8 of 27), a difference that is marginally statistically significant at $p=0.072$.⁹⁶ In cases in which corporate plaintiffs succeeded in whole against corporate defendants, litigation costs were denied in only 2 percent of cases (1 of 47). In cases in which corporate plaintiffs succeeded in part against corporate defendants, however, litigation costs were denied in 23.5 percent of cases (12 of 51), a difference statistically significant at $p=0.001$.

Table 6 shows the rate at which litigation costs were denied as a function of judicial district and prevailing party. The most striking result is the 56 percent denial rate in cases won by plaintiffs in Nazareth. We defer further analysis of the Nazareth district to Part V.

TABLE 6. Rate of Litigation Cost Denial by Judicial District and Prevailing Party

Judicial District	Defendant Won	Plaintiff Won	Total
Beer Sheva (n=67)	0.38	0.15	0.27
Haifa (n=376)	0.24	0.13	0.17
Jerusalem (n=165)	0.30	0.10	0.19
Nazareth (n=85)	0.29	0.56	0.46
Tel Aviv (n=429)	0.24	0.13	0.18
Total (n=1122)	0.26	0.16	0.20
Significance	$p=0.628$	$p<0.001$	

Note: The significance levels account for the nonindependence of decisions by the same judge.

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

Table 6's results for Tel Aviv differed for cases in which plaintiffs prevailed in whole or in part. In cases in which plaintiffs prevailed in whole, litigation costs

96. Significance levels reported in the text account for the nonindependence of decisions by the same judge.

were denied in 7.6 percent of cases (8 of 105). When plaintiffs' claims were accepted in part, litigation costs were denied in 17.7 percent of cases (23 of 130), a difference marginally significant at $p=0.067$.

B. Regression Analysis

Because multiple factors of interest may be associated with litigation cost denials, regression analysis is useful in assessing the degree to which Part IV.A's bivariate results persist when explanatory factors are taken into account simultaneously. Since the outcome variable "litigation cost denial" is dichotomous, we employ logistic regression.⁹⁷

Table 5 suggested that plaintiff-defendant status combinations are significantly associated with litigation cost denial rates, at least when defendants prevail. It is therefore important to include plaintiff-defendant party status combinations as explanatory variables in our regression models. Further, Tables 4–6 suggest that whether plaintiff or defendant prevailed can be important in assessing whether litigation costs were denied. To isolate the effect of plaintiff-defendant party status while also accounting for prevailing party, we modeled litigation cost denials separately for cases in which plaintiffs prevailed and cases in which defendants prevailed.⁹⁸ Table 7 confirms the propriety of creating such separate models, as it shows that covariates often differ in size and significance based on the prevailing party. Tables 2 and 5 showed that the government was the plaintiff in few cases. For purposes of our regression models, we therefore combined the government plaintiff categories into a single category of government as plaintiff without distinguishing among defendants by party status.

With respect to individuals as defendants, we initially conducted a separate analysis that coded for the presence of a family as a group of defendants. Fifty-one cases involved such a family group defendant, and forty-nine of these cases had information about the prevailing party. About 70 percent of the family group cases involved Property or Contract claims, and 49 percent were comprised of Property claims. Plaintiffs won 63 percent of these cases (31 of 49) but litigation costs were denied in 48.4 percent of them. This litigation cost denial

97. See generally A. COLIN CAMERON & PRAVIN K. TRIVEDI, MICROECONOMETRICS USING STATA 459 (rev. ed. 2010) (discussing logistic regression).

98. An alternative approach would be to construct variables that measure the interaction between the party status variables (that is, the plaintiff-defendant party status combinations) and the prevailing party variable. Interacting the nine plaintiff-defendant party status combinations with the two prevailing party values would lead to eighteen possible plaintiff-defendant/prevaling-party-interaction dummy variables. We explored these models, but they were less than satisfactory in terms of fitting the data and resulted in multicollinearity problems.

rate is far higher than the 14.7 percent denial rate in cases won by plaintiffs that did not involve a family group as defendants. We therefore initially included a family-group-defendant dummy variable in our models. This variable turned out to be statistically insignificant, however, likely due to its overlap with the Property case category and was therefore dropped from our models.

We also included additional explanatory variables to account for the factors that Part IV.A or Israel's legal rules governing litigation costs suggest may matter in judges' litigation cost allocation decisions. Table 4, for example, showed the importance of case categories and Table 6 showed the importance of judicial districts, so we included dummy variables for each of these factors. Furthermore, 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 variables for whether a plaintiff prevailed in whole or in part and for whether nonmonetary relief was granted in the models of cases won by plaintiffs. The sample contains decisions by ninety-eight different district court judges and we clustered the standard errors by the identity of the judge to account for the nonindependence of decisions rendered by the same judge.

Table 7 reports the regression results. Models (1) and (3) include only cases won by plaintiffs and models (2) and (4) include only cases won by defendants. Due to the small number of cases in some case categories, we added Administrative Law cases, Banking cases, and Corporations Law cases to the residual category of cases, "Other." The table reports the marginal effects of the explanatory variables on the outcome variable. The marginal effects are interpretable as the change in the probability of a litigation cost 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/prevaling-party combinations, for example, is Individual vs. Individual. This means that the coefficients for the other plaintiff-defendant/prevaling-party combinations in Table 7 indicate how much more or less likely a litigation cost denial becomes as 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 4 showed that Tort cases are distinctive, we also constructed models limited to non-Tort 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. We ran similar models with variables for the gender and ethnicity of plaintiffs and defendants, as

well as for cases in which one party was represented by counsel while the other was not.⁹⁹ None of these variables was statistically significant and we therefore do not report these models' results.

TABLE 7. Logistic Regression Models of Litigation Cost Denials

	(1) Cases Plaintiffs Won	(2) Cases Defendants Won	(3) Non-Tort Cases Plaintiffs Won	(4) Non-Tort Cases Defendants Won
Claim Fully Accepted	-0.130*** (0.024)	- -	-0.233*** (0.044)	- -
Nonmonetary Relief	0.087** (0.037)	0.036 (0.066)	0.129*** (0.048)	0.017 (0.059)
Individual v. Corporation	-0.061* (0.031)	-0.070 (0.044)	-0.069 (0.056)	-0.102** (0.049)
Individual v. Government	0.042 (0.055)	0.006 (0.067)	0.109 (0.107)	-0.033 (0.059)
Corporation v. Individual	-0.039 (0.042)	-0.177*** (0.050)	-0.089 (0.075)	-0.115* (0.062)
Corporation v. Corporation	-0.042 (0.032)	-0.081 (0.057)	-0.067 (0.068)	-0.020 (0.057)
Corporation v. Government	-0.033 (0.036)	-0.137** (0.066)	-0.051 (0.069)	-0.114* (0.066)
Government Plaintiff	-0.012 (0.047)	-0.075 (0.069)	-0.009 (0.091)	-0.052 (0.065)
Beer Sheva	0.057 (0.073)	0.116 (0.128)	0.140 (0.126)	0.226 (0.149)
Haifa	0.017 (0.043)	-0.074 (0.071)	0.032 (0.079)	0.035 (0.089)
Nazareth	0.379*** (0.126)	-0.016 (0.093)	0.497*** (0.143)	0.096 (0.126)
Tel Aviv	0.035 (0.047)	-0.053 (0.074)	0.068 (0.081)	0.028 (0.092)
Arbitration	0.352** (0.142)	-0.248*** (0.033)	0.070 (0.084)	-0.171*** (0.049)

99. Nonrepresentation almost uniformly consisted of plaintiffs having counsel and defendants not having counsel. It was most prevalent in Nazareth, which included twenty of the thirty-eight pro se defendant cases, nineteen of which were Property cases.

	(1) Cases Plaintiffs Won	(2) Cases Defendants Won	(3) Non-Tort Cases Plaintiffs Won	(4) Non-Tort Cases Defendants Won
Contract	0.125** (0.061)	-0.101* (0.057)	-0.092 (0.069)	0.120* (0.066)
Other	0.252** (0.116)	-0.193*** (0.046)	- -	- -
Property	0.246*** (0.073)	-0.192*** (0.045)	0.020 (0.074)	0.027 (0.062)
Expropriation	- -	-0.117 (0.095)	- -	0.112 (0.193)
Proportionate Reduction in Error	17.6%	5.8%	16.3%	4.0%
Pseudo R-Squared	0.243	0.086	0.180	0.068
Observations	652	460	402	351

Note: The dependent variable is a dichotomous variable for which 1 represents a litigation cost denial. The proportionate reduction in error compares the models' predicted outcomes to the rate of error using the modal outcome (no denial of litigation costs) as the prediction in each case. Standard errors, clustered by judge, are in parentheses. * 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 2005–06.

The coefficient on “Claim Fully Accepted” in model (1) indicates that full acceptance of a plaintiff's claim, in contrast to partial acceptance or denial of the claim, is strongly, negatively, and statistically significantly associated with a court not ordering payment of litigation costs. Full acceptance of a claim decreases the probability of a litigation cost denial by 13 percent. When the sample is limited to non-Tort cases in model (3), this effect is even stronger with a 23.3 percent decrease in the probability of a litigation cost denial upon full acceptance of a plaintiff's claim. This result can be interpreted as showing that judges implement RCP Rule 512's instruction to consider the degree to which a prevailing party succeeded on its claims. The size and statistical significance of the “Nonmonetary Relief” variable coefficient in models (1) and (3) also suggests that judges take seriously RCP Rule 512's instruction to take account of the nature of the relief

granted when deciding on whether to award the prevailing party its litigation costs.¹⁰⁰ We next describe the case category, party status, and district results.

1. Case Categories

Table 4 showed high litigation cost denial rates in Tort and Expropriation cases won by defendants, low denial rates in Banking cases won by defendants, and low denial rates in Tort and Expropriation cases won by plaintiffs. Models (1) and (2) confirm that these results persist when one accounts for other explanatory factors.

In model (1), the coefficients for all case category dummy variables are positive, indicating a higher probability of litigation cost denials when plaintiffs win non-Tort cases than when they win Tort cases. These coefficients are all statistically significant. Winning Tort plaintiffs tend to be awarded litigation costs more frequently than plaintiffs who prevail on non-Tort claims. Expropriation cases were excluded from model (1) because there was no variation in the variable: As shown in Table 4, litigation costs were never denied in such cases.

When plaintiffs lost Tort cases, on the other hand, they tended not to be assessed their adversary's litigation costs. In model (2), all case category coefficients other than Expropriation are substantial and negative, and all coefficients except Expropriation are either statistically significant or marginally statistically significant.

The results for Arbitration cases won by plaintiffs are striking. Model (1) shows that prevailing Arbitration plaintiffs were 35.2 percent more likely to be denied litigation costs than prevailing plaintiffs in Tort cases. Denial rates in Arbitration cases in model (1) also significantly differed from denial rates in Contract cases ($p=0.042$). In model (2), denial rates in Arbitration cases significantly differed only from those in Tort cases, and the intercategory variation outside of Tort cases was generally lower than in model (1). In model (3), Arbitration cases had the highest rates of litigation cost denials when plaintiffs won, and the difference between denial rates in Arbitration cases and Contract cases was statistically significant ($p=0.031$). Model (4) shows that, excluding Tort cases from the analysis, Contract cases had the highest rates of litigation cost denials when defendants won—denial rates were 12 percent higher than in the Other reference category. Contract denial rates in model (4) only marginally signifi-

100. 53 percent of nonmonetary relief cases won by plaintiffs were Property cases. Nonmonetary relief dominated the Arbitration (28 of 29 cases won by plaintiffs) and Property (124 of 146 cases won by plaintiffs) case categories. This helps explain the prominence of the nonmonetary relief node in Figure 1, *infra*.

cantly differed from denial rates in Property cases ($p=0.074$). Litigation cost denial rates in Expropriation cases were similar to those in Contract cases, but the Expropriation category had so few cases that this result merits little emphasis.

2. Plaintiff-Defendant Combinations

Table 5 suggested high rates of litigation cost denials when individual plaintiffs prevailed against individual defendants. That five of the six plaintiff-defendant combination coefficients in model (1) are negative—indicating that litigation cost denials were less likely in such cases than in the reference category of Individual v. Individual—is consistent with this, as is one of the coefficients differing marginally statistically significantly from the reference category. The positive sign on the coefficient for Individual v. Government is the one exception to this pattern, but this coefficient is not close to being statistically significant. In general, the coefficients for the plaintiff-defendant combination variables were modest in model (1). The range of their observed effect was only about a 10 percent difference in the probability of a litigation cost denial compared to a case between two individuals. The denial rate for individual plaintiffs prevailing against corporate defendants, however, was significantly lower than the denial rate for individual plaintiffs prevailing against the government ($p=0.017$). Prevailing government plaintiffs were less likely to be denied litigation costs than individuals who prevailed against other individuals, but this result was not statistically significant. These results are reasonably consistent with Table 5's report of the bivariate relation between litigation cost denial and party status.

In model (2)'s regression of litigation cost denials for prevailing defendants, some larger effects emerge. The negative sign on five of the six plaintiff-defendant combination coefficients suggests that winning defendants were likely to be denied litigation costs when they were individuals who prevailed against individual plaintiffs. This denial effect is substantial, and highly statistically significant, when compared to both the 13.7 percent lower probability of a litigation cost denial when government defendants prevailed against corporate plaintiffs and the 17.7 percent lower probability of a denial when corporate defendants prevailed against individual plaintiffs. The only coefficient for a plaintiff-defendant combination with a positive sign, Individual v. Government, was near zero and far from statistically significant. These results are reasonably consistent with Table 5's bivariate results. As Table 5 also suggested, the large and negative sizes of the coefficients for cases lost by corporate plaintiffs indicate that judges are reluctant to deny litigation costs when corporate plaintiffs lose. As Table 5 also suggested, when defendants prevailed the three highest rates of liti-

gation cost denials all involved individual plaintiffs—the reference category of Individual v. Individual, Individual v. Corporation, and Individual v. Government. Together, these results suggest that judges tended to protect losing individual plaintiffs against litigation cost awards.

When one excludes Tort cases in model (3), the results for the plaintiff-defendant combinations do not change dramatically but vary in size. As in model (1), five of the six party status coefficients are negative, suggesting that judges were relatively more likely to deny litigation costs in cases in which individuals prevailed against individuals. The coefficients tend to be larger negative numbers in model (3) than in model (1), suggesting a stronger denial effect for individual plaintiffs who prevailed against individual defendants in non-Tort cases.

Model (4), which analyzes non-Tort cases in which defendants prevailed, shows a negative sign on all of the party status coefficients, again suggesting that prevailing defendants were most likely to be denied litigation costs when they were individuals who prevailed against individual plaintiffs. Three of the party status coefficients significantly differed or marginally significantly differed from the reference category. The coefficients for the individual plaintiff categories in model (4) show a less clear pattern of protecting individuals than those in model (2). This suggests that judges are especially likely to protect individuals in Tort cases.

3. Districts

Both models of cases with prevailing plaintiffs (models (1) and (3)) suggest that the Nazareth district court was more willing to deny litigation costs in such cases than other district courts. This confirms the results of Table 6, which showed a 56 percent overall rate of litigation cost denials in Nazareth in cases won by plaintiffs—a rate far higher than in other districts. Table 6 also showed a different pattern of litigation cost denials in cases won by defendants. In such cases, Beer Sheva judges were the most likely to deny litigation costs. Regression models (models (2) and (4)) also support this result.

After controlling for other factors, model (1) shows that in cases in which plaintiffs prevailed, Nazareth judges were 37.9 percent more likely to deny litigation costs than the reference category of Jerusalem judges. Model (3) shows that this difference increases to 49.7 percent in non-Tort cases. Both differences are highly statistically significant. In model (1), moreover, Nazareth judges not only differed significantly from Jerusalem judges but also differed significantly from Haifa judges ($p < 0.001$), from Tel Aviv judges ($p < 0.001$), and from Beer Sheva judges ($p = 0.003$). In model (3), without Tort cases, Nazareth judges again

significantly differed from Jerusalem judges, Haifa judges ($p < 0.001$), Tel Aviv judges ($p < 0.001$), and Beer Sheva judges ($p = 0.020$).

The district level pattern of litigation cost denials changes dramatically in cases won by defendants. Models (2) and (4) show that the Nazareth–Jerusalem difference is much smaller, pointing in inconsistent and statistically insignificant directions in these cases. In model (2), the only significant or near-significant differences were between Beer Sheva and Tel Aviv judges ($p = 0.075$) and between Beer Sheva and Haifa judges ($p = 0.048$). In model (4), Beer Sheva judges differed significantly from Tel Aviv judges ($p = 0.047$), and differed marginally from Haifa judges ($p = 0.053$). Thus, although Nazareth judges were the most protective of losing defendants, Beer Sheva judges seem to be most protective of losing plaintiffs.

As a check on our regression results, we constructed a classification and regression tree (CART). CART analysis helps explore how decisions branch at what are believed to be relevant nodes in the analysis (that is, at the explanatory variables).¹⁰¹ Each node in a decision tree is split into two groups, and the data are then partitioned into those groups to process the data farther down the tree. This binary partitioning process is repeated, with child nodes generating their own subnodes. A CART is a useful check on results obtained by logistic regression because it is nonparametric and therefore does not depend on assumptions underlying regression models.

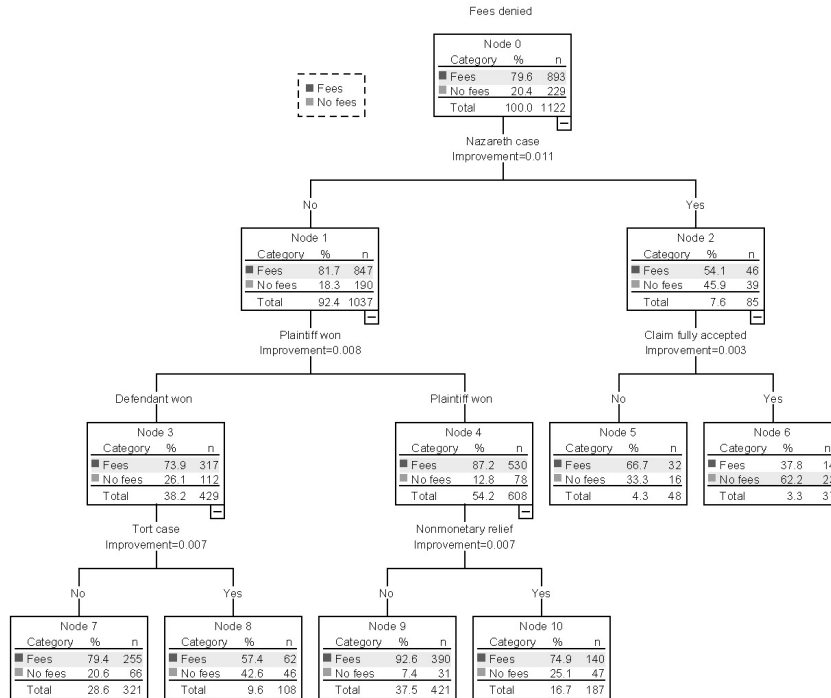
Figure 1 presents a CART for our data. Although space constraints prevent presenting a CART that includes all of our variables, Figure 1 confirms our evidence of strong associations between litigation cost¹⁰² denials (node 0) and the explanatory variables locale, prevailing party, and case category. The Nazareth variable is the highest node in the classification tree, suggesting that influences on litigation cost denials are strongly associated with locale. In the Nazareth subgroup of cases, denials are likely further associated with the Property case category. For non-Nazareth cases, the next highest node is the prevailing party variable (nodes 3 and 4). This result supports modeling cases won by plaintiffs separately from cases won by defendants. For the 429 non-Nazareth cases won by defendants, the Tort case category is the next node (nodes 7 and 8), with large differences in litigation cost denials between its two branches. This supports examining models that exclude Tort cases. Overall, then, this nonparametric

101. See generally LEO BREIMAN ET AL., CLASSIFICATION AND REGRESSION TREES (1984); Jonathan P. Kastellec, *The Statistical Analysis of Judicial Decisions and Legal Rules With Classification Trees*, 7 J. EMPIRICAL LEGAL STUD. 202 (2010).

102. In Figure 1's nodes, the term fees is used to represent litigation costs to conserve space.

CART analysis confirms the associations detected in the bivariate and regression analyses and provides a reasonable visualization of the data.

Figure 1. Classification and Regression Tree for Litigation Cost Denial



V. DISCUSSION

Our results suggest a hierarchy in which Israeli judges are most protective of individual litigants and least protective of large corporations. The greater protection of individuals is substantially attributable to Tort cases. The regression models are generally consistent with the raw rates of litigation cost denials by party status and with the bivariate results presented in Tables 4 to 6.

In addition to this individual protection theme, the data suggest that Israel's judges operate at least three different de facto litigation cost allocation subsystems, depending on the nature of the case and the status of the parties. We find evidence of subsystems dominated by one-way shifting, by a loser pays rule, and by a mixed system of loser pays with discretion to deny litigation costs. We even find a pocket of cases in one district where the American rule prevailed for one kind of case.

A. One-Way Shifting Dominates in Tort

In Tort cases, Israel's district court judges produced results that are about as close to a one-way shifting system for litigation costs as they are to a loser pays system. Table 4 shows that 42 percent of successful Tort defendants did not recover their litigation costs, whereas 96 percent of successful plaintiffs recovered theirs. This pattern overwhelmingly favors individual plaintiffs; Table 3 shows that individual plaintiffs brought 92 percent of tort actions.

Deeper analysis of litigation cost denial patterns in Tort cases offers insights into the possible effects of granting the U.S. corporate tort reform movement's wish for the implementation of a loser pays litigation cost allocation system. Table 8 shows the pattern of litigation cost denials by plaintiff-defendant party status combinations in Tort cases. Corporations would likely be most concerned about cases in which individuals sued them because that is the most frequent plaintiff-defendant combination in Tort cases. In cases won by individual plaintiffs, corporations had to pay their own litigation costs plus plaintiffs' litigation costs 99 percent of the time. In cases won by defendants, on the other hand, prevailing corporations still had to pay their own litigation costs 52 percent of the time. When weighting these percentages by the frequency of plaintiff wins (139 cases) and defendant wins (31 cases), corporate defendants paid their own litigation costs in 90 percent of the 170 Tort cases in which individual plaintiffs sued corporate defendants. The individual plaintiffs, on the other hand, paid their own litigation costs in only 10 percent of cases. These results are much closer to one-way shifting than to a loser pays system. These results are not a reflection of Israeli judges tending to deny all victorious Tort defendants their litigation costs. When corporate defendants prevailed in Tort cases against corporate plaintiffs, litigation costs were rarely denied, though that plaintiff-defendant combination was infrequent.

If, therefore, the United States adopted a loser pays rule, gave judges discretion to deny litigation costs, and American judges behaved similarly to Israeli judges, corporations might not only have to pay their own litigation costs in the vast majority of cases but also often have to pay the plaintiffs' litigation costs. Under the current American rule, by contrast, they only have to pay their own litigation costs—win or lose. As Stephen Yeazell intimated in commenting on the effects of discovery reform, be careful what you wish for.¹⁰³ Florida's aborted ex-

103. See Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943, 945 (2004) ("Having got what we asked for and what we paid for, we are now soberly assessing the results.").

periment with a loser pays rule in medical malpractice cases¹⁰⁴ reinforces the implications of the Israeli experience.

TABLE 8. Rate of Litigation Cost Denials in Tort Cases by Plaintiff-Defendant Party Status Combination and Prevailing Party

	Defendant won	Plaintiff won	Total
Individual v. Individual (n=103)	0.43	0.07	0.16
Individual v. Corporation (n=170)	0.52	0.01	0.11
Individual v. Government (n=55)	0.50	0.05	0.35
Corporation v. Individual (n=8)	0.00	0.25	0.13
Corporation v. Corporation (n=18)	0.08	0.00	0.06
Corporation v. Government (n=5)	0.33	0.00	0.20
Total (n=359)	0.42	0.04	0.16

Source: Dinim database of Israeli civil district court cases that were adjudicated on the merits and terminated in 2005–06.

A similar pattern emerges from the much smaller class of Expropriation cases, most of which involve individuals suing the government. In the eight cases won by individual plaintiffs against the government, litigation costs were never denied. In the five cases won by the government against individual plaintiffs, litigation costs were denied in two cases. These results again suggest protection for individuals.

B. Loser Pays Dominates for Public Corporations

Evidence of a loser pays norm was most prominent in cases involving public corporations. Within the corporate party category, we coded for whether a corporate plaintiff or defendant was a public corporation. We expect such corporations to have more assets, on average, than other parties, which may influence judges’ litigation cost rulings. One-hundred-thirty cases, or 11.4 percent of the sample, involved public corporate defendants, and forty-four cases, or 3.9 percent

104. See *supra* notes 37–39 and accompanying text.

of the sample, involved public corporate plaintiffs. Of the 130 cases with public corporate defendants, plaintiffs prevailed in seventy-six cases and had their litigation costs denied in 7.9 percent of them. Similarly, judges denied litigation costs in only one of the fourteen cases (7.1 percent) that involved public corporate plaintiffs that lost to a prevailing defendant. The near-uniform treatment of public corporations precludes efforts to identify factors (such as case category or district) that may influence the treatment of such corporations. Little variation exists in the outcome of interest, litigation cost denials, which could be explained using other factors present in the cases. Despite our resulting inability to include public corporate status as an explanatory variable in our regression models, our models reflect some of the treatment of these corporations. This is because variables representing corporate status, without further distinguishing between public and private status, remained in the models and public corporations represent a significant number of the parties characterized as corporations.

Further examination of public corporation cases shows how close the Israeli litigation cost allocation system operated as a nearly uniform loser pays system as applied when such corporations lost. Of the 130 cases in which public corporations were defendants, 98 percent had only two plaintiff-defendant patterns: Either the public corporation sued another corporation or an individual sued the public corporation. Judges denied litigation costs in only 6.5 percent of cases (4 of 62) in which an individual plaintiff succeeded against a public corporation. Similarly, judges awarded litigation costs to successful corporate plaintiffs in 83 percent of cases (10 of 12) in which they prevailed against a public corporation defendant. By contrast, judges denied litigation costs in one-quarter of the cases (9 of 36) in which a public corporation prevailed against an individual plaintiff. Judges also denied litigation costs in 24 percent of the cases (4 of 17) in which a public corporation defendant prevailed against a corporate plaintiff. Of the forty-three cases for which we have data on public corporations as plaintiffs, judges denied litigation costs in 7 percent of the cases (1 of 14) in which the public corporation lost and in 10 percent of the cases (3 of 29) in which the public corporation plaintiff prevailed.

C. Mixed System

In cases not involving Tort, Expropriation, or public corporations, Israel operates a system in which litigation costs are awarded approximately equally in cases won by plaintiffs and defendants. Of the remaining 641 cases, 349 were won by plaintiffs with litigation costs being denied in 25.8 percent of them. In the 292 cases won by defendants, litigation costs were denied in 22.3 percent of the cases.

Thus, a soft loser pays rule dominated but with substantial rates of departure for both plaintiffs and defendants.

D. District Effects

The data also show that the treatment of litigation costs varied depending on the district that heard the case. This might be in part because the case category mix varied by district. As Table 1 showed, Property cases dominated Nazareth's docket. They comprised more than 50 percent of Nazareth's cases, while they did not account for more than half of that share in any other district. Nazareth's high overall litigation cost denial rate derived from its 72.7 percent denial rate in Property cases won by plaintiffs, a rate nearly triple that of any other district. These cases were mostly litigated between individual plaintiffs and individual defendants. In Nazareth Property cases, Israeli judges come closest to the American rule of each party bearing its own costs.

E. Party Status Hierarchy

Against the background of the importance of case categories and other factors such as court locale, a party status hierarchy emerges. Israeli judges were least protective of public corporations, which almost always had to pay litigation costs both as losing defendants and as losing plaintiffs. They were most protective of individual litigants, who often did not have to pay their adversaries' litigation costs as losing plaintiffs, and were rarely denied their litigation costs as winning plaintiffs in the large category of Tort cases.

Evidence of protection of individual litigants also exists in the two other large case categories of Contract and Property. In results not reported in the tables above, we examined the pattern of litigation cost denials by case category and plaintiff-defendant combination. Courts once again protected individuals, as litigation costs were denied in 37.1 percent of Contract cases lost by individual plaintiffs against individual defendants, in 20 percent of Contract cases lost by individual plaintiffs against corporate defendants, and in 50 percent of Contract cases lost by individual plaintiffs against government defendants. Litigation cost denial patterns in Property cases do not provide as much useful information about party status because such cases overwhelmingly involved individual litigants. Individuals were plaintiffs in 84.1 percent of all Property cases and defendants in an additional 4.5 percent of cases. Litigation cost denials were common in such cases, particularly in cases won by individual plaintiffs against individual defendants, in which litigation costs were denied 43.8 percent of the

time. This pattern is sensitive to inclusion of cases from Nazareth, but this is in part because Property cases were so prevalent in that district.

CONCLUSION

Israeli judges usually require losing parties to pay their adversaries' litigation costs. The loser pays rule is most strictly applied to public corporations, which are generally required to pay both parties' litigation costs as losing plaintiffs and losing defendants. When plaintiffs prevail on their claims in whole rather than in part, they are much less likely to have their litigation costs denied, suggesting that a party's degree of success influences judicial decisions to award litigation costs. Substantial pockets of departure from the loser pays norm exist, however. The norm is asymmetrically applied in Tort cases, in which prevailing plaintiffs almost always receive litigation costs while prevailing defendants receive them only little more than half the time. It is also the exception, rather than the rule, in Property cases in Nazareth.

The Israeli litigation cost award pattern is thus consistent with the qualitative descriptions of loser pays systems that led Reimann to reject the American rule–British rule dichotomy. The loser pays jurisdictions described by Reimann were so riddled with exceptions and limitations on amounts awarded as to suggest that no large group of jurisdictions regularly awards winners litigation costs more than Israeli judges do—regardless of what litigation cost rule these jurisdictions outwardly claim to apply. Further confirmation of Israel's consistency with less judge-centered systems requires more systematic information from loser pays jurisdictions. The variety of litigation cost subsystems that Israeli judges seem to implement is also an interesting judicial complement to the variety of litigation cost clauses that large corporations choose when they contract with one another outside of court.¹⁰⁵ The variety of litigation cost allocation methods that exists in both judge-centered systems and in a private contractual setting suggests that theorizing about optimal litigation cost rules should consider the rich variety actual practice reveals.

This Article mainly described previously unstudied patterns of litigation cost denials. Whatever the implications of our findings for the global debate about the optimal litigation cost allocation system, our results should be of great interest for practitioners. Israeli lawyers and clients now have systematic evidence about litigation cost denials in civil cases litigated to conclusion. This evidence should

105. See Eisenberg & Miller, *supra* note 5, at 352 tbl.2 (showing no attorney's fee rule dominates in U.S. public corporation contracts).

inform their decisions about whether to accept cases, whether to file suit, and about what kind of postfiling litigation behavior to engage in. For example, lawyers in Nazareth Property cases may wish to inform their plaintiff clients about the high probability of not recovering litigation costs even if they prevail. Lawyers in Tort cases throughout Israel may wish to inform their clients about the asymmetric treatment of litigation cost denials in such cases. Our descriptive data also support at least one normative observation. It has been argued that a fair and efficient litigation cost system requires asymmetry with express consideration given to the relative wealth of the litigants.¹⁰⁶ When Israeli judges departed from the default loser pays treatment, they usually did so in a way that is consistent with this aspiration.

106. See Rosen-Zvi, *supra* note 1, at 717 (proposing a “progressive one-way fee-shifting rule as a means of equalizing justice in civil litigation and assisting people of modest means in financing litigation against wealthy adversaries”).