

Cost and Fee Allocation in Civil Procedure

Report on Israel

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I. The rules regulating the allocation of court costs and attorney fees (hereinafter collectively referred to as “trial costs”) are specified in Sections 511-519 of the Rules of Civil Procedure.¹ Section 511 sets out the basic rule granting the court full discretion regarding the allocation of trial costs. Section 512(b) instructs the court to base its calculation on the amount or value of the relief asked for by the plaintiff and on the remedy granted by the court. It also allows the court to take into consideration the behavior of the parties during the litigation. The Supreme Court has ruled that reimbursement of trial costs is restricted to costs that are “reasonable, proportional and necessary” to the litigation.² Courts are not required to distinguish between the two components of trial costs (namely, court costs and attorney fees),³ and may treat them jointly. Despite the wide discretion granted to them, in practice courts tend to follow the “loser pays” rule.⁴ This rule is counterbalanced by additional considerations, including the losing party’s access to justice, avoiding over-deterrence and equality.⁵ In practice, there is a great deal of variation in the scope of trial costs that are awarded by different judges. Historically, courts have tended to disregard the actual amounts expended by winning parties when awarding costs. This led to substantial under-compensation. In recent years, however, following the “constitutional revolution”⁶ that began with the enactment of the Basic Law: Human Dignity and Liberty and the constitutionalization of civil procedure, the awards of trial costs tend to be more in line with actual costs,⁷ although in most cases they still do not reflect the actual costs expended on the litigation. Awards of trial costs in appeal proceedings are treated in the same manner.

¹ Rules of Civil Procedure, 1984 (the “Rules”)

² R.C.A. 6793/08 **Luar Ltd. v. Meshulam Levinstein Engineering** (decided 6.28.2009).

³ Rule 512(a) of the Rules of Civil Procedure.

⁴ URI GOREN, CIVIL PROCEDURE ISSUES (Tenth Edition, 2009) 744.

⁵ H.C. 891/05 **Tnuva v. The Authority for the Licensing of Imports** (decided 31.3.2005).

⁶ AHARON BARAK, INTERPRETATION IN LAW (VOL. III – CONSTITUTIONAL INTERPRETATION) (1994).

⁷ SHLOMO LEVIN, THE THEORY OF CIVIL PROCEDURE: INTRODUCTION AND BASIC PRINCIPLES (Second edition, 2008) 48.

The costs of taking evidence can be costly in certain types of cases such as tort cases involving bodily injuries as well as other cases in which expert testimony is essential.⁸ Each party bears its own costs of collecting evidence, including expert testimony. One important exception is court-appointed experts, the costs of which are allocated by the court. Under Section 513(1) of the Rules of Civil Procedure, the parties' outlays on experts are a component of trial costs and, as such, are treated in the manner described above.

A high percentage of civil cases are settled out of court, whether through direct negotiation or via court-affiliated ADR mechanisms.⁹ In such cases, the parties typically reach an agreement regarding the manner in which trial costs will be allocated among them. When agreement on this issue cannot be reached, the parties may turn to the court for a ruling specifically on this matter.

II. There are a number of regulatory exceptions to the requirement to pay court fees, which are based either on the party's financial need or on the nature of the proceeding. Courts will exempt plaintiffs in full or in part on a showing of economic inability to pay.¹⁰ This provision is applied narrowly, and the applicant must demonstrate not only inadequate personal financial resources but also the unavailability of access to financial assistance from other sources (such as family members). Exemptions based on the nature of the proceedings include such cases as prisoner petitions,¹¹ claims for damages for bodily harm, and governmental takings,¹² as well as many others listed in Section 20 of the Court Rules (Court Fees). In all such cases, the exemption from payment of court fees may be partial.

In 2008 the Rules of Civil Procedure were amended to incorporate mandatory introductory mediation meetings in most types of civil cases (over a certain monetary threshold). Mandatory pre-litigation procedures impact trial costs both formally and informally. Formally, plaintiffs may be reimbursed for court fees if such mediation is

⁸ Special rules govern proof of medical matters in which expert testimony is required. See Rule 127. In order to contest such testimony counter expert testimony must be submitted. See Rule 128.

⁹ For statistics on mediations conducted in the year 2008 see http://www.israelbar.org.il/article_inner.asp?pgId=79649&catId=178

¹⁰ Section 14 of the Court Rules (Court Fees), 2007.

¹¹ Section 9 of the Court Rules (Court Fees), 2007.

¹² Section 3(8) of the Court Rules (Court Fees), 2007.

successful.¹³ Informally, courts take into account the parties' willingness to engage in mediation when ruling on trial costs. Since mandatory pre-litigation mediation is a recent development, it has not yet been fully implemented, and thus the full scope of its impact remains unclear.

Parties are permitted to represent themselves in civil cases,¹⁴ and in small claims proceedings, self-representation is mandated while attorney representation is greatly restricted.¹⁵ In cases of self-representation, trial costs are calculated as if the party were a witness on her own behalf.¹⁶ Statistical data on the prevalence of self-representation is not available, but one may assume a negative correlation between the value of the claim and the incidence of self-representation.

III. Rules governing trial costs are interpreted by judges as intended to affect a party's decision to litigate. Court fees are designed, among other things, to decrease the incidence of frivolous claims. Court fees are set as a percentage (typically 2.5%) of the value of the relief sought, and thus serve as a disincentive to overestimating a plaintiff's claim.¹⁷ This is counterbalanced by restricting reimbursement of trial costs to amounts that are "reasonable, proportional and necessary," the intent of which is to prevent over-deterrence in filing suits, as well as to facilitate more equal access to justice.¹⁸

Court fees are paid in two installments: the first half upon filing the claim, and the second half 20 days prior to the date set for the opening of trial.¹⁹ The court is authorized to order the plaintiff to deposit a security to insure the future reimbursement the defendant's costs of trial in case she loses. The security is usually deposited at the initial stages of trial.²⁰ This mechanism is rarely used by the courts, and is usually restricted to foreign plaintiffs. Attorney's fees are paid pursuant to the agreement that is reached between the lawyer and the client which can take a variety

¹³ Section 6(b) of the Court Rules (Court Fees), 2007.

¹⁴ Rule 472 of the Rules of Civil Procedure.

¹⁵ Section 63 to the Courts' Act, 1984.

¹⁶ Rule 516 of the Rules of Civil Procedure.

¹⁷ R.C.A. 2623/02 **Sys v. Bezek**, P.D. 57(1) 717, 720 (2002); C.A. 10537/03 **State of Israel v. Yesh Gad Industries**, P.D. 59(1) 642, 648 (2004).

¹⁸ R.C.A. 6793/08 **Luar Ltd. V. Meshulam Levinstein Engineering** (decided 6.28.2009).

¹⁹ Rule 6(a) of the Court Rules (Court Fees), 2007.

²⁰ Rule 519 of the Rules of Civil Procedure.

of forms. No data exists as to the prevalence of upfront fee payments, which constitute a de facto barrier to access to the courts.

IV. As a rule, court fees in the general civil courts amount to 2.5% of the value of the relief sought, with a minimum of 639 NIS. For any claim over 21,565,431 NIS the court fees are 1% of the amount in claim.²¹ There are particular rules governing court fees in specific types of cases such as declaratory relief, contempt of court, derivative claims etc. In addition, specialized courts and tribunals (such as family court, labor court, small claims court, etc.) are governed by special rules with respect to courts fees.

Attorney fees are established by agreement between the lawyer and the client. The Israel Bar Act authorizes the Bar to issue recommendations for minimal attorney fees.²² The Bar has issued non-binding recommendation regarding minimal attorney fees for various categories of legal services.²³ In addition, the Minister of Justice is authorized to declare that with respect to particular types of legal services, a cap on attorney's fees is required, in which case the Bar's national council will set the maximum fees permitted.²⁴ Such fee caps currently apply pursuant to the Compensation for Victims of Car Accidents Act.²⁵

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

V. The basic rule governing attorney fees permits monetary compensation only.²⁶ Success-oriented fees are allowed in civil cases,²⁷ conditioned on explicit written

²¹ Second Supplement (item 8) of the Court Rules (Court Fees), 2007.

²² Section 81 of the Israel Bar Act, 1961.

²³ Israel Bar Rules (Recommended Minimal Fees), 2000.

²⁴ Section 82 of the Israel Bar Act, 1961.

²⁵ Section 16(b) of the Compensation for Victims of Car Accidents Act, 1975.

²⁶ Rule 9(a) of the Israel Bar Rules (Professional Ethics), 1986.

²⁷ Rule 9(b) of the Israel Bar Rules (Professional Ethics), 1986.

agreement to that effect between the attorney and her client.²⁸ Contingency fee arrangements are quite common, especially in tort cases.

The law provides for regulation of success-oriented fees. The Bar is authorized to intervene in an agreement between an attorney and her client and lower the agreed-upon fee if it finds the amount asked by the lawyer excessive.²⁹ In addition, specific regulatory restrictions can be found in the Compensation for Victims of Car Accidents Act, under which the amount a lawyer can charge for a successful outcome is capped, based on the manner in which the case was concluded (out-of-court settlement prior to filing a suit, 8%; out-of-court settlement after the suit was filed, 11%; trial verdict, 13%).³⁰

The sale of tort claims is prohibited by statute.³¹ As regards other types of suits, the situation is more ambiguous. The champerty doctrine applies in Israel and prohibits the sale of claims to third parties. However, over the years this principle has been eroded by the courts, who now draw a distinction between the selling of the right to sue (which is prohibited), and the selling of the right to collect damages (which is allowed). Courts are also more likely to permit such a transfer when the purchaser of the right to sue has some property interest in the claim.³²

In class action suits, special rules apply both with respect to court fees and to attorney fees. The Class Action Act of 2006 requires the regulation of court fees by the Minister of Justice.³³ These regulations are still pending. In the meantime, courts usually require class action plaintiffs to pay court fees only with respect to their personal claim (which is typically very small). Attorney fees are regulated by the Act, which requires the court's approval of the amount, even when the suit is settled out of court.³⁴ The general rules governing the imposition of trial costs on the losing party also apply to class action suits. However, the court uses its discretion cautiously in

²⁸ R.C.A. 4723/05 **Levi, Adv. v. Brosh** (decided 12.09.2005).

²⁹ Section 84(b) of the Israel Bar Act, 1961.

³⁰ Section 16(a) of the Compensation for Victims of Car Accidents Act, 1975.

³¹ Section 22 of the Tort Ordinance [New Version], 1968.

³² R.C.A. 2077/92 **Sheldon Adelson v. Reif**, P.D. 47(3) 485 (1993).

³³ Sections 44 of the Class Action Act, 2006.

³⁴ Sections 18 and 23 of the Class Action Act, 2006.

order to achieve the goals underlying the class action mechanism, and imposes high costs on the plaintiffs only when the action is considered frivolous.³⁵

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

VI. Israel provides publicly funded legal aid for the indigent. Since 1975 the Legal Aid Department of the Ministry of Justice has provided legal assistance in civil matter for low-income individuals with meritorious claims. Legal aid includes both counseling and representation in court by attorneys appointed by the Legal Aid Department.³⁶

Numerous NGOs, law school clinics, and private law firms provide legal aid pro bono. The Israel Bar Association established a pro bono program (“Schar Mitzva”) in 2002, with over 200 lawyers currently volunteering. All law schools have established clinics offering legal aid in a variety of matters. Nonetheless, demand greatly exceeds supply, and many people in need are unable to receive legal aid. Litigation costs thus remain a serious barrier to access to the courts not only for the indigent but also for individuals of average income.

VII. Due to the great variation in, and case-specific nature of, trial costs, we are unable to provide a reliable estimate of the sum total of trial costs. We are currently at the early stages of a large-scale empirical study of this question.

However, it is safe to say that there is an access to justice problem in small and small to medium cases. This problem, in addition to the heavy case load on the regular court system, led the minister of justice to increase the jurisdiction of small claims court (from 17,800 NIS (around \$5,000) to 30,100 NIS (around \$9,000) in one year) as well as the initiation of speedy trials for cases that worth 100,000 NIS or less a few years ago.

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³⁵ B.S.C. (Tel-Aviv) 14471/01 **Azualus v. The American-Israel Gas Corp.** (decided 12.19.2006).

³⁶ <http://www.justice.gov.il/MOJHeb/SiuuMishpati/>

Over the last 15 years, the number of lawyers per capita in Israel has increased dramatically, and is expected to reach one in 160 within three years. The increase in the number of lawyers has already resulted in a decline in attorney fees (as well as in the quality of legal services rendered), and this trend is not expected to change in the foreseeable future.