

Recovering the Costs of Litigation in *Beit Din*

By Rabbi Shlomo Weissmann

One of the benefits of resolving conflicts in mediation and arbitration forums such as *beit din*, rather than in court, is the cost savings that result from the relative efficiency of alternative dispute resolution processes.¹ Still, in any forum, parties must incur attorneys' fees and other costs, and the litigation process can be expensive. Parties who prevail in litigation often seek to have the other side reimburse them for their litigation costs. In any given *din torah*, the *dayanim* (arbitrators) are charged with the responsibility of assessing the facts and circumstances of the case to determine whether the award of the *beit din* should include a reapportionment of costs of litigation.² This article will examine the right to recover legal fees from the perspective of Jewish law, particularly in the context of *beit din* litigation.

The general rule governing the right to recover legal fees is derived from a Talmudic discussion (*Sanhedrin* 31b) regarding the relative rights of a plaintiff and defendant to choose the location of the *beit din* in which to resolve their dispute. In the midst of that discussion, the Talmud quotes an objection raised by Rabbi Elazar: plaintiffs, particularly lenders seeking to collect debts owed to them, should not be forced to bear the increased costs of litigating in a faraway *beit din* to recover funds that may rightfully be theirs. Rabbi Elazar's statement is presumably based on the assumption that a plaintiff, even if he or she prevails on the merits of the case, will not be awarded compensation for the costs of litigation – be they attorneys' fees, court costs or travel costs. On this basis, a number of *Rishonim* conclude that

¹ See "Dispute-Wise Business Management: Improving Economic and Non-Economic Outcomes in Managing Business Conflicts," American Arbitration Association, accessed January 27, 2012, www.adr.org/si.asp?id=4124 (a 2006 research study sponsored by the American Arbitration Association).

² Prior to the commencement of a *din torah*, the parties enter into a binding arbitration agreement which provides for the *psak* (decision) of the *beit din* to be legally enforceable once it is issued. As a matter of arbitration law, arbitrators typically possess the authority to issue awards that include the reapportionment of legal fees. See *In re Northwestern Natl. Ins. Co.*, 2000 WL 702996, *1 (S.D.N.Y. May 30, 2000) and Richard C. Mason and Catherine E. Hamilton, "An Arbitration Panel's Authority to Award Attorney's Fees, Interest and Punitive Damages," *Rutgers Conflict Resolution Law Journal* 6 (Spring 2009):2. This is especially the case where the parties have agreed to grant such authority to the arbitration panel. For example, parties appearing before the Beth Din of America agree that those proceedings take place pursuant to the Rules and Procedures of the Beth Din of America. Sections 34(b) and 35(a) and (b) of the Rules and Procedures grant discretion to *dayanim* to apportion costs of litigation in the arbitration award issued by the *beit din* ("Rules and Procedures of the Beth Din of America," Beth Din of America, accessed January 27, 2012, http://bethdin.org/docs/PDF2_Rules_and_Procedures.pdf).

litigants generally must each bear the costs they incur in prosecuting or defending claims in *beit din*.³ This rule is codified by the *Shulchan Aruch*.⁴

The presumption in Jewish law that a prevailing party is not entitled to recover the costs of litigation is subject to a number of possible exceptions which will be explored in this article.⁵ These can be divided into five broad categories. The first involves cases where a plaintiff's improper behavior causes his or her adversary to incur costs that would not otherwise have been incurred.⁶ The second involves cases where a plaintiff seeks to recover lost costs that are the result of the defendant's improper defensive actions. The third category of exceptions involves cases where the parties have implicitly or explicitly agreed to reallocate expenses in a manner other than the default rule. The fourth category involves cases dealing with awards of *mezonot* (spousal support). The fifth category involves recent attempts to actively change the default rule regarding the allocation of costs of litigation.

³ See *Tosafot*, Sanhedrin 31b, s.v. *vivotzi*, and R. Yosef Karo, *Beit Yosef, Choshen Mishpat* 14:5, citing Rosh, *Sanhedrin* 31b, Siman 40 and Mordechai, *Sanhedrin*, no. 707.

⁴ *Shulchan Aruch, Choshen Mishpat* 14:5. See also *Shulchan Aruch, Choshen Mishpat* 9:5, which rules that fees paid to *dayanim* for adjudicating a case must be split evenly among the litigants. *Shulchan Aruch* and many of the earlier and later sources on this topic refer generally to *hotzaot* (costs) of litigation. Earlier sources refer to the costs of hiring a scribe to prepare various *beit din* documents. In contemporary times, attorneys' fees represent the vast majority of the costs incurred in litigation. Most of the written *teshuvot*, *psakim* and articles on this topic group all litigation expenses together, and treat liability for attorneys' fees as akin to all other costs of litigation. Consistent with that, this article does not distinguish between various types of litigation costs. See, however, R. Eliav Shochetman, "Hachiyuv Bihotzaot Mishpat Bipsikat Batei Hadin Harabaniyim," *Dinei Yisrael* 10-11 (1984): note 54, who notes that *batei din* have sometimes distinguished between court fees and attorneys' fees in their decisions regarding the reallocation of costs among litigants.

⁵ As discussed above in note 4, *Shulchan Aruch, Choshen Mishpat* 9:5 rules that fees paid to *dayanim* for adjudicating a case must be split evenly among the litigants. This is based on a concern, rooted in the Talmud (*Ketubot* 105a), that any uneven payment of such fees to a *dayan* would constitute *shochad* (bribery). To the extent a *beit din* wishes to order one side or another to disproportionately pay arbitration fees directly to a *dayan*, the issue of *shochad* would need to be addressed. In reality, however, *beit din* decisions in which the *dayanim* award a reallocation of arbitration expenses typically call for the reimbursement by one party of the other's out of pocket arbitration expenses that have already been paid to the *beit din*. In addition, see R. Moses Feinstein (1895-1986), *Iggerot Moshe, Choshen Mishpat* II, No. 26, who discusses, and ultimately permits, the disproportionate payment of fees directly to a *dayan* by a non-prevailing litigant pursuant to an agreement between the parties, notwithstanding the concern of *shochad*.

⁶ Many of the sources that address the issue of liability for litigation costs distinguish between parties in the position of *malveh* (lender) and *loveh* (borrower). In reality, *batei din* are called upon to adjudicate all manners of disputes, not only those arising between lenders and borrowers. The distinction drawn between a *malveh* and *loveh* in this context refer more broadly to the distinction between a claimant/plaintiff and defendant. Of course, any particular dispute between two parties may feature a number of interrelated claims, defenses, counterclaims and setoffs, and more than one party may properly be characterized as a plaintiff or defendant depending on the particular aspect of the case under consideration.

I. IMPROPER ACTIONS OF A PLAINTIFF USE OF SECULAR COURTS

A plaintiff who prosecutes a monetary claim before the secular courts most often violates the Torah's prohibition against litigating before gentile courts.⁷ Jewish law thus views a plaintiff in secular court as engaging in a prohibited form of extra-judicial self-help. The Rama quotes two opposing positions regarding whether a defendant improperly brought to secular court may seek monetary compensation from the plaintiff where the plaintiff's prohibited action results in the defendant incurring expenses he would not have otherwise had to pay.⁸ These two views emanate from opposing views among the *Rishonim* regarding whether a plaintiff intending only to reclaim what is rightfully his or hers (*libotzi et shelo*), but not to otherwise harm his or her adversary, is liable in tort for such action. Maharam Lublin rules in accordance with those authorities who do not find the plaintiff liable in tort to the defendant.⁹ The Shach, however, cites and rules in accordance with a number of authorities who assign liability to the plaintiff.¹⁰

Even if such recovery is typically allowed, a defendant may sometimes be found to have acceded to secular court adjudication, and thus waived his or her rights to such recovery, if he or she simply participates in the process without actively seeking to have the matter removed to a *beit din*. In one case involving a plaintiff who improperly resorted to secular court, Rabbi Shmuel Yitzchak Shur did not allow the defendant to recover expenses he incurred after the very earliest stages of the litigation, reasoning that the defendant's failure to initiate a *hazmana* (*beit din* summons) process against the plaintiff at that stage estopped him from asserting a claim for expenses thereafter.¹¹ Similarly, Rabbi Shlomo Yehuda Tabak dismissed a defendant's claims for reimbursement of costs associated with defending an ac-

⁷ See R. Yaacov Feit, "The Prohibition Against Going to Secular Courts," *The Journal of the Beth Din of America* 1 (2012): 30.

⁸ Rama, *Choshen Mishpat* 388:5.

⁹ R. Meir MiLublin (1558-1616), *Shu"t Maharam Lublin*, no. 26. The Rishonim generally label one who improperly seeks secular court relief as a *moser* (informant), and *Shulchan Aruch*, *Choshen Mishpat* 388:2, rules that a *moser* is categorically liable in tort. Nevertheless, Maharam Lublin, citing the Mordechai, limits this liability to one who intentionally causes financial loss to his or her adversary ("*mitkavein libazik et chaveiro*").

¹⁰ Shach, *Choshen Mishpat* 388:26, citing the view of Maharam Lublin, as well as authorities, including *Darcei Moshe*, who assess liability.

¹¹ R. Shmuel Yitzchak Shur (1839-1902), *Shu"t Minchat Shai* II, no. 60.

tion in secular court, on the theory that the defendant's participation in that action constituted a waiver of any such claims.¹²

Clearly, in a case where the plaintiff is entitled under Jewish law to utilize the secular courts, the defendant may not seek recovery of attorneys fees incurred in defending such a claim.¹³ Examples of such cases are collection actions for uncontested obligations or collection actions pursuant to a *beit din* award.¹⁴

FRIVOLOUS CLAIMS

In the case of a frivolous claim, a plaintiff may be liable to reimburse a defendant for litigation costs even if the plaintiff sought to adjudicate the case in *beit din*, rather than in secular court. *Yeshuot Yisroel* rules that a plaintiff who knowingly pursues a meritless claim against a defendant is liable to reimburse the defendant for costs expended by the defendant in defending the claim.¹⁵ This ruling is significant, and provides *dayanim* with an important tool to deter frivolous claims in *beit din*. *Yeshuot Yisroel* derives this rule from Rama's statement that a litigant is entitled to reimbursement for costs incurred in appearing before a *beit din* in another location, when the litigant relied on the other party's assurance that he or she would appear before that *beit din* and then failed to appear.¹⁶ *Yeshuot Yisroel* argues that this ruling of the Rama reflects the view that any intentional act that causes damage, even indirect damage, results in a reimbursement obligation on the part of the tortfeasor.¹⁷

¹² R. Shlomo Yehuda Tabank (1832 – 1907), *Shu"t Teshurat Shai, Mabadura Tinyana*, no. 164.

¹³ R. Aryeh Leib Tzintz (1768 – 1833), *Shu"t Maharal MiPlatzk, Choshen Mishpat*, no. 30.

¹⁴ See R. Feit, "The Prohibition Against Going to Secular Courts," 36.

¹⁵ R. Yisroel Yehoshua Trunk (1821-1893), *Yeshuot Yisroel, Ein Mishpat*, 14:4.

¹⁶ Rama, *Choshen Mishpat*, 14:5. The Rama's position is based on the view of Maharam MiRutenberg, quoted by Mordechai. On this basis, a *beit din* might order a litigant to reimburse his or her adversary for fees unnecessarily expended due to, for example, the litigant's failure to appear for a scheduled hearing. See *Piskei Din Rabaniyim* 6 (Haifa 1966), 83.

¹⁷ *Yeshuot Yisroel*, 14:4. Jewish law obligates a tortfeasor to reimburse for damages resulting from his or her direct actions. According to most *Risbonim*, a tortfeasor is morally (*latzeit yedei shamayim*) but not legally obligated to reimburse for damages indirectly resulting from his or her actions (*grama*), unless they fall under the category of *garmi*. This is the position of the Rosh and Tosafot, cited as normative by the Rama (*Choshen Mishpat* 386:3). The Talmud presents a number of cases that are considered *garmi*, and the *Risbonim* debate what qualifies a case as *grama* or *garmi*. Among other factors suggested are whether the damage was proximate in time to the action and whether it was a predictable consequence of the action. Although the opinion of the Rama in 386:3 is understood by many to be

2. IMPROPER ACTIONS OF A DEFENDANT FRIVOLOUS DEFENSES

Yeshuot Yisroel identifies an important limitation to his aforementioned ruling. While a plaintiff may be forced to bear the costs incurred by a defendant in defending against the plaintiff's frivolous claim, the same does not hold true for a defendant who purposefully asserts frivolous defenses in the face of a valid claim. According to *Yeshuot Yisroel*, such action constitutes an indirect tort (*grama*), and would not result in liability on the part of the defendant.¹⁸ Based on this analysis, a Haifa *beit din* ruled that a defendant who asserted frivolous defenses was not obligated to reimburse the plaintiff for the plaintiff's litigation costs.¹⁹

Although not articulated in this manner by *Yeshuot Yisroel*, the distinction he draws between frivolous claims, on the one hand, and defenses, on the other hand, is logical given the differing postures of parties to a lawsuit. A plaintiff who fabricates and advances a meritless claim can be said to be engaging in an act of naked aggression, the costs for which he should clearly be liable. On the other hand, Jewish law grants a little more leeway to parties in a defensive position. Their behavior is passive in that they seek to maintain the status quo, even if, in the process, they proffer defenses that stretch the limits of credibility.

RECALCITRANCE IN APPEARING BEFORE A *BEIT DIN*

A defendant can often thwart a claimant's efforts to recover funds owed to him or her by simply refusing to appear before a *beit din*. In a society that lacks a compulsory *beit din* system, a *din torah* can only effectively take place if both sides enter into a *shtar berurin* (arbitration agreement) in which they agree to be bound legally by the decision of the *beit din*. Where a defendant refuses to do so, a *beit din* may issue a *seruv* (document of contempt) and/or a *heter arkaot* (permission to litigate in secular court). In some cases, a defendant who was initially reluctant to participate in a *din torah* may yield and agree to submit to *beit din* adjudication,

based on a contractual theory similar to promissory estoppel (see R. Yair Chaim Bachrach (1638-1701), *Shu"t Chavot Yair*, no. 168 and R. Yechezkel Landau (1713-1793), *Shu"t Noda BiYebuda, Mahadura Tinyana, Even Haezer*, no. 90), *Yeshuot Yisroel* understands the ruling of the Rama in *Choshen Mishpat* 14:5 to be based on the position that an intentionally inflicted tort constitutes *garmi* rather than *grama*.

¹⁸ *Yeshuot Yisroel*, 14:4. See above at note 17 for a discussion regarding *grama*.

¹⁹ *Piskei Din Rabaniyim* 6, 83.

and the plaintiff may seek to recover the costs of compelling that submission, such as costs of publicizing the *seruv*. The *Shulchan Aruch* rules that the plaintiff is entitled to recover such costs.²⁰

However, the ability of a plaintiff to recover such costs may depend on the legitimacy of his or her underlying claims. The Sma, quoting the Rivash, maintains that a plaintiff may recoup funds lost due to the defendant's recalcitrance only if the *beit din* ultimately determines that the plaintiff's underlying claims were compelling and worthy of a monetary award.²¹ Rabbi Refael Ziskind disagrees with the Sma, and maintains that the defendant must reimburse the plaintiff for the harm caused by his or her recalcitrance, regardless of the merits of the plaintiff's underlying claim.²² *Netivot Hamishpat*, quoting *Tumim*, takes a middle approach, and allows recovery by the plaintiff only if the *beit din* assesses that the plaintiff believed in good faith of the legitimacy of his or her claims, regardless of their actual merit.²³ *Aruch Hashulchan* adopts the approach of *Netivot Hamishpat* and *Tumim*.²⁴

Where the defendant is unwilling to appear before a *beit din*, the claimant is often left with the alternative of pursuing his or her claim in secular court. To what extent the plaintiff may recover costs of litigation thereafter is the subject of a dispute between the Rashba, on the one hand, and a host of *Rishonim* including the Rosh and Rivash, on the other hand. According to the Rashba, the litigation costs incurred by the plaintiff by virtue of the defendant's recalcitrance falls under the category of *grama*, or indirect damages for which there is no judicial remedy.²⁵ The Rosh, Rivash and others, however, maintain that the defendant is obligated to reimburse

²⁰ *Shulchan Aruch, Choshen Mishpat* 14:5, based on a wide range of *Rishonim*, including Rosh, Rashba, Maharik, Rabbeinu Yerucham and others. The Rashba's position here stands in contrast to his position (below, note 25 and accompanying text) that costs of litigation in secular court following a litigant's recalcitrance to appear before a *beit din* are characterized as *grama* and therefore not recoverable. Many authorities account for this discrepancy by suggesting, based on the language of the Rashba, that costs of compelling *beit din* adjudication (as opposed to costs incurred in litigating in secular court) are recoverable notwithstanding their categorization as *grama*, pursuant to a specific rabbinically imposed penalty (*knas*). See, for example, R. Zvi Ushinski, *Orchot Mishpat* (Jerusalem: Mosad Harav Kook, 2003), 295 and *Iggerot Moshe, Choshen Mishpat* II, no. 26.

²¹ R. Joshua Falk (1555-1614), *Sma, Choshen Mishpat* 14:28, citing R. Isaac ben Sheshet Perfet (1326-1408), *Teshuvot HaRivash*, no. 475.

²² R. Refael Ziskind (1722-1803), *Shu"t Vishav Hakoben*, no. 99.

²³ *Netivot Hamishpat (Biurim)*, 14:4.

²⁴ *Aruch Hashulchan, Choshen Mishpat*, 14:10.

²⁵ R. Shlomo Ibn Aderet (1235-1310), *Teshuvot HaRashba*, no. 940.

the plaintiff for all further costs of litigating, once the defendant has been labeled a *mesarev* (unwilling to appear before a *beit din*).²⁶ *Shulchan Aruch* rules that there is no liability, while Rama sides with the view of the Rosh and others that the defendant is obligated to reimburse the plaintiff for the costs of pursuing an action in secular court.²⁷

3. IMPLICIT OR EXPLICIT AGREEMENT OF THE PARTIES

Contracts between parties often contain a “prevailing party clause” that provides for the losing party in any lawsuit arising under the contract to bear the costs of litigation between the parties, including attorneys’ fees. Since Jewish law generally recognizes the ability of parties to transact business according to agreed upon terms and conditions, such a clause should be enforceable as a matter of Jewish law.²⁸ The Sma singles out a contract between parties to reallocate litigation expenses, in particular, as enforceable.²⁹ Rabbi Moshe Feinstein notes, however, that

²⁶ R. Asher (1250-1327), *Teshuvot HaRosh*, no. 73,3 and *Teshuvot HaRivash*, no. 475. This dispute between the Rashba and Rosh and Rivash may be based on a more fundamental dispute found in *Tosafot, Baba Batra* 22b, s.v. *zot*, regarding the definitions of *grama* and *garmi* (discussed above in note 17). The Vilna Gaon (*Biur HaGra, Choshen Mishpat*, 14:30) suggests that the Rashba sides with the Ri, who defines *garmi* as damage resulting proximately in time following action personally committed by the tortfeasor. The Rosh and Rivash, according to the Vilna Gaon, hold like the Ritzba, who understands *garmi* to be a rabbinically imposed penalty applied to disincentivize tortuous actions, and which applies to situations which are common and where the damage is foreseeable (*bezek hamatzui viragil lavoh*). Litigation costs in secular court that result from an adversary’s recalcitrance in coming to *beit din* fall into the latter, but not the former, category. In addition to the explanation of the Vilna Gaon, the exact holdings of the Rosh and Rashba are subject to a number of interpretations. See, for example, *Iggerot Moshe, Choshen Mishpat* II, 26.

²⁷ *Shulchan Aruch, Choshen Mishpat*, 14:5. The Rama specifies that recovery of costs incurred in a secular court action is only possible if the plaintiff obtained express permission from a *beit din* to pursue his or her claims in secular court. However, see Feit, “The Prohibition Against Going to Secular Courts,” that permission may not always be required. See R. Moshe Yosef Mordechai Meyuchas (1738-1806), *Sefer Birkot Mayim, Choshen Mishpat*, no. 7, which rules that in the case of a collection action in secular court on a written promissory note where the borrower has not asserted any defenses, the lender’s litigation costs in secular court are recoverable even without express permission from a *beit din* to resort to secular court, even according to the Rama. See also R. Yaakov Yishaya Blau, *Pitchei Choshen Hilchot Nezikin* (Jerusalem: *Machon Liboyraab*, 1988), 109, note 69. However, see *Iggerot Moshe, Choshen Mishpat* II, no. 26, suggesting that according to the Rama recovery may not be possible in any case absent explicit permission to bring the claim in secular court. Also, it is not clear whether the dispute among the Sma and *Tumim* (see above at notes 21-23 and accompanying text), and the merits of the underlying claims of the plaintiff, are also relevant to the reimbursement of fees incurred in secular court.

²⁸ See *Baba Metzia* 94a, *Shulchan Aruch, Even Haezer*, 38:5 and *Shulchan Aruch, Choshen Mishpat*, 291:17 and 305:4.

such a contract is only valid if it is entered into early in the business relationship; such a clause entered into after a conflict between the parties has already arisen suffers from problems of *asmachta* and may be unenforceable.³⁰

In addition, contracts often contain governing law provisions that provide for any disputes arising under the contract to be decided in accordance with the laws of a specified jurisdiction. Such provisions are generally enforceable under Jewish law.³¹ In some cases, a *beit din* might conclude that even absent an express choice of law provision, the course of dealing of the parties makes it likely that they implicitly adopted such a provision as a term of their business dealings.³² Although in the United States each party to a lawsuit typically bears its own costs of litigation, regardless of which party prevails, there are many statutory exceptions to this rule.³³ In addition, many legal scholars and advocates of tort reform have called for costs of litigation to be borne by the non-prevailing party, and recent legislative activity in some states have trended in that direction.³⁴ In addition, in many countries other than the United States the losing party is required to pay the costs of litigation.³⁵ In a case where the *beit din* concluded that the parties agreed to be governed by the

²⁹ *Sma, Choshen Mishpat*, 61:12. See also R. Yitzchok Yaakov Weiss (1901-1989), *Sbu"t Minchat Yitzchak* V, no. 118.

³⁰ *Iggerot Moshe, Choshen Mishpat* II, no 26. *Asmachta* refers to a presumption that one or more of the parties did not possess the requisite intent to bind themselves to an agreement because of the overly speculative nature of the agreement. According to Rabbi Feinstein, a party's agreement to pay litigation costs for an existing conflict may not reflect an actual intent to do so, but may instead be the product of the party's misplaced confidence that they will prevail.

³¹ See R. Yona Reiss, "Matneh Al Mab Shekatuv Batorah," *Shaarei Tzedek* 4 (2003), 288. See, also, Section 3(d) of the Rules and Procedures of the Beth Din of America.

³² See *Iggerot Moshe, Choshen Mishpat* I, no. 72. See also Section 3(e) of the Rules and Procedures of the Beth Din of America.

³³ See *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U. S. 598 (2001) ("In the United States, parties are ordinarily required to bear their own attorney's fees— the prevailing party is not entitled to collect from the loser. Under this 'American Rule,' we follow a general practice of not awarding fees to a prevailing party absent explicit statutory authority. Congress, however, has authorized the award of attorney's fees to the 'prevailing party' in numerous statutes...")

³⁴ For a good overview of the history of the American Rule, critiques of the rule, and attempts at reform, see Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation", *Florida Coastal Law Review* 12 (Winter 2011): 357.

³⁵ See W. Kent Davis, "The International View of Attorney Fees in Civil Suits: Why is the United States the 'Odd Man Out' in How it Pays its Lawyers," *Arizona Journal of International and Comparative Law* 16 (1999): 361.

laws of such a jurisdiction, the prevailing party would be entitled to recover legal fees expended in the course of the litigation.

4. SPOUSAL SUPPORT CASES

Cases involving *mezonot* (spousal support) present an exception to the rule against a prevailing party recovering litigation costs, at least according to a 1981 appellate decision of the *beit din* of the Rabbanut in Israel authored by Rabbi Avraham Shapira, a former chief rabbi of Israel.³⁶ The case involved a man who had been ordered by the *beit din* to provide monetary support for his wife. He appealed the decision, and the appellate *beit din* found no basis for his appeal. Writing for the majority of *dayanim* (judges), Rabbi Shapira opined that the husband was obligated to reimburse the wife for the money she expended on an attorney. This was because, generally, spousal support awarded by a *beit din* represents the *beit din's* assessment of the basic needs of the spouse based on an appropriate standard of living. Implicit in any *mezonot* award is the assumption that the spouse will net the amount awarded. Where the spouse receiving the support must incur costs to collect the support, that spouse is entitled to collect a gross amount that includes the costs of collection.

5. NEW APPROACHES

In an article published in 1981, Professor Eliav Shochetman notes that many people choose to litigate their disputes in the secular courts rather than in *beit din* due to the fact that Israeli law allows for the recovery of legal expenses by a prevailing party, in contrast to the rule under Jewish law.³⁷ Professor Shochetman proceeds to advance a number of possible solutions to this problem. Among them, he quotes a suggestion advanced by Rabbi Mordechai Eliyahu, former Chief Rabbi of Israel, in a *beit din* decision issued in 1974 calling for the institution of a formal rabbinic enactment that would obligate the losing party to reimburse the litigation costs of the prevailing party.³⁸ As precedent for such an enactment, Professor Shochetman cites a similar communal decree issued in Lithuania in 1633 that empowered *daya-*

³⁶ *Piskei Din shel Batei ha-Din ha-Rabbaniyim be-Yisrael* 12 (Jerusalem 1981), 186.

³⁷ R. Shochetman, "Hachiyuv Bihotzaot Mishpat Bipsikat Batei Hadin Harabaniyim," 263.

³⁸ *Ibid.*, 281.

nim to award fees in favor of prevailing parties to *dinei torab*.³⁹ Professor Shochetman notes that there are considerable barriers to the enactment of formal rabbinic enactments in contemporary times. For example, in response to a proposed enactment to raise the age at which the obligation to pay child support terminates, Rabbi Ovadia Yosef wrote that an enactment can be binding under Jewish law only if it enjoys a broad consensus of the entire rabbinic establishment.⁴⁰

In lieu of such an enactment, Professor Shochetman suggests the possibility that *dayanim* may award attorneys' fees based on the general authority vested in *batei din* to impose extra-judicial remedies ("*makn vi'onshin shelo min hadin*") to curtail behavior that violates public policy ("*limigdar milta*").⁴¹ There is broad authority for this power based on a number of sources among the *Rishonim*, and the *Shulchan Aruch* ultimately codifies the ability of a *beit din* to impose extrajudicial remedies to benefit society.⁴²

Notwithstanding the general rule under Jewish law that precludes the recovery of costs incurred in litigating in *beit din*, we have demonstrated that there are a number of exceptions to this rule. Often, litigation costs must simply be written off as a "cost of doing business," except in those circumstances where an adversary's actions fall into the particular categories set forth above.

Rabbi Shlomo Weissmann, a graduate of Columbia Law School, practiced law for several years and now serves as the Menahel (Director) of the Beth Din of America.

³⁹ Ibid.

⁴⁰ Ibid., note 93.

⁴¹ Ibid., 293.

⁴² See *Shulchan Aruch, Choshen Mishpat*, 2. It is worth noting, however, that both the *Shulchan Aruch* and Rama premise the authority of a *beit din* to impose such remedies on the existence of a central, organized communal structure. Given the lack of such structure in our contemporary communities, any solution based on *makn vi'onshin shelo min hadin* is likely to remain a theoretical, rather than practical, suggestion.