

# Representing Disability in Tort Litigation: An Empirical Analysis of Judicial Discourse (1998–2018)

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*This study empirically examines whether and how the introduction of disability rights impacted the portrayal of disability in personal injury court decisions in Israel and offers a method for doing such research in other legal realms and contexts. We conducted a quantitative content analysis of Israeli district court judicial rulings over twenty years to measure whether a discursive shift occurred from a medical-individual view of disability to a social constructionist and a rights-based understanding of disability. Our coding system included descriptive and conceptual indicators, forming two indexes: a conventional index and a progressive index. Our findings reveal a steady dominance of the conventional discourse and a gradual yet limited rise in progressive discourse. Moreover, individual court decisions often manifest both types of discourse but are still dominated by a conventional view of disability and rarely apply direct disability rights terminology. These findings provide pioneering empirical evidence that substantiates the disability critique of tort law, demonstrating that judicial decision making is slow to adopt a disability rights perspective. More broadly, our findings show that the infusion of a disability rights orientation does not necessarily replace the older medical-individual view of disability but adds to it, resulting in a mixed discourse that includes both conventional and progressive elements.*

## INTRODUCTION

This study empirically examines whether and to what extent the introduction of disability rights has impacted the portrayal of disability in personal injury court decisions in Israel and offers a method for doing such research in other legal fields and contexts. Recent years have seen a growing social constructionist understanding of disability as a dynamic and interactive social phenomenon that is shaped by social, cultural, political,

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and legal processes (Oliver 1990; Davis 1995; Linton 1998; Bickenbach et al. 1999; Fougeyrollas and Beauregard 2001; Mor 2006; Goodley 2010). Such an understanding challenges traditional views of disability—often referred to as the medical or the individual model—as a misfortune, a pathology, and an inherent inferiority. The shift in the understanding of disability has been accompanied by a growing recognition of disability rights, which has offered a new legal discourse to translate disabled persons' experiences and demands into legal schemes of rights and benefits. The elaboration of disability rights has assigned courts the role of protecting, promoting, and enhancing those rights while posing a challenge to judicial interpretation and reasoning of disability-related disputes.

This study is part of a larger effort to identify and analyze changes in understanding disability in various legal contexts. We are interested in the extent to which a shift has occurred from an individual-medical, to a social-constructionist, rights-oriented view of disability in different realms of judicial decision making. We are particularly interested in judicial fields seemingly unrelated to disability rights since they allow us to explore how each field's conventions and assumptions shape its response to disability rights.

Personal injury court decisions present a particularly apt choice for examining the judicial construction of disability for two main reasons. First, disability rights legislation does not directly govern the field of tort law. Personal injury court decisions operate within a private law framework, mainly serving to resolve private disputes and compensate an injured party. At the same time, adjudicating such cases must adhere to the overall normative framework of civil and human rights and may be affected by broader social trends of disability acceptance and awareness. Hence, personal injury court decisions are subject to a complex normative framework that conforms to the features of tort law as a juridical field but are also subject to the mandates of the legal system, including its disability rights scheme. Thus, Israel has an elaborate and dynamic common law-based tort system (Barak 1992; Rivlin 2012), in which courts play a significant role in developing the law through precedent-setting and norm elaboration (Englard 1974). Israel also has well-developed disability legislation, led by the 1998 Equal Rights of Persons of Disability Law (ERPDL), which followed the US 1990 Americans with Disabilities Act (ADA).<sup>1</sup> Additional disability related laws concern social services, social security, education, legal capacity, and more (Rimmerman et al. 2015). The two legal frameworks may seem disconnected, yet this study points at potential interactions and mutual influences.

Second, tort law is a central arena where the meaning of disability is shaped, contested, and utilized. We view personal injury law as the law of disablement as it deals with the process of becoming disabled: the circumstances of the disabling event and its bodily, material, social, and legal implications, including the envisioned trajectories of life with a disability (Bloom and Miller 2011; Mor 2018; Mor and Pikkell 2019). So far, the study of tort law from a disability perspective has been quite limited. The existing disability critique of tort law has uncovered its biased and skewed understanding of disability as a negative trait, a medical condition, and a tragedy, often ignoring the

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1. Equal Rights for Persons with Disability Law of 1998, March 5, 1998 (Israel); Americans with Disabilities Act, Public Law 101-336, July 26, 1990 (United States).

disabling social structure, which remains unchallenged (Bagenstos and Schlanger 2007; Bloom and Miller 2011; M. Weber 2012; Mor 2018; Mor and Pikkell 2019). Tort law is, therefore, an uncommon yet fascinating site for a socio-legal study of the changing meaning of disability.

The present study is a pioneering attempt to provide empirical evidence to support or refute the claim that personal injury court decisions tend to portray disability in a medical-individual manner and to ignore society's role in disablement processes. It also examines whether a social constructionist view and a rights-based understanding of disability have infiltrated such decisions and to what extent. Our primary hypotheses were that, overall, personal injury court decisions in the studied period typically express a medical-individual view of disability, though gradually manifest a social- and rights-oriented understanding of disability as disability rights and disability awareness become established. We also hypothesized that individual decisions might exhibit a complex portrayal of disability, characterized by a dominant medical-individual understanding of disability with sporadic references to the social nature of disability, yet rarely express a rights-based view of disability.

To trace the changes in the meaning of disability as they appeared in personal injury court rulings, we conducted a quantitative content analysis of Israeli district courts' judicial rulings over twenty years. We searched for personal injury judicial rulings issued by Israeli district courts concerning an injurious event that resulted in a permanent disability. We narrowed our search to decisions rendered during four-year intervals, starting from 1998, the enactment year of the ERPD, and ending in 2018. We coded all decisions from every studied year, searching for descriptive and conceptual indicators. Descriptive indicators included, for example, variables concerning the decision (for example, cause of action, page length) and the plaintiff (for example, age, gender, and resulting disability). Conceptual indicators included variables concerning the disability language that court decisions may employ, grouped under two types of discourse: a conventional discourse, characterized by a medical and tragic-oriented language (for example, handicap, diagnosis, miserable, dependent) as opposed to a progressive discourse, characterized by a social and rights-oriented language (for example, disability, rights, society, integration, stigma). We then created two indexes to measure the prevalence and intensity of each discourse: a conventional index and a progressive index. Based on these two indexes, we observed and analyzed changes in disability discourse as employed in the studied decisions over time.

Our findings confirmed our hypotheses. They reveal a steady dominance of the conventional discourse and a gradual yet limited rise in the progressive discourse. They also show that individual court decisions often manifest both types of discourse, though still dominated by a conventional view of disability and rarely apply direct disability rights terminology. These findings substantiate the disability critique of tort law, demonstrating that judicial decision making is slow to adopt a disability rights language but is still affected by larger-scale social and legal change processes as reflected in judges' discursive choices. Following these findings, we call for a change in how court decisions portray disability and in tort law's underlying assumptions and doctrinal structures. More broadly, our findings demonstrate that the infusion of disability rights orientation into judicial discourse does not necessarily replace the older medical-individual view of disability but adds to it. The result is a mixed discourse that includes both conventional

and progressive elements, demonstrating how existing perceptions of disability are deeply embedded in legal doctrine and judicial imagination.

## THEORETICAL FRAMEWORK: DISABILITY, TORTS, AND JUDICIAL DISCOURSE

### Disability Rights, Disability Theory, and the Law

This study uses the theoretical framework of disability legal studies (DLS) to examine the infiltration of disability rights discourse into the sphere of personal injury court decisions. DLS examines the socio-legal construction of disability by interrogating the social, cultural, political, and economic processes that shape the meaning of disability in diverse legal contexts and the role of law in such processes (Mor 2006; Kanter 2011; Heyer 2015a). We view disability rights as a valid legal discourse that has been utilized in recent decades to transform the meaning of disability in law, society, and politics and to change the place of disabled persons in society as full members and equal rights bearers (Stein and Stein 2007; Bagenstos 2009).

The disability rights perspective presents a transformative vision for a just and welcoming society for disabled persons that rests on disability equality, human rights, participation, access, and pride (Silvers 1998; Swain and French 2000; Stein and Stein 2007; Bagenstos 2009). Disability rights translate disabled persons' experiences of exclusion and oppression into legal claims to bring about social change. Indeed, civil and human rights have been long criticized for their inherent limitations, which are rooted in their exclusionary histories, liberal biases (Blau and Moncada 2005), and limited effectiveness as "hollow hopes" (Rosenberg 2008). Nevertheless, in this study, we acknowledge their role as a resource for legal mobilization and a tool for expanding the legal imagination (McCann 2008; Heyer 2015b).

The enactment of disability rights into law thickens the normative framework on which disability-related claims can rest and offers a new legal discourse to address disability in any legal field when relevant issues are addressed and discussed (Kanter 2011; Waterstone 2015). This emergent legal discourse seeks to replace the older yet prevailing view of disability as an inherent difference that deserves different treatment (Silvers 1998; Bagenstos 2009). The latter assumes that disabled persons lack the necessary legal subjectivity and capacity to be considered equal rights holders (Silvers 1998; Bagenstos 2009) and is rooted in medical and individual understandings of disability that view disability as a tragedy, a medical pathology, and an inherent inferiority (Stein and Stein 2007). The ambitious project of disability rights is to alter these social and legal realities by using the newly introduced language of rights, access, accommodations, and discrimination and by attending to the disabling social conditions that create barriers to full social, political, and economic participation.

Evaluating the shift to disability rights involves a deeper understanding of disability theory. The rise of disability rights has been accompanied by, and infused with, a social constructionist account of disability as offered by disability studies (Stein and Stein 2007; Heyer 2015b). Research in disability studies often draws upon different models of disability; each represents an ideal-type view of disability (Drum 2009; Goodley

2010). Disability scholars use these models to reevaluate existing social and legal arrangements and reimagine alternatives. This study utilizes four main models of disability, grouped under two types of discourse: a conventional discourse and a progressive discourse.

The conventional discourse comprises two models, the individual model and the medical model. Both characterize the traditional approach to disability as identified by later critics and as manifested in early disability policy. The individual model is mainly associated with the work of Michael Oliver (1990, 1996), who defined and critiqued it. It assumes that disability is a personal tragedy, an immutable trait located in the disabled person's physical body, and an individual problem that should be fixed to meet social norms. Under the medical model, disability is primarily a medical condition, defined and explained in medical-scientific terms, as utilized by health professionals. It assumes that disability is a pathology, an abnormality that subjects the person to practices of cure, care, and rehabilitation (Davis 1995; Wendel 1996; Linton 1998). Both models view disability as an immutable trait, and, in both, the role of society in disablement processes remains unnoticed. The term "conventional discourse" emphasizes the social conventions that underlie this discourse and relates to the corresponding legal conventions that dictate its use in diverse legal contexts.

The progressive discourse comprises the social model and the rights model. Both are the bedrocks of the newly introduced disability rights discourse. Michael Oliver (1990, 1996) was the first to introduce the social model to an academic audience. Oliver argued that disability is socially constructed, a product of social relations and interactions that results in stigma, segregation, environmental barriers, and paternalistic social and legal arrangements (see also Goodley 2010). This understanding emphasizes the dynamic, interactive, and contextual nature of disability and the role of society in generating disablement (Abberley 1997; Charlton 1998), although at times criticized for ignoring the bodily experience of pain (Shakespeare 2006). The rights model treats disability as an issue of civil rights (Hahn 1996; Silvers 1998) and human rights (Stein and Stein 2007) and views disabled people as a minority group (Hahn 1996). It translates the social model's insights into legal schemes of rights and liberties, including non-discrimination, access, inclusive education, and independent living. Its leading legislative models are the ADA and the 2007 Convention on the Rights of Persons with Disabilities (Stein and Stein 2007; Kanter 2011; Sabatello and Schulze 2013).<sup>2</sup> The term "progressive" reflects the social dimension of disability that characterizes both models and underlies their political vision.

While each of the two discourses and their attendant four models has its drawbacks, they offer conceptual clarity that is particularly useful for empirical research (Mor and Pikkell 2019). Based on these two types of discourse, we identified key terms that indicate what language personal injury court decisions employ and developed two indexes to measure their intensity. Using a longitudinal approach, we used the indexes to trace a shift from a conventional to a progressive discourse. We hope that the tools we develop here will be helpful in measuring discursive trends in future empirical projects on the impact of disability rights on court decisions and on judicial texts and legal change more broadly.

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2. Convention on the Rights of Persons with Disabilities, 2007, 999 UNTS 171.

## Tort Law and Disability

Despite obvious connections between personal injury and disability, tort law has not been a common site to examine the spread and impact of disability rights on the judicial construction of disability. As the archetypical field of private law, tort law is usually considered ill-suited to promote civil rights or to express constitutional values (Jeffries 1989). At the same time, tort law has historically served to protect the autonomy of individuals in society, compensate those whose autonomy, bodily integrity, or property has been harmed, and sanction those who have used their liberty at the expense of others (Goldberg and Zipursky 2010). Furthermore, the rise and expansion of dignitary torts have proved that, under certain circumstances, tort law can and should protect individuals and groups from discrimination and the infringement of rights (Bender 1997). Still, various critiques of tort law seek to expose its underlying biases as a field that underserves disadvantaged groups. Thus, egalitarians have demonstrated that law serves the powerful and the rich (Abel 1990; Keren-Paz 2013). In addition, socio-legal scholars have explored power dynamics in the emergence and transformation of disputes (Felstiner, Abel, and Sarat 1980) and the various social and cultural forces that shape tort law (Engel and McCann 2009; Engel 2010; Bloom, Engel, and McCann 2018). Similarly, feminist and race critiques interrogate how gender and racial biases shape tort law and influence its implementation (Bender 1992; Bitton 2003; Chamallas and Wriggins 2010).

The disability challenge to tort law seeks to expose another layer of bias in its operation and underlying assumptions. As DLS instructs, stigma and assumptions concerning disability permeate all fields of law, shape the design of legal norms and institutions, and are shaped by them (Mor 2006; Kanter 2011; Heyer 2015a). Yet the study of disability and tort law is limited. So far, scholars have dedicated their attention to the interaction of tort law with disabled persons, particularly as injured or injurers in the context of negligence (tenBroek 1966; Milani 1998; Dorfman 2016), as newborns in wrongful life lawsuits (Hensel 2005; Perry 2007; Mor 2014), and as targets of disability discrimination and harassment in dignitary torts (M. Weber 2012). Others have brought attention to damages as a realm that involves expectations and assumptions about life with a disability, specifically in the context of hedonic damages for pain and suffering (Bagenstos and Schlanger 2007) and sex damages for harm to sexual functioning (Mor and Pikkell 2019). More broadly, Anne Bloom and Paul Miller (2011) were the first to interrogate disability stigma in tort litigation and its impact on litigants and public perceptions of disability. These studies demonstrate the intellectual contribution of disability critique to the study of tort law and the impact of disability rights on its development. Some individuals have gone further to explore the fundamental assumptions that underlie tort law as a field.

Within this growing body of scholarship, several scholars have uncovered tort law's limited and skewed understanding of disability as a negative trait, a medical condition, and an inherent state of misery and suffering (Bagenstos and Schlanger 2007; Bloom and Miller 2011; Mor 2018). Some show that the search for individual fault often ignores the disabling social structure, which remains unchallenged (Hensel 2005; Bagenstos and Schlanger 2007; Bloom and Miller 2011; Mor 2014). These studies also maintain that tort law's underlying assumptions do not allow for a complex picture of

disability's hardship and joy, thereby shaping both claimants' language in court and judges' views of life with a disability.

Most recently, we identified tort law, specifically personal injury law, as the law of disablement: the law that addresses the implications of becoming disabled (Mor 2018; Mor and Pikkell 2019). Under this view, personal injury law is a mechanism of state response to injurious events and their disabling consequences. Personal injury court decisions shape the meaning of disability by defining who is disabled and who is not, which injurious event deserves compensation, and what types of remedies are available for those who become disabled (Bloom and Miller 2011; Mor 2018). Moreover, an essential function of tort law is to provide financial relief to disabled persons to compensate for their losses. When discussing compensation, courts engage with the bodily, material, social, and economic implications of disablement and the envisioned trajectories of life with a disability (Bagenstos and Schlanger 2007; Bloom and Miller 2011; Mor and Pikkell 2019).

The negative view of disability as employed in tort law is therefore rooted not only in stigma but also in tort law's essential features as a juridical field: tort decisions follow a specific form; speak a particular language to a certain audience; serve specific functions, including persuasion, legitimacy, and the resolution of actual conflict; and, above all, have real-life consequences by assigning liability and awarding damages (Bourdieu 1986). Therefore, lawyers and judges inevitably work under certain assumptions regarding the nature and meaning of disability. These assumptions are shaped by societal views and the legal framework within which they are formed and operationalized. A medical worldview will constitute and enforce a medicalized discourse within which compensation claims can succeed. A social perspective will underscore the socioeconomic infrastructure that shapes the experience of disability following an injurious event and the role of society in generating stigma and barriers to participation.

So far, these arguments regarding torts law's limited understanding of disability have not been empirically tested. This study is the first to examine the language that personal injury court decisions employ, whether these views have changed over time and the extent to which a disability rights orientation has permeated tort law's conventions and logic.

### Judicial Rhetoric and Disability Discourse

Our focus on the judicial rhetoric of trial courts assumes that legal texts have a meaning-making function. To trace and identify whether a discursive shift occurred in personal injury court decisions, we performed a qualitative content analysis of district court rulings when sitting as a first instance trial court. This methodological choice rests on several contentions: first, that courts, specifically trial courts, participate in constructing legal meanings and shaping social perceptions (Rollins 2002; Vanhala 2010; Vogler 2016); second, that the judicial text is an essential self-sufficient research subject, especially apt for content and discourse analysis (Hall and Wright 2008; Shuy 2015; Kirkham and O'Loughlin 2019); and, third, that content and discourse analysis are valuable tools for uncovering the social and legal meaning of disability (Grue 2011, 2019; Mor and Pikkell 2019).

Higher courts have a prominent role in meaning making, particularly in common law systems where they set precedents. Yet trial courts, too, participate in shaping legal categories, terms, and concepts. Trial courts are the main arena where litigants and attorneys present their cases, and judges base their rulings on the unmediated assessment of all facts and evidence (Silbey 1981; Mather 1998). As the frontlines of legal claims, they can make legal theory reality and may initiate doctrinal trends. Moreover, judicial texts hold essential expressive functions in shaping social norms, perceptions, and realities (Mazzone 1998; Best 2012; Nadler 2017) and may reflect and affect shifts in public opinions and social perceptions (Rollins 2002; Vanhala 2010; Vogler 2016). Ultimately, while the impact of court rulings on larger-scale social change processes is debated, their role in shaping legal positions is undisputed (McCann 2008; Rosenberg 2008).

Also crucial for our research is that courts have a unique role in promoting civil rights. The turn to disability rights has given courts a role as guardians of disabled persons' rights and liberties, particularly in constitutional and antidiscrimination law (Waterstone 2015). Yet courts, too, are subject to judicial bias (Guthri, Rachlinski, and Wistrich 2001; Mahoney 2015) and institutional constraints (Barzilai 2006; Rosenberg 2008). Such biases and limitations play a role in disability litigation (for example, Vanhala 2010; Emens 2012; Waterstone 2015; Dorfman 2020). These biases and constraints play an even more significant role in other realms of law, which are not directly affected by disability rights legislation and impetus. Therefore, disability rights instructions are relevant to any legal field whenever disabled people's life and life choices are at stake. Thus, even though personal injury court decisions may not directly discuss disability rights issues, they compel judges to engage with questions concerning the implications of living with a disability and the place of disabled people in society.

Content analysis of judicial rulings offers a window into judicial decision making and discursive choices, revealing judges' opinions, values, and interests as they play out in the language they deploy (Sadl and Palmer Olsen 2017; Kalimo, Meyer, and Mylly 2018; Kirkham and O'Loughlin 2019). Content analysis in legal research is an empirical form of discourse analysis. It entails a systemic analysis of many judicial rulings representing a particular field, time, or setting and facilitates drawing large-scale conclusions regarding the relationships between law and society (Hall and Wight 2008; Murchison and Jochelson 2015; Kirkham and O'Loughlin 2019). Content analysis of judicial discourse allows us to interrogate the social construction of ideas (Barret, Fann Thomas, and Hocevar 1995) and the cultural contexts and political settings that shape judges' vocabulary and rhetorical preferences (Kalimo, Meyer, and Mylly 2018). Therefore, the language used in legal texts may indicate how a particular issue is constructed and understood in our society (Gales 2009).

For the socio-legal study of disability, discourse analysis is a vital tool as it adds an interpretive layer (Kalimo, Meyer, and Mylly 2018) that allows the insertion of a disability critique into disability rights scholarship (Grue 2019; Mor and Pikkell 2019). Disability discourse analysis of court decisions investigates the linguistic choices of judges and uses them to uncover biases, identify legal barriers, and provide opportunities for change and growth (Corker and French 1999; Grue 2019). While it cannot offer a complete account of judges' attitudes and the motivations behind their linguistic



choices, it is still instrumental for enhancing disability theory and furthering social and legal change processes (Grue 2011).

### Disability and Torts in the Israeli Legal System

We focused our research on Israeli district courts, sitting as trial courts in personal injury court decisions. As first instance tribunals, Israeli district courts hear cases that involve severe injuries that can substantially impact many aspects of one's life. Therefore, judges that rule in tort cases of severely disabled individuals must openly discuss the claimant's disability and its consequences, providing insight into their reasoning and perceptions of life with a disability (Mor 2018; Mor and Pikkell 2019). The Israeli legal system is modeled after the British common law system, in which courts have the normative power to set precedents and create new norms when needed (Englard 1974). The tort system is the emblem of this bottom-up common law type of judicial lawmaking. While Israel has its Tort Ordinance and other statutory mechanisms, the judiciary's role is to infuse these often loosely defined legal norms with particular meaning (Englard 1974; Barak 1992; Rivlin 2012).<sup>3</sup> More recent developments have mobilized Israeli tort law to actively protect equality and fundamental civil rights through dignitary tort schemes, though these initiatives have been more successful when promoted through legislation rather than judicial adjudication (Cohen-Eliya 2003; Bitton 2006). Nevertheless, trial court rulings in tort law tend to be instrumental and technical as they apply legal rules to specific facts and circumstances, are bound by precedent, and are subject to the judicial hierarchy of reversal and approval on appeal.

At the center of our study is the compensation part of the decision, which discusses the plaintiff's disability and its consequences. This part of the judicial decision is particularly technical and instrumental. In it, the court determines the plaintiff's disability and the awarded damages that will make her "whole again" by covering her losses following the disabling event. To compensate for these losses, the court assesses the implications of the acquired disability in realms such as medical treatment, rehabilitation, housing, mobility expenses, loss of income, and non-quantifiable harms, such as pain and suffering and loss of enjoyment. This study does not concern the type or amount of damages awarded but, rather, the language and terminology that courts use when award damages.

The starting point of our empirical investigation was 1998. Disability rights activism arrived in Israel in the 1990s (Ziv 1998; Rimmerman et al. 2005), following the enactment of the ADA in the United States (Ziv 1998; Kanter 2003; Heyer 2015b), the rise of global disability activism (Charlton 1998; Heyer 2015b), and local developments of growing awareness and rights consciousness (Ziv 2004). In 1998, the disability rights era in Israel officially started with the enactment of the ERPDL. The ERPDL followed the ADA's model of disability rights legislation (Herr 2001), combined with a Nordic welfarist emphasis on the affirmative duty of the state to provide disability services (Ziv 1998). The ERPDL was a significant legislative achievement. It included operative provisions relating to antidiscrimination, accommodations, access,

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3. Torts Ordinance of 1968, April 17, 1968 (Israel).

and declaratory provisions that offered a normative framework for all disability-related matters (Ziv 2004; Mor 2019). In subsequent years, disability rights legislation expanded, the ERPDL was further implemented, and additional legal fields were subject to the impact of rights, although changes were incremental and slow (Rimmerman et al. 2005, 2015). Among the very few Israeli Supreme Court precedents concerning disability rights was the 2012 *Hammer* decision.<sup>4</sup> The *Hammer* decision abolished wrongful life claims by explicitly acknowledging the ERPDL's impact on tort law, declaring that a life with a disability cannot be considered harm (Karako-Eyal 2013; Mor 2014). This powerful statement remained in the realm of wrongful life but had no further impact on tort law as a field.

The present study aims to provide a broader analysis of the potential impact of disability rights on the evolution of personal injury case law. Our earlier study examined the effect of disability rights on personal injury court decisions in the context of sex damages, which compensate for harm to sexual functioning (Mor and Pikkel 2019). We found that the form and type of sex damages and judicial rhetoric have changed over time toward a more social, affirmative, and inclusive approach, yet change has been slow and limited in scope. This study offers a broader analysis of whether and how judicial rhetoric regarding disability has changed over the years. While this study focuses on Israeli case law, its theoretical underpinnings and methodological approach provide vast opportunities for equivalent research. We have traced changes in rhetoric and discourse, not doctrinal developments. Therefore, our methods and findings are relevant and applicable to different judicial contexts, though they require the adaptation of the coded terminology and the screening criteria to fit local jurisprudence.

## METHODS

This study uses quantitative content analysis of judicial discourse to interrogate courts' responses to the rise of disability rights in personal injury cases over twenty years between 1998 and 2018. We offer a longitudinal analysis of how judges understand and construct disability and how it has changed in the studied years, beginning with the enactment of the ERPDL in 1998. Our goal was to create an index that measures the use of two different discourses (the individual-medical approach and the social rights-based approach to disability) in every court decision. Following Mark Hall and Ronald Wright's (2008) conceptualization of content analysis of judicial texts, we coded and analyzed 423 Israeli district court decisions in four-year intervals from 1998 to 2018. Due to a large number of cases in the overall period and the manual collection and coding method that we used, we decided to narrow our database by using fixed intervals and coding all cases each year. The four-year intervals allowed us to trace the change in judicial discourse over time with sufficient data for the analysis. The coding of all cases in each studied year allowed us to minimize the risk of sampling bias and to have statistically significant results.

We sampled the cases for this research using a computerized search in Nevo, the most comprehensive legal database in Israel today. We selected the cases by using

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4. *Hammer v. Prof. Amit et al.*, C.A. 1326/07 (2012) (Hebrew).

the following criteria: we searched for district courts' decisions while sitting as a trial court in cases that involved a long-term impairment of any type (physical, sensory, emotional, cognitive, aesthetic, or other), including only those final rulings that discussed compensation (we excluded liability only cases). Next, we coded the cases for descriptive and conceptual variables. We used inductive quantitative content analysis and comprised a coding sheet of predetermined variables representing different understandings and assumptions of disability based on the theoretical framework presented above. We carefully read and analyzed each court ruling using the coding sheet and inserted the coded variables into a computerized SPSS database. We hired six research assistants (law students) for coding who worked under the authors' supervision. We trained the research assistants to follow the coding sheet but did not provide them with the study's hypotheses. We double-coded 20 percent of the decisions to guarantee the coding scheme's reliability and the variables' clarity.

Descriptive variables refer to factual data concerning the case identity and the characteristics of the court, the judge, and the parties. We coded the case number, year of decision, case duration in years (from opening to judgment), decision's page length, cause of action (road accident or other), decision type (compensation only or liability and compensation), result (compensation awarded or not), court's location by district, and the judge's gender. We also coded for data concerning the plaintiff's gender, age, and the resulting disability assessment in percentage (also called medical disability).

Conceptual variables refer to the abstract terms that we used to measure the discourse that courts employ using content analysis. Content analysis has been described as an advantageous method for quantitative research of judicial decisions when studying a large number of judicial decisions that hold similar value (Hall and Wright 2008; Kirkham and O'Loughlin 2019). We focused our coding and analysis on the judges' discursive terms and vocabulary choices. Table 1 specifies the terms we used as conceptual variables, grouped by the disability discourse they form together. We used each group of variables as an index to measure the intensity level of each discourse in every court decision. Every court decision received a score per index based on the cumulative number of indications.

One group of conceptual variables contains terms associated with a conventional understanding of disability. These variables comprise the conventional index, divided by three subgroups: disability terminology, including deformity (*mum*), impairment (*lakut*), and handicap (*nechut*); medical terminology, including diagnosis (*ivchun*), medical examination (*bdika*), treatment (*tipul*), and nursing care (*si'ud*); and individual-tragic terminology, including suffering (*sevel*), pain (*ke'ev*), miserableness (*misken*), tragedy (*tragedia/ason*), lack of pleasure (*he'ader hana'a*), dependence (*tlut*), and loneliness (*bdidut*). We excluded those results in which pain or suffering was part of the legal term "pain and suffering" because we were interested in the free language that the court uses. We also excluded the terminology "lack of pleasure" when it appeared as a form of nonspecific damages.

The second group of conceptual variables contains terms associated with a progressive understanding of disability. These variables comprise the progressive index, divided by three subgroups: disability terminology, including disability (*mugbalut*), disabled (*mugbal*), and limitation (*migbala*); social terminology, including society (*chevra*), community (*kehila*), integration (*Shiluw*), stigma (*stigma*), employment opportunities, and

**TABLE 1.**  
**Disability discourse: conventional and progressive indexes**

Conventional index variables	Progressive index variables
Deformity ( <i>mum</i> )	Disability ( <i>mugbalut</i> )
Impairment ( <i>lakut</i> )	Disabled ( <i>mugbal</i> )
Handicap ( <i>nechut</i> )	Limitation ( <i>migbala</i> )
Diagnosis ( <i>ivchum</i> )	Society/Social ( <i>chevra/ti</i> )
(Medical) examination ( <i>bdika</i> )	Community ( <i>kehila</i> )
Treatment ( <i>tipul</i> )	Integration ( <i>Shiluv</i> )
Nursing Care ( <i>si'ud</i> )	Stigma ( <i>stigma</i> )
Suffering ( <i>sevel</i> )*	Employment opportunities
Pain ( <i>ke'ev</i> )*	Housing options
Lack of pleasure ( <i>he'ader hana'a</i> )	Right/s ( <i>zchut</i> )
Dependence ( <i>tlut</i> )	ERPDL
Miserable/ness ( <i>misken/ut</i> )	Discrimination ( <i>aflaya</i> )
Tragedy ( <i>tragedia/ason</i> )	Accommodation/s ( <i>hata'ama</i> )
Lonely/ness ( <i>bdidut</i> )	Accessibility ( <i>negishut</i> )

Note: \*Excluding the legal term “pain and suffering.”

housing options; and rights-oriented terminology, including right(s) (*zchut/yot*), the ERPDL, discrimination (*aflaya*), accommodation (*hata'ama*), and accessibility (*negishut*).

The search for conceptual variables took two forms. First, for most terms, we conducted a morphological search that included all possible derivations and compositions of the word. Hebrew's grammatical nature uses root words that form nouns, verbs, and adjectives, which can be used in the plural and singular, male and female, and past, present, and future derivatives. Thus, we coded all relevant options. Second, for some variables, a simple search for the word was insufficient as we were interested in the context of its use. In these instances, we conducted a morphological search and then situated the word in its immediate context to examine its relevance. Thus, for “lack of pleasure,” we searched for pleasure and its derivatives; we then looked at whether the context was of a lack or loss of pleasure following the disabling event (we did not find any positive references to pleasure). Similarly, after a morphological search for employment and housing, we examined whether the court referred to the social aspects of employment and housing—for example, their availability for disabled persons—and not their individual aspects—for example, the plaintiff's capacity to work or housing costs.

After coding all conceptual variables, we formed the two indexes, the progressive index and the conventional index, each comprising fourteen variables, as described above. While we initially counted and coded all appearances of each parameter in each decision, we later changed our coding system to a dichotomous count, which examines whether the decision mentioned the requested term. This change created a clearer database for statistical analysis. We began our investigation by tracking the mean occurrence of each conceptual variable for every studied year, measured in a dichotomous count

(see [Tables 4](#) and [7](#)). We then combined the index by averaging the cumulative score of all cases in each studied year. Each case's score indicated the number of coded variables per index on a scale of one to fourteen, resulting in a conventional index score and a progressive index score. Based on these scores, we measured each index's frequency distribution and mean score for every studied year. With the results for both indexes, we could trace patterns of change in each independent variable and each index. Together, they create a multifaceted portrayal of disability representation as employed in personal injury court decisions over time and provide a comparative analysis of judges' perceptions of disability at different times.

The methodology of this study is not free of limitations. Any socio-legal research using computerized case law databases is inherently limited because not all court decisions appear in these databases (Bogoch, Halperin-Kaddari, and Katvan 2011). Moreover, many cases are settled and do not reach a final decision (Galanter 2004). However, considering the large selection of available cases and the research methodology (including all published cases of each studied year), we assume that the sample is sufficient for testing the study's hypotheses. Moreover, we believe that disability-related factors do not bias the selection of published cases, so they should not significantly impact our results.

Another limitation to consider is the reliability and consistency of content analysis based on a simple word count. Reliable content analysis requires careful examination of each selected word, including its possible synonyms, the context in which it appears, and attention to potential inconsistencies between coders (R. Weber 1990; Stemler 2000). We took several steps to minimize these limitations. First, we created an elaborate coding sheet and considered as many terms, synonyms, and phrasing options as possible to cover as many linguistic choices as possible. Second, we used trained research assistants who located and coded the words and traced the context of their use. We then monitored their coding to ensure reliability and consistency. We know this is not a fail-proof methodology as it may still involve certain biases and limitations and miss some hidden layers of the studied texts.

## FINDINGS

Our findings trace the changes in judicial discourse concerning disability in personal injury court decisions and the impact of disability rights on judicial language over time. We located a total of 423 personal injury district court decisions that met our selection criteria, published between 1998 and 2018, in four-year intervals. The following sections present the results of our coding work. As stated earlier, our coding system included descriptive and conceptual variables that formed the indexes. We begin with presenting our descriptive findings and then the conceptual findings, organized by the indexes we created, starting with the conventional index and continuing to the progressive index. For each index, we present the mean number of cases for each variable, by year, followed by the distribution and means of each combined index. Next, we display the finding of multivariable regression analysis to estimate the means of each index in each studied year, controlling for independent variables that might affect each index score. Lastly, we present a combined view of our results by juxtaposing

the two indexes next to each other and situating each case on a joint conventional-progressive scale.

**General Trends: Descriptive Variables**

Tables 2 and 3 present the results of the descriptive variables by year. Table 2 concerns general descriptive variables, and Table 3 concerns plaintiff and judges' demographic descriptive variables. Our initial coding included a larger number of variables, which we later narrowed to the most relevant or significant ones, as shown below.

*The Number of Court Decisions per Year*

As Table 2 shows, the total number of cases has risen and then declined. The variance in the number of court decisions each year is due to two main reasons. First, technological changes have affected the availability of digitalized court discussions and contributed to the rise in numbers. Second, the decline in cases may be related to the phenomenon of the vanishing trial. Many lawsuits do not reach the stage of final verdict due to out-of-court and court-administered settlements (Galanter 2004; Cohen and Alberstein 2019). In the context of our study and similar studies, the latter development may hinder future research focusing on judicial discourse.

**TABLE 2.**  
General descriptive variables

		Year of verdict						
		All Cases 1998-2018	1998	2002	2006	2010	2014	2018
Number of cases	N	423	63	101	104	69	43	43
Name of column			(A)	(B)	(C)	(D)	(E)	(F)
Road accident	YES %	63.8	60.3	76.2	54.8	65.2	58.1	65.1
Number of pages	Mean	19.9	11.9	11.7	24.8	21.3	26.6	30.7
	S.D.	16.8	7.0	9.9	17.1	22.1	11.4	20.3
	Maximum	154	32	75	80	154	54	95
	Minimum	2	3	3	2	4	6	5
	Count	423	63	101	104	69	43	43
Duration	Mean	5.2	4.1	5.1	6.5	4.4	5.1	5.1
	S.D.	2.5	1.9	2.2	2.6	2.7	2.5	2.2
	Maximum	16	9	13	16	12	15	11
	Minimum	1	1	1	1	1	2	1
	Valid N	423	63	101	104	69	43	43

Note: The significance level for uppercase column letters: ≤ .05.

**TABLE 3.**  
**Demographic descriptive variables**

		Year of verdict						
		All cases 1998-2018	1998	2002	2006	2010	2014	2018
Number of cases	N	423	63	101	104	69	43	43
Name of column			(A)	(B)	(C)	(D)	(E)	(F)
Judge gender	Female %	41.1	27.0	38.6	46.2	40.6	55.8	41.9
Plaintiff gender	Female %	26.7	23.8	27.7	29.8	18.8	39.5	20.9
Plaintiff age	0-17 %	22.4	24.1	24.0	20.0	22.1	23.3	22.0
	18-30 %	27.1	24.1	24.0	27.0	29.4	27.9	34.1
	31+ %	50.5	51.7	52.1	53.0	48.5	48.8	43.9
	Mean	29.7	28.9	30.3	31.3	29.6	28.9	26.9
	S.D	15.4	14.5	15.5	15.3	15.7	17.8	13.7
Medical disability	Valid N	406	58	96	100	68	43	41
	Mean	55.1	46.4	52.8	54.8	56.5	69.4	58.9
	S.D.	28.8	25.4	28.8	28.3	29.9	28.4	28.9
	Maximum	100	100	100	100	100	100	100
	Minimum	0	5	4.4	0	0	0	5
	Valid N	411	62	99	103	68	38	41

Note: The significance level for uppercase column letters:  $\leq .05$ .

### *Cause of Action*

We coded all causes of action and later grouped them under two subcategories: road accidents and all others. This division follows the two major tort statutes in Israel: 1968 Torts Ordinance and the 1975 Road Accidents Victims Compensation Law.<sup>5</sup> The latter utilizes a no-fault system that offers an easier compensation method accompanied by compensation caps. Thus, it includes a statutory limitation on damages for pain and suffering calculated by a mandatory mathematical formula. We found that most cases in our database (63.8 percent) were road accident cases. While we cannot explain the variance in the results, they were found significant for our analysis below.

### *The Number of Pages*

Our findings show a clear and statistically significant increase in the length of written court decisions. The length of the judicial text may considerably affect the occurrence or absence of a word. The longer the verdict, the more words are observed that may serve as indications for a conventional or a progressive discourse. To measure the decision length, we coded the number of each case page. The average length of all documented cases in our database is about twenty pages, with significant variability among

5. Torts Ordinance of 1968; Road Accidents Victims Compensation Law of 1975, August 8, 1975 (Israel).

cases ranging from two to 154 pages. The mean number of pages increased from fewer than twelve pages in 1998 and 2002 to an average of twenty-four to thirty pages from 2006 onwards. We do not know whether this is part of a general trend. We will address the significance of this component to our findings below.

### *Duration*

Case duration measures the time from case opening to case closure with a final decision. Case duration may be affected by the case's complexity, which may be related to the severity of the involved injury. As we can see, the average case duration had not changed much throughout the years, except for 2006, when it was significantly higher. We will later address the effect of this component on our findings.

### *Demographics*

Table 3 concerns descriptive demographic variables of judges and plaintiffs by year of judgment. Our findings show that in 41 percent of the cases the judge was a woman and that the number of female judges rose substantially from 1998 to 2014. Plaintiffs' demographics show inconsistent results concerning gender and a slight decline in plaintiffs' average age. A closer look reveals a rise in plaintiffs aged eighteen to thirty and a decrease in plaintiffs aged thirty and above. All in all, 20 percent of the plaintiffs were children (under eighteen years of age), 27 percent were young adults (aged from eighteen to thirty years old), and 50 percent were older adults (thirty year olds and above). The plaintiff's age proved significant for our study, as we will explain later.

### *Medical Disability*

Medical disability is the court's determination of the severity of the plaintiff's disability. It is based on physicians' assessments, and the parties can debate it. We found that the average percentage of plaintiffs' medical disability was 55 percent, rising significantly from 1998 to 2014 and later declining. What is essential for our study is its impact on our results.

### *The Conventional Index*

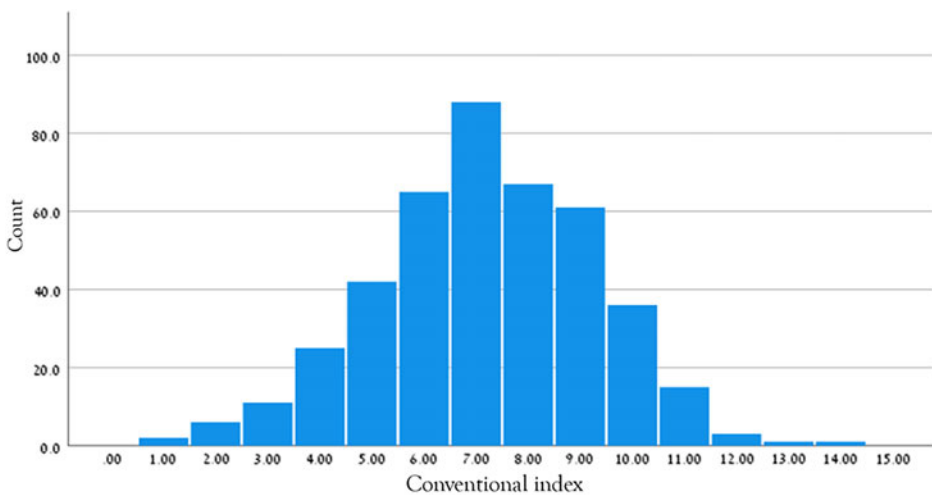
As its name suggests, the conventional discourse of disability is common, and, as such, the frequency of the words that characterize it is high. Table 4 portrays the variance for each of the fourteen variables that comprise the conventional index across time. The results show that twelve out of fourteen variables have not declined. Six variables show a prevalence of over 50 percent (per year and average total). The words "handicap," (medical) "examination," "treatment," and "suffering" are most prevalent and appear in 75 to 100 percent of cases. The usage of disability terminology is stable, with "handicap" being the most dominant term. Medical terminology, too, is frequently used, with two dominant variables: "examination" and "treatment." The usage of individual-tragic language is prevalent in three variables (suffering, pain, and dependence)



**TABLE 4.**  
**Percentage of conventional index variables' appearances**

	Year of verdict						
	All cases 1998-2018	1998	2002	2006	2010	2014	2018
Number of cases	423	63	101	104	69	43	43
Name of column		(A)	(B)	(C)	(D)	(E)	(F)
<b>Conventional index variables</b>							
Handicap	98.6	100.0	99.0	99.0	97.1	95.3	100.0
Impairment	37.4	36.5	26.7	43.3	44.9	39.5	34.9
Deformity	23.2	25.4	16.8	25.0	24.6	25.6	25.6
Treatment	94.3	96.8	92.1	92.3	95.7	97.7	95.3
(medical) Examination	83.7	81.0	79.2	84.6	82.6	93.0	88.4
Diagnosis	58.2	47.6	51.5	61.5	59.4	69.8	67.4
Nursing care	46.6	42.9	46.5	51.9 F	50.7	55.8 F	23.3
Suffering	76.4	68.3	64.4	82.7 B	78.3	86.0	88.4
Pain	66.4	57.1	59.4	71.2	65.2	83.7	69.8
Dependence	18.0	12.7	14.9	21.2	18.8	23.3	18.6
Lack of pleasure	8.5	6.3	5.9	10.6	10.1	9.3	9.3
Lonely/ness	8.0	6.3	5.0	6.7	15.9	9.3	7.0
Tragedy	5.7	4.8	5.0	7.7	0.0	16.3	2.3
Miserable/ness	1.4	0.0	1.0	1.0	4.3	0.0	2.3

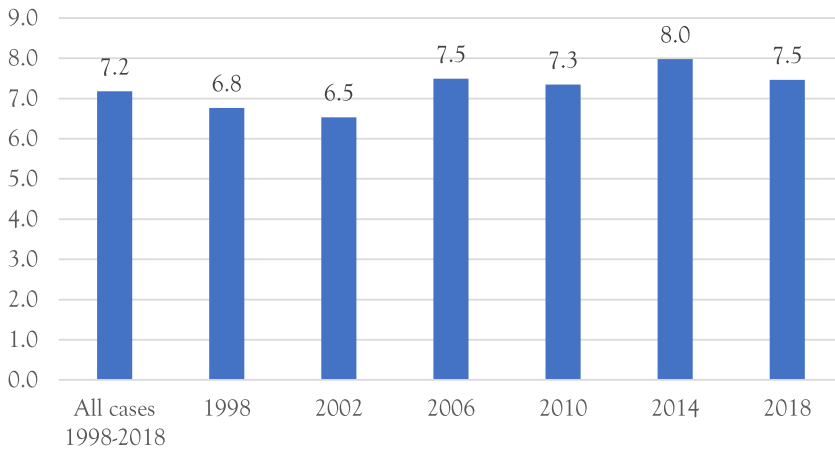
Note: The significance level for uppercase column letters:  $\leq .05$ .



**FIGURE 1.**  
**Conventional index frequencies distribution.**

and were seldom mentioned in four variables: “lack of pleasure,” “miserable/ness,” “tragedy,” and “lonely/ness.”

The distribution of the conventional index is normal, as presented in Figure 1. Figure 1 shows the aggregate distribution of all studied cases, with an overall average



	All cases 1998-2018	Year of verdict					
		1998	2002	2006	2010	2014	2018
		(A)	(B)	(C)	(D)	(E)	(F)
Mean	7.2	6.8	6.5	7.5 B	7.3	8.0 AB	7.5
S.D.	2.1	1.8	2.1	2.1	2.3	2.0	2.1
Maximum	14.00	10.00	12.00	11.00	12.00	13.00	14.00
Minimum	1.00	2.00	1.00	2.00	1.00	3.00	4.00
Count	423	63	101	104	69	43	43

Note: The significance level for uppercase column letters:  $\leq .05$

**FIGURE 2.**  
Means of conventional index score by year.

case score of 7.2 and a standard deviation of 2.1, as specified in Figure 2 (all cases column). The results range from one to fourteen on a scale of fourteen, meaning that all studied cases scored between a single indicator to all indicators that comprise the conventional index.

For each year, we calculated the mean and standard deviation of the conventional index. Figure 2 shows that we identified just a moderate increase over twenty years, with 2014 averaging significantly higher than 1998 and 2002. To explore if differences in the means of the conventional index over the years are significant while controlling for independent variables, we ran an SPSS-based General Linear Model (GLM) covariance analysis (ANCOVA) (Rutherford 2011). We included in the model those variables that theoretically might have affected the discourse: year of verdict, the number of pages, case duration, cause of action if road accident (0/1), judges' gender, and plaintiffs' gender, age, and medical disability. We found that for this index the year factor effect is not significant ( $F = 1.165$ ;  $sig. > 0.05$ ) (Table 5).

The B coefficient in Table 6 indicates a positive and significant effect of the cause of action if a road accident (0.832;  $sig. = 0.00$ ), number of pages (0.61;  $sig. = 0.00$ ), case duration (0.085;  $sig. < 0.05$ ), gender of the plaintiff if a female (0.426;  $sig. < 0.05$ ),

TABLE 5.

GLM results: tests of between-subject effects for the conventional index (dependent variable: conventional index)

Source	Type III sum of squares	Df	Mean square	F	Sig.
Corrected model	569.972 <sup>a</sup>	12	47.498	14.719	0.000
Intercept	186.652	1	186.652	57.841	0.000
Road accident	53.368	1	53.368	16.538	0.000
Number of pages	297.609	1	297.609	92.226	0.000
Duration	14.691	1	14.691	4.552	0.034
Gender of judge	5.108	1	5.108	1.583	0.209
Gender of plaintiff	13.460	1	13.460	4.171	0.042
Age of plaintiff	12.287	1	12.287	3.808	0.052
Percentage of medical disability	15.950	1	15.950	4.943	0.027
Year of verdict	18.798	5	3.760	1.165	0.326
Error	1229.470	381	3.227		
Total	22386.000	394			
Corrected total	1799.442	393			

Note: <sup>a</sup>R squared = 0.317 (adjusted R squared = 0.295).

TABLE 6.

GLM model: parameter estimates for conventional index (B and standardized B)

Parameter	Standard				B (standardized)	Standard			
	B	error	t	Sig.		error	t	Sig.	
Intercept	3.755	0.610	6.159	0.000	6.878	0.298	23.069	0.000	
Road accident	0.832	0.205	4.067	0.000	0.400	0.098	4.067	0.000	
Number of pages	0.061	0.006	9.603	0.000	1.019	0.106	9.603	0.000	
Duration	0.085	0.040	2.134	0.034	0.212	0.099	2.134	0.034	
Gender of judge	0.236	0.187	1.258	0.209	0.116	0.092	1.258	0.209	
Gender of plaintiff	0.426	0.209	2.042	0.042	0.189	0.092	2.042	0.042	
Age of plaintiff	-0.012	0.006	-1.951	0.052	-0.181	0.093	-1.951	0.052	
Percentage of medical disability	0.008	0.003	2.223	0.027	0.217	0.097	2.223	0.027	
1998	0.592	0.395	1.500	0.134	0.592	0.395	1.500	0.134	
2002	0.074	0.363	0.204	0.839	0.074	0.363	0.204	0.839	
2006	0.267	0.351	0.759	0.448	0.267	0.351	0.759	0.448	
2010	0.530	0.368	1.440	0.151	0.530	0.368	1.440	0.151	
2014	0.569	0.416	1.366	0.173	0.569	0.416	1.366	0.173	
2018	0 <sup>a</sup>	—	—	—	0 <sup>a</sup>	—	—	—	

Note: <sup>a</sup>This parameter is set to zero because it is redundant.

and a small positive effect of medical disability (0.008; sig. < 0.027). There is no effect for the judge's gender and age of the plaintiff and no significant differences in each year's effect compared to 2018. To reveal the relative effect of each independent variable, we

**TABLE 7.**  
**Estimated means of conventional index by year (dependent variable: conventional)**

Year of verdict	Mean	Standard error	95% confidence Interval	
			lower bound	upper bound
1998	7.506 <sup>a</sup>	0.249	7.016	7.995
2002	6.987 <sup>a</sup>	0.192	6.609	7.365
2006	7.180 <sup>a</sup>	0.190	6.806	7.554
2010	7.443 <sup>a</sup>	0.223	7.005	7.881
2014	7.482 <sup>a</sup>	0.299	6.894	8.070
2018	6.913 <sup>a</sup>	0.297	6.328	7.498

Note: <sup>a</sup>Covariates appearing in the model are evaluated at the following values: road accident = 0.66244; number of pages = 20.11; total duration = 5.24; gender of judge = 1.40; gender of plaintiff = 1.27; age of plaintiff = 29.864; disability assessment – medical disability (%) = 55.6295.

looked at the standardized B of the independent covariates (excluding the year factor). We found that the number of pages and the cause of action, if road accidents, strongly affected the conventional index score over all other covariates (1.019, 0.400, respectively). To conclude, when looking at Table 7, which presents conventional index estimated means, it is evident that no increase or decrease trend is apparent over the years when all other parameters are constant: 1998 (7.5); 2002 (7); 2006 (7.2); 2010 (7.4); 2014 (7.5); 2018 (6.9).

### The Progressive Index

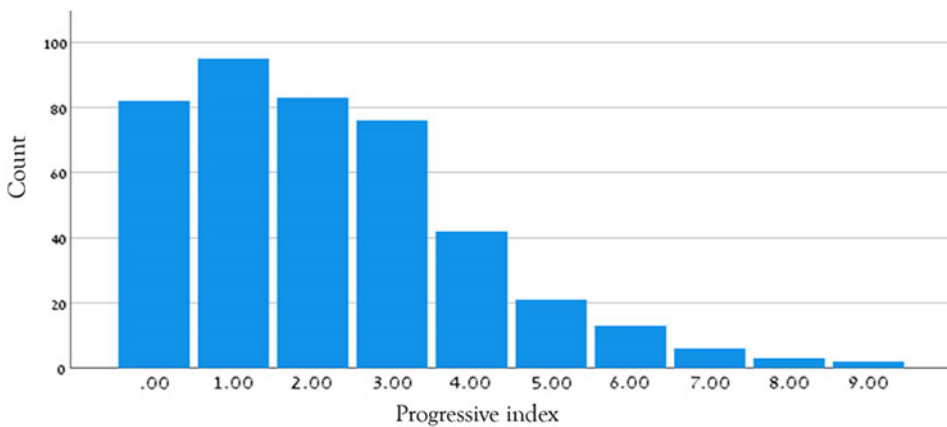
We used the same method to create the progressive index score. Most of the progressive discourse words are not common in personal injury law. Table 8 presents the variance for each of the fourteen variables that comprise the progressive index, showing that all the progressive index's words have increased throughout the years. Still, only six variables show a prevalence of over 20 percent. The words “disabled,” “limitation,” “integration,” and “accommodation” are most prevalent and represent all terminological subgroups. All disability terminology variables, “disability,” “disabled,” and “limitation,” have significantly increased and appear in 21.7 percent, 24.3 percent, and 30.3 percent of all cases, respectively. The usage of most social variables is low, around 10 percent, except for “society” and “integration,” which average 24.1 and 38.3 percent, respectively. Average scores are even lower for rights-oriented variables, with one exception: the word “accommodation” is relatively common and appears in 41.4 percent of all coded cases. The ERPDL is almost non-existent, as it appears in 0.2 percent of all cases, only in 2006.

The progressive index distribution is unilateral with a right tail (Figure 3). Figure 3 shows the aggregate distribution of all studied cases, with an overall average case score of 2.2 and a standard deviation of 1.8, as specified in Figure 4 (all cases column). The results range from zero to nine on a scale of fourteen, meaning that all studied cases scored anywhere from zero to nine of the fourteen indicators that comprise the progressive index. As with the conventional index, we calculated the mean and standard

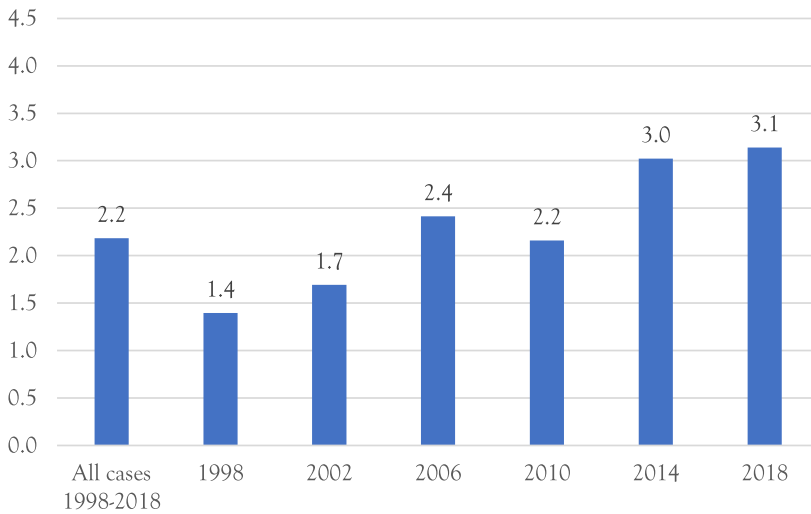
**TABLE 8.**  
**Percentage of progressive index variables' appearances**

	Year of verdict						
	All cases 1998-2018	1998	2002	2006	2010	2014	2018
Number of cases	423	63	101	104	69	43	43
Name of column		(A)	(B)	(C)	(D)	(E)	(F)
<b>Progressive index variables</b>							
Disability	21.7	19.0	11.9	25.0	24.6	34.9	23.3
Disabled	24.3	14.3	20.8	30.8	7.2	39.5	44.2
Limitation	30.3	15.9	22.8	30.8	29.0	25.6	74.4
Society/Social	24.1	20.6	21.8	22.1	26.1	34.9	25.6
Community	7.3	0.0	5.9	4.8	11.6	16.3	11.6
Integration	38.3	30.2	31.7	41.3	43.5	44.2	44.2
Stigma	3.1	1.6	1.0	5.8	1.4	4.7	4.7
Employment opportunities	12.1	9.5	7.9	18.3	10.1	7.0	18.6
Housing options	2.4	0.0	0.0	1.9	2.9	4.7	9.3
Right/s	9.9	1.6	9.9	4.8	13.0	27.9	11.6
ERPDL	0.2	0.0	0.0	1.0	0.0	0.0	0.0
Discrimination	1.2	0.0	2.0	1.0	0.0	4.7	0.0
Accommodation	41.4	27.0	31.7	51.0	46.4	55.8	39.5
Access	2.1	0.0	2.0	2.9	0.0	2.3	7.0

Note: The significance level for uppercase column letters:  $\leq .05$ .



**FIGURE 3.**  
**Progressive index frequencies distribution.**



	Year of verdict						
	All cases 1998-2018	1998	2002	2006	2010	2014	2018
		(A)	(B)	(C)	(D)	(E)	(F)
Mean	2.2	1.4	1.7	2.4 AB	2.2	3.0 AB	3.1 AB
S.D.	1.8	1.1	1.6	1.8	1.8	2.3	2.0
Maximum	9.00	5.00	7.00	8.00	9.00	7.00	9.00
Minimum	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Count	423	63	101	104	69	43	43

Note: The significance level for uppercase column letters:  $\leq .05$

**FIGURE 4.**  
Means of progressive index score by year.

deviation of the progressive index for each year. As Figure 4 shows, we identified an upward trend throughout the years. Over our twenty-year study, the indications for progressive discourse have more than doubled (from 1.4 in 1998 to 3.1 in 2018). Moreover, in 2006, 2014, and 2018, the index was significantly higher than in 1998 and 2002.

To test the hypothesis that the change over the years is due to a shift in perception and to estimate the effect of other variables, we ran a GLM analysis. The model included the variables: year of verdict, number of pages, case duration, cause of action if road accident (0/1), judge’s gender, and plaintiff’s gender, age, and medical disability, as we did with the conventional index. We found that the gender of the plaintiff ( $F = 1.1$ ; sig.  $> 0.05$ ) or the judge ( $F = 0.22$ ; sig.  $> 0.05$ ) and the duration of the case had no effect ( $F = 0.09$ ; sig.  $> 0.05$ ) (Table 9). However, the cause (road accident), number of pages, plaintiff’s age, and the severity of medical disability had a positive effect on the progressive index’s scores. Most importantly, we found that the year of verdict effect was significant ( $F(5) = 2.986$ ; sig.  $< 0.05$ ) when keeping all other variables constant. We did not find such an effect on the conventional index.

TABLE 9.

GLM results: tests of between-subjects effects for progressive index (dependent variable: progressive index)

Source	Type III sum of squares	Df	Mean square	F	Sig.
Corrected model	438.104 <sup>a</sup>	12	36.509	15.560	0.000
Intercept	1.670	1	1.670	0.712	0.399
Road accident	42.764	1	42.764	18.225	0.000
Number of pages	121.644	1	121.644	51.843	0.000
Duration	0.218	1	0.218	0.093	0.761
Gender of judge	.523	1	0.523	0.223	0.637
Gender of plaintiff	2.613	1	2.613	1.114	0.292
Age of plaintiff	20.857	1	20.857	8.889	0.003
Percentage of medical disability	49.332	1	49.332	21.025	0.000
Year of verdict	35.026	5	7.005	2.986	0.012
Error	893.970	381	2.346		
Total	3,347.000	394			
Corrected total	1,332.074	393			

Note: <sup>a</sup>R squared = 0.329 (adjusted R squared = 0.308).

TABLE 10.

GLM model: parameter estimates for progressive index (B and Standardized B) (dependent variable: progressive index)

Parameter	Standard				B			
	B	error	t	Sig.	standardized	error	t	Sig.
Intercept	0.809	0.520	1.556	0.121	2.731	0.254	10.742	0.000
Road accident	0.745	0.174	4.269	0.000	0.358	0.084	4.269	0.000
Number of pages	0.039	0.005	7.200	0.000	0.651	0.090	7.200	0.000
Duration	0.010	0.034	0.305	0.761	0.026	0.085	0.305	0.761
Gender of judge	0.076	0.160	0.472	0.637	0.037	0.079	0.472	0.637
Gender of plaintiff	0.188	0.178	1.055	0.292	0.083	0.079	1.055	0.292
Age of plaintiff	-0.015	0.005	-2.981	0.003	-0.236	0.079	-2.981	0.003
Percentage of medical disability	0.013	0.003	4.585	0.000	0.381	0.083	4.585	0.000
Year 1998	-0.874	0.337	-2.596	0.010	-0.874	0.337	-2.596	0.010
2002	-0.752	0.309	-2.433	0.015	-0.752	0.309	-2.433	0.015
2006	-0.372	0.300	-1.242	0.215	-0.372	0.300	-1.242	0.215
2010	-0.656	0.314	-2.091	0.037	-0.656	0.314	-2.091	0.037
2014	0.125	0.355	0.351	0.726	0.125	0.355	0.351	0.726
2018	0 <sup>a</sup>	-	-	-	0 <sup>a</sup>	-	-	-

Note: <sup>a</sup>This parameter is set to zero because it is redundant.

Moreover, the B coefficient, shown in Table 10, shows a positive effect for a higher progressive index score for road accidents compared to other causes (0.358), the number of pages (0.039), and the percentage of medical disability (0.013). The plaintiff's age has a negative effect: the older the age, there is decline in the progressive score (-0.015).

**TABLE 11.**  
**Estimated means of progressive index by year (dependent variable: progressive index)**

Year Decision (group)	Mean	Standard error	95% confidence Interval	
			lower bound	upper bound
1998	1.886 <sup>a</sup>	0.212	1.469	2.304
2002	2.008 <sup>a</sup>	0.164	1.686	2.330
2006	2.388 <sup>a</sup>	0.162	2.070	2.707
2010	2.104 <sup>a</sup>	0.190	1.731	2.477
2014	2.885 <sup>a</sup>	0.255	2.384	3.386
2018	2.761 <sup>a</sup>	0.254	2.262	3.259

Notes: <sup>a</sup>Covariates appearing in the model are evaluated at the following values: road accident = 0.66244; page length = 20.11; total duration = 5.24; judge gender = 1.40; plaintiff gender = 1.27; plaintiff age = 29.864; disability assessment: medical disability (%) = 55.6295.

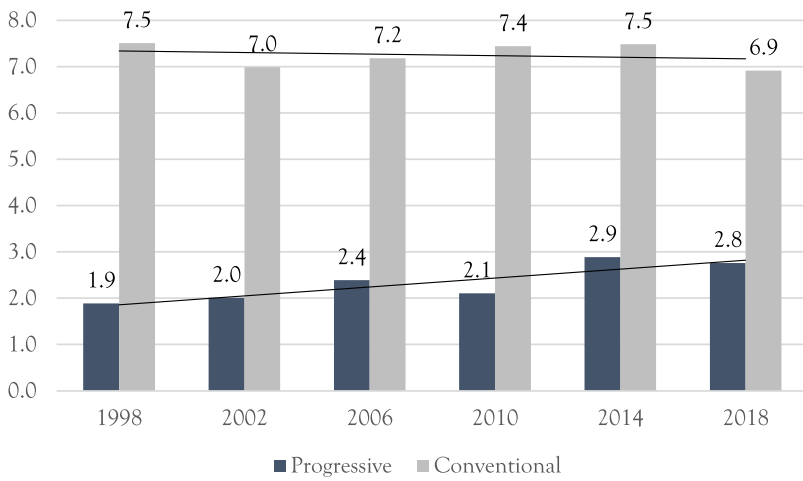
The standardized B reveals that the number of pages has the most substantial effect (0.651). The percentage of medical disability and the cause of action (if road accidents) also have a significant positive effect on the index score (0.358, 0.381, respectively). The years 1998, 2002, and 2010 have a significant negative effect (−0.874, −0.752, −0.656) compared to 2018. Although 2006 has a negative coefficient (−0.327; sig. > 0.05), it is not significantly different from 2018. The year 2014 has a positive coefficient but no significant difference (0.125; sig. > 0.05) compared to 2018. To conclude, when looking at the progressive index's estimated means in Table 11, one can see the upward tendency from 1.886 in 1998 to 2.761 in 2018, while all other variables are constant.

### A Combined View: Relations between Indexes and Scores

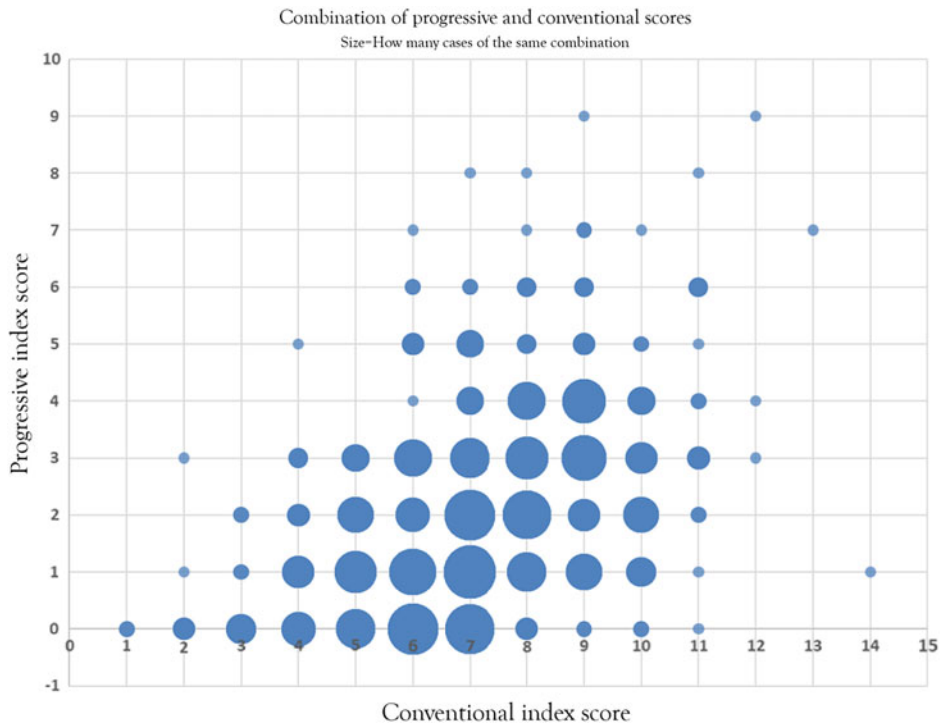
After presenting each index separately, we offer a combined figure that illustrates the two indexes next to each other and a combined graph that situates each case on a conventional-progressive scale. Comparing the estimate means of both indexes on the same chart demonstrates apparent differences. Figure 5 shows no evident change in the conventional index, next to an apparent increase in the progressive index. This finding is compatible with our finding that the use of words indicative of a conventional discourse is significantly higher than the use of words indicative of a progressive discourse. Moreover, as we hypothesized, the rise in the progressive discourse appears alongside a steady presence of the conventional discourse and does not replace it.

The diagonal shape in Figure 6 shows that, for each individual case, the conventional index score is typically higher than the progressive index score and never more than one point lower. Moreover, most cases with high progressive index scores also have high conventional index scores, demonstrating that the newly emerging progressive discourse adds to the existing conventional discourse. The correlation between the two indexes is significant although not very strong (Pearson correlation 0.203; sig. < 0.000, controlling for road accidents, the plaintiff's age, number of pages, percentage of medical disability, and year of verdict). Given the stability of the conventional index over the years and the moderate increase in the progressive index (as shown earlier), this





**FIGURE 5.**  
 Estimated means by year: comparison chart for conventional and progressive indexes.



**FIGURE 6.**  
 Combination of progressive and conventional scores.

presentation of our results confirms and supports our above conclusion that the progressive discourse does not replace the conventional discourse, even at the individual case level, as decisions that scored high on the progressive index also scored high on the conservative index.

## DISCUSSION

The disability critique of tort law presents a challenge: can personal injury law compensate for injurious events without labeling the resulting disability as a misfortune, a pathology, and a negative trait (Bagenstos and Schlanger 2007; Bloom and Miller 2011; Mor 2018; Mor and Pikkell 2019). Meeting this challenge requires personal injury law to adopt a language compatible with disability rights and disability theory and to view disability as an interactionist, relational, and contextual social category and the experience of disability as primarily affected by disabling environment and social barriers. The motivation behind this study was to examine whether a medical-individual view of disability indeed characterizes personal injury law, whether this medical-individual view of disability has changed following the introduction of disability rights, whether a socially rights oriented view of disability has gradually replaced it, and what is the scale of the change that took place.

### The Continuous Dominance of the Conventional Discourse

Our findings provide the first empirical evidence to support the claim that the dominant understanding of disability in personal injury court decisions is a medical-individual one. We labeled it a conventional view of disability to emphasize two points: first, it is a traditional view of disability based on prevalent social conventions regarding disability and life with a disability, and, second, it rests on conventions rooted in tort law's characteristics as a field. Therefore, our explanation for the continuing dominance of the conventional discourse has several layers. First, persistent societal views of disability as a pathology and a tragedy in public discourse shape the minds of all legal actors, including the judges who write judicial rulings that discuss and award compensation. Second, persistent discursive conventions of personal injury law use medical knowledge to determine the plaintiff's disability and consequent medical, functional, and societal needs. Third, continuous practical conventions in personal injury litigation require the language and performance of tragedy and pain to win higher compensation.

A closer look at specific variables reveals that no variable under the conventional index has declined significantly throughout the years. Disability terminology remained constant, even though the word "deformity," for instance, has a particularly negative connotation. Most notably, medical terminology is more prevalent than individual-tragic terminology. We explain this by the conventions of the legal field of tort law: medical language concerning examination, diagnosis, treatment, and nursing care is the traditional and most established way to support one's claim for compensation through agreeable objective-scientific knowledge.

Among the tragic-individual variables, three are more prevalent: suffering, pain, and dependence. These terms border on medical language as they describe the person's bodily condition and functioning. As such, they are part of the language required to establish one's need for financial relief. On the other hand, the explicit language of tragedy, misery, loneliness, and lack of pleasure is relatively low. We suggest several reasons for the low frequency of "ultra" tragic discourse: first, such language is not formally necessary to support one's claim; second, the language in these decisions is generally "dry" and instrumental; and, third, judges may find it too hurtful. Interestingly, several variables seem to rise, including diagnosis, pain, suffering, dependence, and lack of pleasure. This finding is statistically linked to the decision's length and the severity of the plaintiff's disability when controlling all variables. Still, it also strengthens our claim that the conventional discourse includes a tragic component and that this component has not declined.

### The Gradual Diffusion of a Progressive Discourse

The social constructionist and rights-based approach to disability seek to replace the medical-individual understanding of disability in every sphere of life and law. The introduction of disability rights has provided an alternative language to do so. However, not every field of law is readily open to adopting a disability rights discourse, incorporating a socially oriented view of disability and exhibiting a progressive understanding of disability. Tort law presents a particularly challenging sphere because of its internal conventions and constraints. Our findings provide pioneering evidence of a gradual, though limited, diffusion of a progressive disability discourse into personal injury court decisions. We labeled it progressive because the political commitment to rights entails a belief in social progress and a positive view of the possibility of legal reform. In addition, our findings reveal progressive infiltration of a social rights-based discourse. Finally, the term "progress" entails an evolutionary rather than a revolutionary understanding of social and legal change processes, which better describes the nature of the studied dynamics.

A closer look at specific variables reveals mixed trends: a gradual but slow increase in most parameters under the progressive index but very little to nearly zero references to archetypical disability rights terminology such as access, discrimination, and the ERPDL. Disability terminology reveals a most dramatic increase. Thus, "disability," the term most associated with the shift to disability rights in Israeli public discourse, rose significantly until 2014 and dropped in 2018. Additionally, the terms "disabled" and "limitation" gained prominence, though not dominance. The latter are related terms that share the same root word with disability (*mugbal*, *migbala*, *mugbalut*) but are less associated with disability rights. The word "limitation" has surpassed "deformity" and "impairment," perhaps because it resonates with impairment and is common among health and welfare professionals. Still, "handicap" enjoys ultimate dominance probably because it is considered the standard term for disability in public and legal discourse. It remains to be seen whether "limitation" will remain a second leading term and whether "disability" will continue to rise. The use of these terms may be unconscious but clearly shows the diffusion of a new language.

Most social variables show a general increase. The studied judicial decisions seem to mention “integration” and “society” more often. They also gradually mention and address “stigma,” “community,” and “housing options,” though to a much lesser extent. The notably high prevalence of “integration” may be related to its relevance to various issues, including employment, housing, and education, and the linkage between the awarded compensation and expected integration in society. References to “community” and “housing options” show a substantial increase. Together with “integration” and “society,” they may attest to a growing concern regarding inclusion, as the progressive discourse prescribes. References to “stigma” are scarce, suggesting that judicial decisions treat integration and inclusion as related to social conditions and not to social attitudes. Discussion of “employment opportunities” appears unstable, maybe because adopting an integrationist approach to employment may be a double-edged sword that results in a compensation reduction (in the absence of awareness of stigma and discrimination, judges may assume that employment opportunities are higher in an age of disability rights).

Explicit disability rights terminology increase seems to be the lowest and least frequent. Of all the cases in our study, only one mentioned the Israeli disability rights law (the ERPDL), probably because it appears unrequired and irrelevant. Few and rare decisions mentioned discrimination and access, probably for the same reason. The mentioning of a right is on the rise, but not along with the ERPDL or discrimination, suggesting that it is not in a disability rights context. The only dominant variable in this group is accommodation, which was prevalent from year one and significantly increased later. This finding may be because its root word (to accommodate) has relevant derivatives to various specific damages, such as accommodated car, home, work, and all sorts of assistive devices. Nevertheless, using the root word to accommodate indicates a general discursive shift, as it is closely associated with the ERPDL and the new language it introduced. All in all, mentioning right(s) and accommodation indicates a gradual growth of the rights component within the progressive discourse in judicial rhetoric. At the same time, the infrequent mention of stigma, access, and discrimination and the absence of references to the ERPDL when discussing the social conditions that impact the expectancy of integration in society demonstrate low disability rights awareness among tort judges.

We suggest the following explanations for the slow infiltration of the progressive discourse into personal injury court decisions. First, disability rights have been slow to diffuse to any realm of law, even to domains directly governed by disability rights legislation, such as employment discrimination and constitutional law (Bagenstos 2009; Waterstone 2015). Specifically in Israel, even today, twenty-five years after the enactment of the ERPDL, there are very few Supreme Court precedents to guide lower courts in their application of disability rights (Mor 2019). Second, it seems that personal injury litigation and reasoning do not view disability rights as part of the field’s linguistic options and applicable conventions. Tort law is part of private civil law, rooted in a corrective justice perspective, characterized by a medical-individual view of disability and not governed directly by disability rights. Even the heralded *Hammer* decision in 2012, which abolished wrongful life claims in Israel by upholding the value of life with a disability, neglected to address the role of social barriers such as discrimination and lack of access in disabled persons’ lives (Mor 2014).

Third, judges and other legal actors may view disability rights as a contradiction or a threat to tort law's primary functions of assigning individual liability and awarding just compensation. If disablement is a social process and disability rights are the answer, then a single wrongdoer cannot carry this burden alone, and the remedy may lie at the state level (Mor 2018). Following Bloom and Miller (2011), we suggest that the theory and practice of compensation may be rooted in the costs associated with the inaccessible environment and the consequences of persisting societal discriminatory and exclusionary practices, in realms such as employment, mobility, and housing. Thus, stigma and discrimination may explain the loss of earning capacity instead of biological dysfunction. Similarly, compensation for the loss of earning capacity can rest on the estimated costs of necessary accommodations and modifications that support one's reintegration into the workforce instead of a mere medical assessment of one's assumed permanent loss of abilities. Finally, advocates and judges alike may think that neglecting the language of tragedy and adopting a language of possibilities, capabilities, and satisfactory life would undermine the plaintiff's chances of receiving the compensation that she still needs due to her disability and society's inadequate social infrastructure. Resolving these seemingly contradictory directions requires a profound transformation in the logic of personal injury law and its compensation schemes and a new understanding of the relationships between disability, society, and tort law.

### **A Combined View: The Mixed Nature of Individual Cases**

The final step in our analysis includes a combined chart that juxtaposes the conventional index against the progressive index. Unlike our former results, which we presented along a timeline of the studied years, this combined view places each judicial ruling on the chart. Thus, it offers a cumulative illustration of the scale and intensity of the change that takes place. We learn from this depiction that individual cases tend to score high on the conventional index and low on the progressive index. However, we also see that individual cases that scored high on the progressive index scored high on the conservative index—that is, the most progressive cases were also highly conservative.

This depiction teaches us that, at least for now, the progressive discourse does not replace the conventional discourse but adds to it. Perhaps without a rigorous reform of tort law, it is impossible to break free from conventions regarding disability, as it also requires shedding conventions regarding torts and compensation; hence, the conventional index. Tort law's internal logic and structure require loss, harm, and even tragedy to justify compensation. Fully adopting a progressive view, in which disability is not a misfortune, might pull the rug out from under the plaintiff's claim for damages. Under this paradigm, a judge aware of the importance of disability rights and progressive rhetoric and who wishes to award compensation must still use the conventional terminology alongside the progressive one to keep this fragile balance.

### **CONCLUSION**

This article has empirically analyzed judicial rhetoric in personal injury rulings over twenty years (1998–2018). We performed a content analysis of judicial discourse

in 423 cases and then examined the impact of the rise of disability rights and disability awareness on judges' language in their rulings. This study is a first-time empirical account of the effect of disability rights on personal injury law, adding to our previous work on tort law as the law of disablement. We measured whether and how the disability discourse employed by courts has changed over the research's time span by coding descriptive and conceptual variables and combining them into two indexes: conventional and progressive. Our findings reveal a multifaceted picture of changes in the meaning ascribed to disability in personal injury court decisions. We have found that personal injury court decisions remain mostly medical and individual. Thus, the conventional index shows a continuous use of terms associated with the medical and individual understandings of disability with no significant change over the years. We also have found a slow yet significant growth of the progressive index over time, indicating a gradual infusion of terminology associated with a social approach and a disability rights orientation.

Furthermore, the rise of the progressive index score did not mean a decline in the conventional index score. Instead, we found that judges often use mixed terminology incorporating progressive language into a conventional text. We suggest understanding these findings in the context of tort law's conventions and logic, which hold a conventional view of disability and even reinforce such a view by assuming a medical-individual justification for awarding compensation. More broadly, our findings show how conventional and progressive views of disability may coalesce in judicial rulings, demonstrating that conventional views of disability are deeply embedded in legal doctrine and judicial imagination.

The rise of the progressive index shows that the era of disability rights influences judicial rhetoric in hidden ways. The ERPDL does not directly govern tort law, so judges have no obligation or need to adopt a disability rights orientation. Nonetheless, we see how judges have changed how they talk about disability over time as they increasingly choose terms and words identified with the social and rights models of disability. This change emphasizes the mutual relations between courts and society and the significant role of social change processes in shaping judicial rhetoric and rulings.

While the growing infusion of this new understanding of disability into judicial discourse is evident from our study, its effect on judicial outcome is yet to be studied. The correlation between the conventional understanding of disability and the conventions of tort law as a field may discourage judges from fully adopting a progressive approach that may lead to reduced compensation. Such hesitance is only partially justified. Some branches of compensation may decrease (for example, wage loss, pain, and suffering), but others may increase (for example, housing, workplace accommodations, mobility, and assistive technology) (Bloom and Miller 2011). Indeed, the disability critique presents not only a challenge to tort law but also an opportunity to reimagine tort law as a field. The infusion of a disability rights orientation into personal injury law and the adoption of its tenets and lessons requires a deep transformation in tort law's logic and structure as well as in judicial discourse, legal doctrine, and remedial schemes. Eventually, it may entail rethinking personal injury law and reconsidering alternative directions, such as comprehensive no-fault mechanisms or social welfare programs (Mor 2018).

Our findings urge future research on several fascinating questions. First, now that we have evidence regarding the change in judicial discourse, we can turn to an empirical examination of the effect that such change might have on practical outcomes: the award of damages, the types of damages awarded, and distributive effects on gender, age, and so forth. We can also focus on specific areas of tort law—such as work-related accidents, disability rights-related torts (for example, access, discrimination), or specific types of damages (for example, pain and suffering, housing expenses)—to examine what understanding of disability they employ and whether they follow similar patterns. Finally, this study presents a new and valuable tool for discourse analysis of legal texts. The index system we have developed can be applied to different tort systems and accommodated to fit various jurisprudential contexts. Expanding this line of research to other realms of law will improve our ability to trace patterns and trends in the representation of disability in judicial rulings in the age of disability rights.

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