***This suit should never have been brought” – Frivolous Litigation in Israel and the Attorney’s Role***

*This phenomenon of flooding the courts with motions regarding the smallest of issues - motions, the sole purpose of which is to wear out the opposing side, is a sickness, and it is spreading like a malignant growth within the body of the legal system. In its current dimensions, robs and wastes the time of the courts’ judges; harasses the opposing sides and forces them to incur unnecessary expenses; it forces each party to sharpen their knives against each other; and needlessly increases the disputes between them. And consequently, the court finds itself unnecessarily involved in matters that should not have been brought before it, and it cannot turn to its main work. This is a spreading and malignant phenomenon, and it must be uprooted.[[1]](#footnote-1)*

**Introduction**

It was Judge Learned Hand who wrote: “I must say, that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death.”[[2]](#footnote-2) A decision of whether “to litigate or not to litigate” is not a simple matter. It requires the weighing of legal, financial, social and personal considerations.[[3]](#footnote-3) A wrong answer will have dramatic consequences for the parties to the dispute[[4]](#footnote-4) (who waste their time and energy and bear the financial and emotional costs of litigation), for the court (because of the extra burden imposed on the legal system),[[5]](#footnote-5) and for society in general (which suffers the various types of harm done to third parties and the increased administrative costs which are borne by the taxpayers).[[6]](#footnote-6)

I studied the legal issue in 2009, for a paper I wrote as part of my undergraduate degree in law; for this purpose, I surveyed Israeli cases in which the court expressed the opinion that a civil lawsuit that had been brought before it was frivolous.[[7]](#footnote-7) For that paper, my starting point was that when the court either directly or implicitly states that a lawsuit is unnecessary, the presumption is that the conduct of the litigation will be fruitless/inefficient/not be productive. Of course, there may be a variety of other situations in which litigation can be deemed to be “frivolous”. Additionally, it may be that certain litigation is non-frivolous from a social perspective, but frivolous from the personal private perspective – and *vice versa*.[[8]](#footnote-8) For the purpose of focusing and simplifying the discussion here, however, I have chosen the definition given above for the frivolous lawsuit phenomenon?.

My earlier study highlighted the Israeli academic literature concerning attorneys who represent plaintiffs and the role that these attorneys play regarding the frivolous litigation phenomenon: do the lawyers contribute to the creation of the phenomenon, do they work to prevent it, or are they indifferent to the matter?

The outline of a new theoretical model developed out of the attempt to create an incentive for lawyers to prevent the initiation of frivolous litigation and to themselves refrain from causing it. According to the proposed model, a lawyer may be held professionally responsible, in certain circumstances for the fact that a lawsuit is brought “which it would have been better not to have been brought”. The tort model includes the imposition of a duty to inform and warn a client regarding the matter, and a description of possible defenses and remedies (including the inability to charge attorney’s fees and compensation for additional damages caused to such clients as a result of the frivolous litigation; the imposition punitive damages to be paid to the court and in exceptional cases; the ordering of an attorney to pay compensation to the defendant).

The original research included a lengthy discussion of the comparative law on the subject, including a detailed examination of legislation, case law and theoretical writings regarding adversarial legal systems. The emphasis in the survey was on the focus on economic analysis of the case. The survey of Israeli law indicated that the court does have inherent authority – though not expressly established in the Basic Law on Liberty – to order an attorney to pay expenses personally.[[9]](#footnote-9) However, this authority is exercised only in special and exceptional cases,[[10]](#footnote-10) and only after the attorney has been given the opportunity to explain his behavior. Additionally, an attorney has the right to appeal such an order, in the framework of an “ancillary proceeding.”[[11]](#footnote-11)

As part of an attempt to study the possible establishment of the model within the Israeli legal system, I mapped all the Israeli case law dealing with the matter of the imposition of court expenses on an attorney, on a personal level. A review of the digital legal databases identified 318 decisions from criminal and civil proceedings in various judicial tribunals.[[12]](#footnote-12) An examination of the differences between a court’s willingness to order an attorney to pay legal expenses when the attorney represents a civil litigant, as opposed to the imposition of such an order in the case of an attorney defending a client in a criminal proceeding – as well as a study of the rationales and consequences of these differences – could be fascinating. But that issue would need to be the subject of a separate study. This paper will focus on identifying the general trends indicated by the judicial decisions, and on an analysis thereof.

Between conservatism and forgiveness – a mapping of Israeli case-law regarding awards of personal expenses against attorneys

*The motion should not have been brought. But as it has been brought, it is absolutely and completely denied. Attorney Barel shall pay, personally (and not his client), the legal expenses for this motion to the State, in a total amount of NIS 10,000.[[13]](#footnote-13)*

The *Diskin* decision is one of a relatively small number of cases in which an Israeli court decided to order an attorney representing a party in a proceeding before the court to pay expenses. Israeli courts rarely initiate a discussion of the issue ordering an attorney appearing before it to pay expenses, and this is indicated by the relatively small number of cases dealing with the matter among Israel’s considerable case law. There are also very few cases of such payment of expenses having been ordered,[[14]](#footnote-14) even when the court has actually expressed the view that such payment should be ordered.[[15]](#footnote-15) Furthermore, an analysis of the decisions shows a growing willingness on the part of courts to cancel the order to pay expenses after the fact,[[16]](#footnote-16) when such an order has been issued, and then appealed by the attorney.

Thus, the Israeli jurisprudence on this issue is developing; the courts’ decisions have fluctuated between an absolute determination that an attorney may not be personally ordered to pay expenses with respect to professional behavior in representation of one of the parties,[[17]](#footnote-17) on the one hand, and on the other – a partial willingness to order such payment in exceptional cases.[[18]](#footnote-18) However, the case law does not include a single decision in which a court ordered an attorney, personally, to pay expenses solely because of the filing of a lawsuit.

An analysis of those cases in which personal liability actually was imposed on a lawyer indicates that the courts tend to impose the measure when an attorney does not appear for a court date that had been set without requesting permission for such absence, or by at attorney’s inappropriate conduct toward the court or its officers. Personal liability may also be imposed when the attorney conducts a legal proceeding which is clearly intended to serve the attorney’s interests exclusively, rather than those of his client.[[19]](#footnote-19) It is important to note that in these cases as well, the courts only order the payment of expenses when the circumstances are particularly severe.[[20]](#footnote-20) Even then, the various courts’ final decisions reflect a certain inconsistency.

Courts do not use the “personal liability for expenses” weapon in cases in which an attorney makes frivolous claims or seeks to obtain extensions or drag out court sessions.[[21]](#footnote-21) Such acts will at most generate a verbal scolding. Israeli courts will direct sharp remarks and anger toward attorneys who appear before them, when the judge believes that the attorney’s professional and personal conduct justifies such. However, a scolding included in a court transcript or made in the presence of a client[[22]](#footnote-22) is not the same as an actual order to pay expenses, as only the latter transforms the attorney into an actual defendant.

Even in the relatively few cases in which a court has chosen to order an attorney to pay expenses personally, the amounts involved have tended to be low and not reflective of the full price of the attorney’s behavior. Thus, for example, courts have ordered payment of expenses of only a few thousand shekels[[23]](#footnote-23) for a failure to appear for a scheduled court date, while the true costs of such an absence can actually amount to a much higher sum. A judge’s time is the overworked legal system’s most precious resource.[[24]](#footnote-24) The cancellation of a court date that has already been set, and its postponement to a different time due to the failure of an attorney to appear leads not only to a waste of the court’s time[[25]](#footnote-25) – it also adds to the administrative burden of the court secretariat.[[26]](#footnote-26) Moreover, the extended duration of the proceeding will come at the expense of many other cases which are waiting for their turn in court.[[27]](#footnote-27) Thus, even if it seems that the imposition of expenses is purely an act of compensation (as opposed to a punitive measure or an act of deterrence), the compensation that is usually awarded does not come lose to reflecting the true costs of the negligent or harmful behavior.

An additional interesting aspect of the decisions that have been issued is that many of them are decisions in appeals brought by right, by attorneys seeking to overturn rulings ordering them to pay expenses personally. In most of these, the appeal relates specifically to the order imposing personal liability; in a few cases, the appeal relates to the amount of the expenses that the attorney has been ordered to pay.[[28]](#footnote-28)

In light of the court’s tendency to order only an underpayment of expenses, and in view of the substantial financial resources of the average attorney, the motive for filing these appeals is not likely to be a matter of economics. We can presume that the attorneys who bring these appeals are concerned with their reputations, and with their overall perception among the general public, the courts and the legal community.[[29]](#footnote-29) A court order directing an attorney to personally pay expenses will have has a long-term consequence: an attorney ordered to pay expenses incurs not only a direct, if small (in the area of a few thousand shekels), financial cost – he will also bear heavier indirect financial costs (in the form of clients leaving and cases being taken from him). Lawyers facing such orders may also lose the ability to bring in new clients and face possible exposure to civil lawsuits and complaints to the bar associations ethics’ board, both from clients and third parties. Other than one “serial” appellant, who has used the appellate courts frequently over the years,[[30]](#footnote-30) it appears that most of the attorneys making these appeals do not do so because of any particular attraction to the appeal process. Additionally, the courts’ increased willingness to grant most of these appeals and to cancel the original orders to payindicates, perhaps, that these appeals are based on legitimate grounds for appeal, of the kind that attorneys are generally able to identify easily.

**The place of this research within Israeli academic literature**

As of the time of the writing of this paper, and in contrast to the extensive empirical research characterizing the American literature on this issue,[[31]](#footnote-31) no comparable study has been conducted in Israel regarding the frequency and costs of frivolous litigation, however that term is defined. Nevertheless, while the scope of the phenomenon is at this point unclear, a review of a sampling of the case law from the various levels of Israeli courts shows that it is a recognizable and continuing development, at least as reflected in the remarks of Israeli judges.[[32]](#footnote-32)

The survey of the case law described above constitutes an unprecedented attempt, within Israeli academic literature, to evaluate the position taken by the Israeli courts regarding lawsuits that the relevant judges do not believe should ever have been filed. Because of the need to have legal representation in the legal proceedings, and because of the role that the attorney plays in making the decision of whether and how to conduct a proceeding, the key focus is on those cases in which courts have discussed the matter of making the litigants’ attorneys personally responsible for the payment of court expenses. The intersection of two parameters – frivolous litigation and the imposition of court expenses on attorneys, personally – leads to the following conclusion: while Israeli courts have never imposed personal liability on attorneys for court expenses in a “frivolous lawsuit”, the Israeli courts do not have a consistent position concerning the question they have the inherent authority to impose such liability.

This leads to the point that more academic analysis of the issue is needed in Israel. What is particularly needed is empirical study, of the kind that will help the Israeli legal system formulate a sophisticated position regarding the matter. Research of this sort can supplement the discussion of the issues of attorneys’ professional liability and professional negligence – issues that have been surveyed and analyzed extensively in Israeli academic writing. Thus, for example, it will be interesting to study how the trend toward less imposition of liability on an attorney, described in the previous section, intersects with the academic literature that argues that Israeli courts are less likely to impose liability on attorneys in suits for professional negligence, and that by doing so they create *de facto* immunity for those lawyers.[[33]](#footnote-33) It will be fascinating to study how the case law developments in the fields of contracts law, torts and professional ethics in the coming years will impact on the Israeli courts’ position on this particular important matter.

1. Family Case 046960/06 *M.H. v. B.H.* (unpublished, 2007), per Judge E. Ben Ari (Ettinger), at para 7 (emphases in the original). [↑](#footnote-ref-1)
2. Judge Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, *in* 3 Lectures on Legal Topics, Association of the Bar of the City of New York 89, 105 (1926); Fred R. Shapiro, The Oxford Dictionary of American Legal Quotations 304 (1993) [↑](#footnote-ref-2)
3. David Luban, *The Lost Lawyer: Failed Ideals of the Legal Profession*, 105 Ethics 947-949 (1995); David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L. J. 2619, 2621 (1995) [↑](#footnote-ref-3)
4. David M. Trubek & Austin Sarat, *The Costs of Ordinary Litigation*, 31 UCLA L. Rev. 72, 75 (1983); Jennifer f. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the allocation of litigation costs*, 17 Rand Journal of Economics 557, 558 (1986); Russel Korobkin & Chris Guthrie, *Psychology, Economics and Settlement: A New Look at the Role of the Lawyer*, 76 Texas L. Rev. 77 (1997); Steven Shavell, Foundations of Economic Analysis of Law, 4 (Cambridge, 2004), 389-390; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. Rev. 3, 9 (1986); DH Naftulin, *The Psychological Effects of Litigation on the Industrially Injured Patient: A Research Plea,* 39(4) IMS lnd. Med. Surg. 26 (1970); Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, *Let`s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 Journal of Empirical Legal Studies 551, 552 (2008) [↑](#footnote-ref-4)
5. Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A legislation Perspective,* 16 HARV. J. ON LEGIS. 301, 303 (1979); David Luban, *Settlement and the Erosion of the Public Realm,* 83 Geo. L. J. 2619, 2621 (1995) [↑](#footnote-ref-5)
6. Shavell, *supra*, at 411. [↑](#footnote-ref-6)
7. CA? 6257/98 *Biton v. Sultan* (unpublished, 2002); CA 53255/03 *Mediterranean Sea Car Agency Ltd. v. Moto Media Ltd. et. al.* (unpublished, 2005). [↑](#footnote-ref-7)
8. Shavell, *supra*, at 411. [↑](#footnote-ref-8)
9. Y. Zussman, *Civil Procedure* (7th ed. 1995), 538-539; CA 4845, 4846/95 *Nir v. State of Israel* IsrSC 49(2) 639, at 645-646; CA 6185/00, *Attorney Hana v. State of Israel* IsrSC 56(1) 366, at 378. [↑](#footnote-ref-9)
10. Motion 183/52 *Shatzupak v. Tel Aviv-Jaffa City Council* IsrSC 7 603, at 605-606; Motion 373/60 *Trachtenberg v. Honigman* IsrSC 14 1973, at 1974; CA 415/70 *Eliahu v. Condominium Representation for “Beit Hama’a lot”* IsrSC 25(2) 139, at 140; CA 357/64 *Rakvitz v. Assessment Officer,* Gush DanIsrSC 18(4) 729, at 741-742; CA 2664/90 *Perlov v. Nasimi*, IsrSC 48(1) 787 at 799. [↑](#footnote-ref-10)
11. CA 2240/90 *Atar v. Meltzer* IsrSC 46(4); Misc. Civ. Petitions 2369/06 *Cohen v. Israel Discount Bank Ltd.;* S. Levin, *Civil Procedure: Introduction to Basic Principles* (1999*,* at pp. 58-60); E. Goren, *Issues in Civil Procedure* (2005), at p. 582. Compare, HCJ 188/96 *Chirinsky v. Deputy Chief Judge, Hadera Magistrates Court* IsrSC 52(3), at 721. [↑](#footnote-ref-11)
12. As these appear in the following legal databases: *Nevo*, *Takdinet*, *Dinim*, *Pad-or* [↑](#footnote-ref-12)
13. The equivalent of approximately US $2,500; Misc. Civ. Petitions 4279/05 *Diskin Chisin v. Estate of the late Alexander Rachlin* (2006). [↑](#footnote-ref-13)
14. Criminal Case (Tel Aviv) 40320/01 *Tel Aviv District Criminal Prosecutor’s Office v. Hadad* (unpublished, 2002): “I would certainly never have thought of ordering the public defender to pay costs! There is no basis (legal or ethical) and there is no hint of such in the verdict”; and see also, *Hana, supra*; *Nir, supra.* And compare, Supreme Rabbinical Council Decision 1-13-002793529, *Greif v. Greif* (2005). [↑](#footnote-ref-14)
15. LCA 589/88 *Sar v. Kuba* [1989] IsrSC 42(4) 395; Crim. Case (Jerusalem) 2077/06 *State of Israel v. Arish* (unpublished 2008); Bankruptcy Case (Tel Aviv) 1561/02 *Levi Ramot Dirt and Road Work and Development Ltd. v. ZP Society* (unpublished 2003). [↑](#footnote-ref-15)
16. This is what happened, for example, in CA (Haifa) 1542/05 *Papu v. Clal Insurance Company, Ltd.* (unpublished, 2006). In that case, the lower court had ordered the court to pay expenses in the amount of NIS 3000 plus VAT. The ground was an intentional misdirection by the prosecutor, who was abusing his position as an officer of the court. However, the appeals court chose to grant the appeal and cancelled the order to pay expenses, noting that the such an order is given only as an exceptional and harsh measure, and must be issued only when the court has no doubts; and see also Motion for Leave to Appeal (Tel Aviv) 1813/04 *Hadar Insurance Co. Ltd. v. Shuldman* (unpublished, 2004): there, the lower court judge expressed her distaste for the attorney’s behavior with strong language and ordered him to personally pay NIS 3,000 (“I find it difficult to imagine an act that would turn a court decision into a fraud more than the act committed by the defendant’s counsel.”) Nevertheless, the appellate court held that since the attorney was not given an opportunity to argue on his own behalf and because the respondent’s counsel agreed to cancel the order of expenses, the appeal was granted. [↑](#footnote-ref-16)
17. CA 642/61 *Tefer v. Marleh* IsrSC [1962] IsrSC 16 1000, at 1007-1008. [↑](#footnote-ref-17)
18. *Hana*, *supra*, at 380; *Nir, supra*; *Shatzupak, supra* at 605-606; *Trachtenberg, supra* at 1974; *Eliahu, supra* at 140; *Rakvitz, supra* at 741-742. [↑](#footnote-ref-18)
19. *Diskin* *Chisin*, *supra*; and compare Misc. Civ. Petitions 2764/06 Motion for Leave to Appeal 1081/05 *Anonymous v. Anonymous* (unpublished, 2006). [↑](#footnote-ref-19)
20. CA 5075/02 *Bardugo v. State of Israel* [2004] IsrSC 58(2) 860; Motion (Nazareth) 001825/00 *Feldman v. State of Israel*. [↑](#footnote-ref-20)
21. CrimC (Jerusalem) 2077/06 *State of Israel v. Arish* (unpublished, 2008); HCJ 4182/98 *Getuoni v. Minister of the Interior* (unpublished, 1998); *Hadad*, *supra*; Felony Case (Jerusalem) 856/05 *State of Israel v. Gabai* (unpublished, 2006): although the court describes the “inappropriate, disrespectful and improper behavior” of the attorneys and found that they ignored their duties as attorneys to help the court to do justice, the court issued only a warning. [↑](#footnote-ref-21)
22. *Hana*, *supra;* and see also Civil Case (Haifa) 1081/95 *Libia v. Carmiel Religious Council* (unpublished, 2000). [↑](#footnote-ref-22)
23. Thus, for example, Judge Ziskind of the Jerusalem Magistrates Court ordered an attorney to pay expenses in the amount of NIS 1,500 to the State for failing to appear at a court date, but this amount was eventually cancelled in CA 9579/06 *Sinai v. Court Administration* (unpublished, 2007). (See and compare: CrimA 1731/92 *Ben Reuven Weiner v. State of Israel*, IsrSC 46(3) 265). The Nazareth District Court also expressed its concern regarding “low level attorneys” who fail to appear for court sessions, but it cancelled the personal lability for expenses in the amount of NIS 5,000 for an attorney who failed to appear in court “going beyond the letter of the law” – Motion (Nazareth) 3289/07 *Salam v. State of Israel* (unpublished, 2007); and see also Motion for Leave to Appeal (Jerusalem) 3181/07 *Ya’akov v. Mizrahi* (unpublished, 2007). In that case, an attorney submitted a very relevant document – a document that touched on the core issue of the dispute – but did so only on the day of the court hearing. Consequently, the hearing was postponed by the court, in order to allow the other parties to relate to the document; the court’s and the parties’ time was wasted. The court ordered the movant and/or his counsel to pay expenses in the amount of NIS 10,000. And compare to *Bardugo*, *supra*, where the court ordered the defense counsel to personally pay expenses to the State in the amount of NIS 45,000. However, it should be noted that Attorney Bardugo did not appear at two court sessions and the court reacted strongly to his conduct on the day of the hearing at which he was ordered to pay expenses; in Motion (Nazareth) 3404/02 *Abu Ri v. State of Israel* (unpublished, 2003), an attorney who failed to appear for a court session and instead sent a replacement, was ordered to pay expenses in the amount of NIS 7,500. [↑](#footnote-ref-23)
24. CrimA (Tel Aviv) 70016/05 *Radislav v. Tel Aviv District Criminal Prosecutor’s Office*, para 11 (unpublished, 2005). [↑](#footnote-ref-24)
25. CA (Beersheba) 1192/08 *Moshe v. Elbaz*, para 4 (unpublished, 2007). [↑](#footnote-ref-25)
26. LCA 8327/05 *Tzadik v. Pnimi* (unpublished, 2005). [↑](#footnote-ref-26)
27. CA 653/80 *Barnea Creations Ltd, et. al. v. Danit Development Co. Ltd.* IsrSC 37(1) 802, at 804; LCA 5281/06 Champion *Motors (Israel) Ltd. v. Oz* (unpublished, 2005). [↑](#footnote-ref-27)
28. *Bardugo, supra*. [↑](#footnote-ref-28)
29. *Hana*, *supra*, at 382; *Perlov, supra,* at 799. [↑](#footnote-ref-29)
30. *Nir*, *supra*; CA (Beersheba) 36/92 *Nir v. State of Israel*, 5754? (1) 313; Bar Association Appeal 4743/02 *Nir v. Israel Bar Association Tel Aviv-Jaffa District Council* (unpublished, 2005). [↑](#footnote-ref-30)
31. Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, *Let`s Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 Journal of Empirical Legal Studies 551, 552 (2008); Samuel Gross & Kent Syverud, *Getting to No: A study of settlement Negotiation and the Selection of Cases for Trail,* 90 Michigan L. Rev. 319 (1991); Samuel Gross & Kent Syverud, *Don`t Try: Civil Jury Verdicts in a System Geared to Settlement,* 44 U.C.L.A. L. Rev. 51 (1996); Jeffery Rachlinski, *Gain, Losses and the Psychology of litigation* 70 S. Cal. L. Rev. 113 (1996); George Lowenstein, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. Legal Stud. 135, 135(1993); Marc Galanter & Mia Cahill, *`Most Cases Settle`: Judicial Promotion and Regulation of Settlements*, 46 Stanford L. Rev 1339 (1994) [↑](#footnote-ref-31)
32. *M.H. v. B.H., supra*. [↑](#footnote-ref-32)
33. Asaf Yaakov, “Negligence in the Courthouse: On the Professional Liability of Attorneys in the Framework of a Court Session” *Iyunei Mishpat* 26(1) 5 (2002). [↑](#footnote-ref-33)