**“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, it 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**

Judge Learned Hand 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 about whether or not to litigate is far from simple, and requires weighing legal, financial, social and personal considerations.[[3]](#footnote-3) A wrong answer can have dramatic consequences for the parties to the dispute[[4]](#footnote-4) (who expend their time and energy and bear the financial and emotional costs of litigation), for the court (due to the extra burden imposed on the legal system),[[5]](#footnote-5) and for society (whose access to the courts is reduced by such suits, and whose taxes must cover the increased administrative costs).[[6]](#footnote-6)

In studying this issue in 2008, I surveyed Israeli cases in which the court expressed the opinion that a civil lawsuit brought before it was frivolous,[[7]](#footnote-7) presuming that when the court either directly or implicitly declared a lawsuit unnecessary, it meant that pursuing such litigation would have no effect. Of course, there may be other situations in which litigation can be deemed “frivolous.” Additionally, certain litigation may be non-frivolous from a social perspective, but frivolous from the individual’s perspective and vice versa.[[8]](#footnote-8) For the purpose of this discussion, xxxx’s definition of frivolous lawsuits will be used.

My earlier study highlighted the Israeli academic literature concerning attorneys representing plaintiffs and the role they play in the frivolous litigation phenomenon, asking whether lawyers contribute to creating the phenomenon, do they seek to prevent it, or whether they are indifferent.

The new, tort-based, theoretical model I proposed was designed to create an incentive for lawyers to prevent clients’ initiating frivolous litigation and to themselves refraining from encouraging it. This model would hold a lawyer professionally responsible, in certain circumstances, for a lawsuit having been brought “which it would have been better not to have been brought.” The tort model includes imposing a duty to inform and warn a client regarding the issue, and a description of possible defenses and remedies (including prohibiting the charging of attorney’s fees; charging compensation for damages incurred to defendants as a result of the frivolous litigation; imposing punitive damages to be paid to the court; and, in exceptional cases, requiring an attorney to pay compensation to the defendant).

The original research delved deeply into the comparative law on the subject, including a detailed examination of legislation, case law and theoretical work regarding adversarial legal systems, focusing on economic analyses of the cases. The survey of Israeli law indicated that the court does have inherent authority, albeit not expressly declared in the country’s Basic Laws, 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 the attorney’s behavior. Additionally, an attorney has the right to appeal such an order within the framework of an “ancillary proceeding.”[[11]](#footnote-11)

To help develop an improved model for the Israeli legal system, the original study mapped all the Israeli case law dealing with the imposition of court expenses on an attorney personally. A review of the digital legal databases revealed 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 in a civil rather than a criminal proceeding, including a study of the rationales and consequences of these differences, while intriguing, will need to be the subject of a separate study. This paper will focus on identifying and analyzing the general trends revealed in the judicial decisions.

**Between Conservatism and Forgiveness – Mapping Israeli Case Law Regarding Imposing 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 to pay expenses. Israeli courts rarely entertain discussions of whether to order an attorney appearing before them to pay expenses, as evidenced by the relatively small number of cases raising the matter within Israel’s considerable case law. Indeed, there are very few cases in which such payments have been ordered,[[14]](#footnote-14) even when the court has actually suggested that such a payment was warranted.[[15]](#footnote-15) Furthermore, an analysis of the decisions in which costs have been imposed on attorneys personally and appealed by the attorney, courts are increasingly willing to cancel such orders upon appeal.[[16]](#footnote-16)

Thus, Israeli jurisprudence on this issue is developing, with court decisions fluctuating between categorically rejecting holding an attorney personally responsible for paying opposing parties’ expenses when bring frivolous suits,[[17]](#footnote-17) and a partial willingness to order such payments 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 a lawsuit was filed.

Analyzing those cases in which personal liability was actually imposed on a lawyer indicates that the courts tend to use this sanction when an attorney does not appear for a court date without have requested permission, or if an attorney’s conduct toward the court or its officers is inappropriate. 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 the client.[[19]](#footnote-19) It is important to note that in these cases as well, the courts impose costs on attorneys personally only when the circumstances are particularly extreme.[[20]](#footnote-20) Even then, the 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 at most generating verbal rebukes if the judge determines that the attorney’s professional and personal conduct justifies such. However, a rebuke included in a court transcript or made in the presence of a client[[22]](#footnote-22) is not equivalent to the imposition of costs, as only the latter transforms the attorney into an actual defendant.

Even in the relatively few cases in which courts have ordered an attorney to pay expenses personally, the amounts involved have tended to be low and not reflective of the full cost of the attorney’s behavior. Courts have ordered payments of only a few thousand shekels[[23]](#footnote-23) for failures to appear for scheduled court dates, while the true costs of nonappearance can actually be much higher. A judge’s time is the overworked legal system’s most precious resource.[[24]](#footnote-24) Cancelling and postponing a scheduled court date to a different time due to an attorney’s failure to appear not only wastes the court’s time,[[25]](#footnote-25) but also adds to the system’s administrative burden.[[26]](#footnote-26) Moreover, the unanticipated extended duration of the proceeding will come at the expense of numerous other cases waiting to be heard.[[27]](#footnote-27) Thus, even if imposing expenses on an attorney appears purely compensatory (rather than punitive or deterrent), the compensation commonly awarded does not come close to reflecting the true costs of negligent or harmful attorney behavior.

Another interesting aspect of these decisions is that a significant portion of them are brought by attorneys questioning the very right to impose costs on them 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)

Given the courts’ tendency to impose payment of only a portion of the actual expenses, and considering the usually substantial financial resources of most attorneys, the motive for filing these appeals is unlikely to be economic. Rather, the attorneys bringing these appeals are presumably concerned with their reputations and with their standing with the general public, the courts and the legal community.[[29]](#footnote-29) A court order imposing costs on an attorney personally can have long-term consequences: an attorney ordered to pay expenses incurs not only a direct, if small (generally about a few thousand shekels), financial cost, but may also possibly face higher indirect financial costs in the form of losing clients, current and future. Lawyers so ordered may also be vulnerable to civil lawsuits and complaints to the Bar Association’s 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) most of the attorneys making these appeals are not particularly enamored of the appeal process. Rather, the courts’ increased willingness to grant most of these appeals and cancel the original imposition of personal paymentindicates, perhaps, that there are legitimate and easily-identifiable grounds for these appeals.

**This Research’s Contribution to Israeli Academic Literature**

Currently, no study has been conducted in Israel regarding the frequency and costs of frivolous litigation, however that term is defined, in contrast to the extensive empirical research undertaken about the U.S. system on this issue.[[31]](#footnote-31) Nevertheless, while the scope of the frivolous litigation phenomenon in Israel still requires clarification, a review of a sampling of the case law from the various levels of Israeli courts indicates that debate on the issue, at least among judges, is very alive, breathing, and, some would say, kicking.[[32]](#footnote-32)

This survey of the case law represented an unprecedented attempt to evaluate the position taken by the Israeli courts regarding lawsuits that presiding judges believe should never have been filed. Because of the need to have legal representation in legal proceedings, and because of the role attorneys play in deciding whether and how to conduct a proceeding, the key focus is on those cases in which courts have discussed holding 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 conclusion that 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 whether they have the inherent authority to impose such liability.

Clearly, more academic analysis of the issue is needed in Israel, particularly empirical study that can enable Israel’s legal system to formulate a more nuanced position about the issue. Such research can supplement the discussion of the issues of attorneys’ professional liability and professional negligence, questions that have been surveyed and analyzed extensively in Israeli academic writing. Thus, for example, it could prove useful to study how the trend of decreasing imposition of personal liability on an attorney described herein intersects with the academic literature contending that Israeli courts are less likely to impose liability on attorneys in suits for professional negligence, and that such a response creates *de facto* immunity for those lawyers.[[33]](#footnote-33) It should prove fascinating to see how case law developments in the fields of contracts law, torts and professional ethics in the coming years will influence Israeli courts’ position on this compelling issue.

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; 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 as “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 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 review 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)