

SLAPPS

Characteristics, Dangers, and Ways of Contending with Them

Rachel Aridor Hershkowitz |

Tehilla Shwartz Altshuler



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Rachel Aridor Hershkowitz
Tehilla Shwartz Altshuler

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The Israel Democracy Institute
4 Pinsker St., P.O.B. 4702, Jerusalem 9104602
Tel: (972)-2-5300-888
Website: en.idi.org.il

To order books:
Online Book Store: <http://en.idi.org.il/publications>
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Tel: (972)-2-5300-800; Fax: (972)-2-5300-867

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ABSTRACT

Strategic lawsuits against public participation (SLAPPs) are lawsuits, usually for defamation, intended to prevent publication or force the retraction of criticism by journalists or citizens and to silence public discussion of the plaintiff. In many cases the SLAPPs are filed by corporations, financial magnates, public officials, public figures, or even journalists against journalists, newspapers, media outlets, and citizens.

Defendants in SLAPPs pay a high price both financially and emotionally. They are forced to choose between two evils: either they waste a lot of time and financial resources managing their legal defense, uncertain of the outcome of the lawsuit and weighed down by worry about the high monetary damages being claimed, or they back down and retract the remarks for which they are being sued and are effectively silenced. This price leads to the “chilling effect,” which is the danger inherent in SLAPPs—the impact on the defendant’s willingness to participate in the public discourse. The chilling effect exists even if the suit is ultimately rejected or ends in a settlement.

However, the chilling effect is not limited to the actual defendant in the first “circle of deterrence.” In the second circle of deterrence is the community to which the defendants belong or on whose behalf the defendants acted, for instance their work colleagues, residents of their neighborhood, and activists engaged in the same struggle. In the third circle of deterrence are other participants in the public discourse—individuals, environmental or social activists, scientists and researchers in various disciplines, journalists, small media outlets, small organizations, and nonprofits—that are liable to be deterred from expressing their views

and exercising their right to freedom of expression in the future against the same plaintiff or other similarly powerful figures. The fourth circle of deterrence is society as a whole, which gets the message that participation in the public discourse is dangerous and may exact a high personal price. When a SLAPP is filed over something posted on the Internet (e.g., a social media post, a review on a commercial site), the circles of deterrence may even be international.

This is a severe infringement of freedom of expression, and it can lead to the suppression of information of substantial public interest when public discussion of the information would be important: scientists and researchers may shelve studies that criticize powerful companies, such as pharmaceutical and cosmetic corporations; consumers may refrain from reporting a defective product or problematic management of a business or commercial establishment; journalists may refrain from publishing exposés on improper acts or corruption by elected officials. All this may ultimately be detrimental to the values of democratic governance.

Over the years, US states, Canadian provinces, and Australian states have adopted special anti-SLAPP legislation. In recent years the European Union has broadened its discussion of the regulation of SLAPPs, and a coalition of organizations even drew up a proposal for a comprehensive directive on the subject. The protection granted by the special legislation varies from state to state, but the underlying rationale is the same: the understanding that on certain matters of substantial public interest, public discourse is essential, and the chilling effect caused by SLAPPs should be minimized as much as possible by granting defendants procedural tools with which to put an end to the legal action as quickly as possible.

In Israel there is no clear legal doctrine that strikes the proper balance between the right to a good name and the right to freedom of expression in the context of SLAPPs in general, and in the digital world in particular. The courts have recognized characteristics of SLAPPs and the essential nature of free public discourse—in the context of the balance between

freedom of expression and the right to a good name—in order to shape public opinion on matters of substantial public interest. However, they have refrained from adopting an anti-SLAPP legal doctrine, and on several occasions have urged legislators to amend the Anti-Defamation Law so as to enable them to contend with the chilling effect of these lawsuits. Until the desired legislation is enacted, the tools that currently exist in the law, i.e., the protections provided by the Anti-Defamation Law and the procedural tools in the Civil Procedure Regulations for summary strike-out or dismissal due to abuse of process, are available to defendants in SLAPPs. However, the restrictive interpretation of the procedural tools so as not to deter potential plaintiffs from filing legitimate lawsuits, combined with the ease with which a plaintiff can file a defamation lawsuit according to substantive law, creates fertile ground for filing SLAPPs in Israel. The protections in the Anti-Defamation Law do little to counter the chilling effect of SLAPPs, because even if the defendant ultimately wins the case, it is not a true victory. By the time defendants reach the finish line, they have invested many years and a great deal of money on legal proceedings. Thus the rejection of a lawsuit does not prevent the chilling effect throughout the broad circles of deterrence.

Therefore it is extremely important to come up with solutions that will deter plaintiffs from filing SLAPPs, taking into account the unique features of the digital world. As part of such a solution, we recommend the following:

(1) Adopt special anti-SLAPP legislation by amending the Anti-Defamation Law, including:

a Defining the characteristics of a SLAPP:

- The lawsuit was filed over an utterance or action in a public forum or one that is open to the public, and that utterance or action was presumably an exercise of freedom of expression on a subject of substantial public interest. It does not have to be a matter related to government activity of substantial public interest; it can also be discourse in the civil-commercial sphere.

- The aim of the lawsuit is presumed to be inappropriate or harmful. Inclusion of this characteristic is meant to uncover the plaintiff's intent, as can be determined objectively by the following criteria:

- An imbalance of power between the parties
- The absence of any legal basis for the lawsuit
- A demand for an outrageous sum
- Deliberate selection of a jurisdiction far from the defendant's location
- Naming of a defendant who is not the primary or sole actor (e.g., someone who shared a post on the Internet rather than the writer of the post, or the editor of a newspaper in the case of a suit against a journalist)

b Defining the burdens of proof on the defendant and the plaintiff:

- In the initial stage the burden shall be on the defendant to make a prima facie showing that the lawsuit is over an utterance or action reflecting the exercise of freedom of expression on a matter of substantial public interest. Defendants shall not be required to prove that the suit was deliberately filed to silence them or that it had a chilling effect.

- Once the first stage has been proven, the burden of proof shall pass to the plaintiff, who shall be required to refute the suspicion that the suit was filed for silencing purposes or that it constitutes an abuse of process. Plaintiff shall show that they have sufficient preliminary evidence to support all elements of the cause of action and that there is near-certainty that they will win their lawsuit. In this context, the court will also examine whether the act or utterance over which the lawsuit was filed was legal and what the plaintiff's intent was in filing suit.

- If the defendant proves that the plaintiff is a public figure, the burden of proof shall pass to the plaintiff, who must show that the suit is not being financed with public funds.

c Providing procedural incentives to defendants in SLAPPs:

- A clear, short timetable shall be set for filing an application for summary strike-out, a hearing, and judgment
- The discovery procedure in the main lawsuit shall be suspended.

d Relief and punitive damages:

- In addition to awarding damages equal to the defendant's actual expenses, the court shall be empowered to award monetary compensation as a deterrent reflecting the damage caused to the defendant by the lawsuit. The compensation shall be awarded to the defendant personally, and not to charitable organizations. If the compensation is not awarded to the defendant, it shall be paid to an assistance fund.

(2) Establish a fund for financial assistance in SLAPPs against journalists. The fund shall operate as part of an assistance fund for journalistic projects in Israel through the Bequests Committee in the Office of the Administrator General and shall be financed by digital platforms. In order to prevent personal pressure and any personal relationship between the members of the Bequests Committee and journalists, applications to the fund shall not be made directly by journalists, but rather through the Press Council and representative organizations of journalists.

(3) Recognize the institution of *amicus curiae* in SLAPPs.

(4) Encourage the Israel Bar Association and other organizations to offer their services *pro bono* to defendants in SLAPPs, *inter alia* by amending the Israel Bar Association rules to include defamation lawsuits in Schar Mitzvah, the IBA's *pro bono* program.

(5) Foster a training program for judges and attorneys on SLAPPs and how to contend with them appropriately.

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