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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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STORY LINE

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Carpool

"Baruch's vort (engagement celebration) is tonight," Chaim said to his friend Yoni. "How are you getting there?"

"I'm not sure," said Yoni. "I'm looking for a ride. Will you be driving?"

"I wasn't planning on it," said Chaim. "I prefer not to take my parents' car. Let me know if you hear of something."

Towards evening, Yoni approached Chaim. "Four other people are trying to arrange a ride, but none have a car available," he said. "Any chance of borrowing your parents' car?"

"I'll check," said Chaim. Chaim called his father. "Five of us want to go to Baruch's vort," he said, "but we need a car. Could I take your car?"

"Who will be driving?" asked Chaim's father. "I'll drive there," said Chaim, "but I might be tired on the way back. Someone else may

have to drive."

"Do you know the other fellows?" asked Chaim's father. "Have you ever seen them drive?"

"Yes, I've gone places with them," Chaim answered. "All four are responsible drivers." "I guess you can have the car," said his father. "Please drive carefully, though."

Chaim called Yoni back. "My father gave the OK," he said. "Meet me at 7:30 p.m."

When they arrived at the vort, Chaim parked the car on a side street. He locked the car and checked the doors to make sure they were closed.

When they returned to the car after the vort, they saw that it had been broken into! The brand new CD player had been stolen.

"I can't believe it!" exclaimed Chaim. "My father just had the system installed. It cost him \$350."

An argument broke among the group whether the boys were responsible.

"We locked the doors," said Benny. "What more could we do?"

"That still doesn't mean we're not responsible," said Chaim. "A borrower is liable for theft even if he was not negligent (C.M. 340:1)."

"I don't mean to be rude or ungrateful," said Reuven, "but you're the one who borrowed the car. We just came along for the ride."

"I borrowed it on behalf of everyone!" replied Chaim heatedly. "We should all share the loss."

"Who says?" said Reuven.

"I think that Rabbi Dayan hasn't left the vort yet," chimed in Yoni. "We can ask him!" The five of them returned inside.

Chaim related the whole story. "Who is liable for the CD player?" he asked. "Just me

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Paying the Partnership

My business partner and I buy and sell items for a profit. I received a call from a manufacturer who assured me that he had a product that would net me a handsome profit, but an immediate wire of \$10,000 was required.

I was a bit suspicious, but temptation got the better of me. I transferred the money to him from our business account.

Unfortunately, the man turned out to be a swindler. He disappeared with our money.

Q: I admit that I did not exercise due diligence to confirm that he was honest, but does that negligence obligate me to repay the partnership? What if I had done better research and then it turned out that he was a crook?

A: A partner is expected to conduct himself in accordance with standard practice; if he deviates from the standard, he is liable to pay for any resulting loss. For example,

if there is a type of merchandise that is not normally sold on credit and a partner sold it on credit, resulting in a loss, that partner is liable. If his deviation generates profit, the profit is shared equally (C.M. 176:10).

The point that requires clarification is what obligates the partner to pay for the loss. Is it a consequence of his role as a shomer (custodian), or is he a mazik (damager)? In other words, is his liability a consequence of the fact that every partner is a shomer

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or the whole group?"

"This is a judgment call of the dayan, whether you alone accepted responsibility for the car or you were meant to be the representative agent of the group to borrow it on their behalf," answered Rabbi Dayan (C.M. 200:1; 340:52). "This could depend on whether you said, 'Could I borrow?' or 'Could we borrow?' It could also depend on whether you were going to be the driver, or whether the driving would be shared by the whole group."

"What would typically be assumed?" asked Reuven.

"In the usual case — that the one who takes the car is the sole or primary driver — it would seem that he alone is the borrower," replied Rabbi Dayan. "However, if a group was going on a winter vacation or weekend trip, and all were splitting costs and sharing the driving, it would be more likely that the son is borrowing on behalf of the group."

"If all are considered borrowers, then what?" asked Yoni.

"Two people who borrowed together are jointly responsible and mutual guarantors for each other," answered Rabbi Dayan. "Therefore, each one would pay an equal share in the loss. If one is unable to pay his share, the others remain liable as guarantors for that amount, but are entitled to collect reimbursement from him when he is able to pay (C.M. 77:1; Machaneh Ephraim, Shomrim #27)."

"What if one person was negligent?" asked Chaim. "For example, if he drove too fast and got into an accident?"

"In that case, all would be liable towards the owner initially, since a borrower accepts full responsibility for the item," said Rabbi Dayan. "However, the others would be entitled to reimbursement from the negligent one later (see Shach 77:1; Nesivos 77:1; Pischei Choshen, Pikadon 1:16[33])."

sachar (paid custodian) who is liable when he is negligent (C.M. 176:8), or is he liable because it is considered as though he damaged the partnership's property?

The difference between the two is that in some circumstances, a shomer is exempt, whereas a mazik is liable, e.g. shemira b'baalim (see Pischei Teshuvah 176:13). So is the partner who sold on credit, thereby causing a loss, a mazik or a negligent shomer (Shach 176:16)?

Some say that in a place where no one sells on credit, the partner who did so deviated entirely from standard business practice and is considered a mazik. If some merchants do sell on credit, although one partner is expected to consult with the other partner before doing something unusual, the partner who did not consult cannot be considered a mazik since there is a population that behaves in this manner. The issue is that he did not consult with his partner. Though the other partner may claim later that he would not have agreed

to the deal, he cannot prove what he would have said if consulted before the deal soured. Consequently, the partner who sold the merchandise on credit is not considered a mazik (Mishpat Shalom 176).

The same principle can be applied to your case. If there are people who invest as you did without thoroughly researching that manufacturer before sending money, your liability is that of a shomer. Even if you were negligent, since your negligence involved something that does not have tangible value (like money in a bank account, which is money that the banks owes the depositor and is not, in and of itself, money), you cannot be forced to pay for the loss (C.M. 301:1 and Erech Shai 66:40) — although there may be a moral obligation to repay the loss (see Imrei Binah, Pesach 5). However, if the investment was one that partners would not do without consulting each other, you would be considered a mazik and would be obligated to repay the partnership.

Lost and Found #26

Q: Someone accidentally took my umbrella from the coat rack and left his. May I take his umbrella?

A: Although he mistakenly took your umbrella, you may not take his. Instead, you should post a sign there that an umbrella was mistakenly switched. This applies even to mitzvah items, such as a tallis, siddur, etc. (C.M. 136:2; Kessef Kodashim ad loc.).

If the owner comes and gives simanim but claims that he did not take your umbrella, you must still return his (Pischei Choshen, Aveidah 4:19).

If no one comes to claim the umbrella, after a reasonable time you may use it, as explained in previous questions regarding items whose rule is yehei munach.

Additionally, if the owner is unaware that he took the wrong umbrella and continues to

use yours, you are entitled to use his umbrella in lieu of rental for yours. However, this would not apply to using a switched tallis, since we require full ownership to be able to make a bracha (Hashavas Aveidah K'halachah 7:10).

In a public place, where this frequently happens, the administration can institute and publicize a practice that people not be particular (see Aruch Hashulchan 136:2).

MONEY MATTERS

DID YOU KNOW?

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