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STORYLINE

one **close dayan**

By Rabbi Meir Orlian
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Rabbi Dayan reviewed his email messages. One came from a lawyer, an avid fan of his weekly Choshen Mishpat column. It read: "I very much enjoy reading your column. However, I was left perplexed by two recent articles and would appreciate clarification. One article discussed witnesses at a wedding and explained that relatives are not valid to serve as witnesses. Presumably, they are also disqualified to serve as judges.

"However, in another article about a bar mitzvah boy whose cousin 'stole' the bentching, Rabbi Dayan judged his two nephews who came for a din Torah! Shouldn't Rabbi Dayan have recused (disqualified) himself from this case, as he was a relative of both parties?"

"It was permissible, but he has a good point," Rabbi Dayan said to himself. He pulled a well-used volume of Shulchan Aruch Choshen Mishpat off the shelf and opened it to the relevant passage. "Here it is," he said with satisfaction.

He hit the "reply" button and began writing: "Thank you for your insightful comment about my recent articles. You are correct that a relative or other person who is invalid to serve as a witness is also disqualified to serve as a dayan. Moreover, even certain people who are valid as witnesses are disqualified to judge, such as a friend or adversary (Choshen Mishpat 7:7-9).

"Despite this, it was permissible to judge my two nephews who came before me to judge them. This is based on a comment of the Maharshal, R. Shlomo Luria (1510-1574), cited by the Shach (C.M. 7:5) in his commentary to the Shulchan Aruch.

"The Gemara (B.K. 115a) relates that Ravina judged a case involving his father-in-law that was brought before him. Maharshal notes that when a dayan is willingly approached by the litigants to judge a relative of his, he is permitted to do so, just as Ravina did. He concludes that this is obvious since they accepted him, but some Rabbis avoid judging out of piety; justice suffers on account of this, when other qualified judges are not available."

Rabbi Dayan hit the "Send" button and went on to answer other questions. Half an hour later, his inbox flashed a new message: "Thank you for your response. Could you please clarify the source of the idea that it is possible to willingly accept a disqualified judge?"

Rabbi Dayan replied: "The Maharshal is based on a Mishna (Sanhedrin 24a) that a person can accept upon himself even an invalid judge or witness as valid. This is because the Torah upholds most monetary

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FROM THE BHI HOTLINE

does the **passenger pay?**

Submitted by
N. I.

I was driving my car when a friend waved me down and asked for a ride. He got in and put my CD player, which had been lying unused on the passenger seat, on his lap. I stopped to drop him off before an intersection, rushed him out and drove away. It wasn't until a few minutes later that I looked at the passenger seat and noticed that my CD player was not there. I returned to the place where I had left him and discovered that the CD player had indeed fallen from his lap. In the couple of minutes that it had been lying on the road, cars had driven over it, shattering it completely. My friend admits that, due to the rush, he didn't notice when the player fell off his lap. He feels that it fell because I rushed him, and it probably wasn't damaged until cars crushed it.

Q: Is he obligated to repay me?

A: The question in point is if your friend is considered a shomer (custodian) or a mazik (damager). At first glance, it seems that when he placed the CD player on his lap, he became a shomer and needed to be more careful while exiting the car - even if you rushed him to get out. However, in this case, he should not be liable even if it fell off his lap due to negligence. The reason for this exemption is the halachic rule of baa-

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STORYLINE CONTINUED

agreements that a person willingly makes. When people willingly come before a disqualified dayan to judge their din Torah, they are implicitly agreeing to accept his ruling (see Pischei Teshuva 5:6). Therefore, while I could not coerce my nephews in justice, it was permissible to judge them when they came of their own accord. In practice, the dayan should follow his conscience, whether he can fairly judge the parties without being swayed. If he has concern, he should avoid judging when they can go elsewhere."

A day later, Rabbi Dayan received a further follow-up question: "Since the judge cannot coerce his relatives in justice, is the ruling binding, i.e., can the parties refuse to honor the ruling and turn afterwards to a qualified beis din?

Furthermore, I thought a din Torah requires three judges. How could you have judged your nephews yourself?"

"This is more complicated and involves a major dispute," mused Rabbi Dayan. He opened the Shulchan Aruch and delved for a few minutes in the yellowed pages.

He then hit "reply" and wrote: "When a person accepts a relative or other disqualified person to serve as a dayan, he can back out until the final verdict is issued, but not afterwards. However, he cannot back out if he initially confirmed the acceptance with a kinyan sudar (symbolic transfer of an object, such as a handkerchief, which demonstrates full intent).

"In addition, most authorities maintain that just as a person can accept a disqualified person to judge, he can agree to have a single dayan rule instead of three (SM"A 22:6 and Pischei Teshuva 22:5). If the lone judge was also someone who is disqualified, there is a dispute between the Shulchan Aruch and Rama whether the verdict is binding if there was no kinyan sudar. The Shach considers the issue unresolved. Therefore, if a kinyan sudar was not done, it is not possible to extract payment from the defendant if he wants to adjudicate again in a qualified beis din (C.M. 22:1; Shach 22:3)."

FROM THE BHI HOTLINE CONTINUED

lav imo (Choshen Mishpat 346:1). This unique principle relieves a custodian from any liabilities - even due to negligence - if the owner of the object performs a service that benefits the custodian at the time that he accepted guardianship. Accordingly, even if your friend put the CD player on his lap and as such became a shomer, he would be exempt from any liabilities since you agreed to drive him to his destination.

However, the argument for holding your friend liable in this case is his categorization as a mazik, a damager. The fact that the CD player was on his lap when he stood up, allowing it to fall on the street, is an act of damage to another person's property. A damager is liable even in cases of shogeg (inadvertence) (C.M. 375:1). This applies even if there is no evidence that the CD player broke when it fell on the street and, in fact, only broke when it was run over. The reason for this ruling is the fact that the object was put into a circumstance where it was clearly exposed to damage. Such a case, rules Nesivos HaMishpat (291:7 and 14), is considered an act of mazik (damage), although the damage did not actually occur until later. As such, your friend should reimburse you for the value of your CD player at the time the damage occurred.

(See also Avnei Choshen 291:3 concerning Nesivos HaMishpat ibid.; see also Pischei Teshuvah 176:13 and Minchas Pitim 306:4 for a discussion whether shemirah b'ba'alim is an exemption if the shomer unintentionally damages the object in his custody.)

Please contact our confidential hotline with your questions & comments

877.845.8455 ask@businesshalacha.com

MONEY MATTERS

payment of wages week #9

Q: There is no cash available this month to cover payroll. May I delay payment of salaries?

A: There is a mitzvah to pay wages promptly. However, an employer does not violate the prohibition of delaying wages if he does not have funds to pay the employee (Choshen Mishpat 339:10).

If the employer does not have sufficient funds to cover the payroll entirely, he must still pay whatever amount he is able to. Furthermore, if the employer has accessible funds in the bank or entrusted with someone, he is required to procure them, even if it involves time and effort (Ahavas Chesed 9:7,10; Rama C.M. 104:4).

If the employer does not have funds, but has assets that can be sold, there is a dispute whether he is required to sell them in order to raise cash for payment of wages (see R. Akiva Eiger C.M. 339:10). If he can borrow money in order to pay promptly, it is proper that he do so (Pischei Teshuva 339:8; Ahavas Chesed 9:7).

In any case, a person should not hire a worker if he does not expect to be able to pay him promptly, unless the worker was told ahead of time and he agreed to receive payment later (Ahavas Chesed 10:12).