

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

UNCONSCIOUS GIVING

Two days before Purim, Rafi Braun fell off a ladder and suffered a serious blow to his head. He was taken to the hospital.

"We hope that he will be O.K.," the doctors told Mrs. Braun after examining Rafi. "However, we would like to sedate him fully for a day or two." During the next 24 hours, Rafi's condition stabilized. "His progress is encouraging," the doctors told his wife the next day.

"Baruch Hashem!" Mrs. Braun exclaimed.

"Tomorrow, we hope to reduce the sedation and bring him back to consciousness," the doctors said. "His vital signs have returned stable since the accident."

Purim morning, Mrs. Braun got up early. She heard the *Megillah*, gave *matanos l'evyonim* and *mishloach manos* on behalf of herself and her husband, and went to the hospital to relieve her daughter, who had spent the night there.

During the course of the morning, the doctors reduced the sedation. Little by little, Rafi began showing signs of responsiveness.

Finally, in the afternoon, Rafi opened his eyes!

"A Purim miracle!" Rafi's wife joyfully exclaimed. Rafi stared at her with a puzzled look.

"Today is Purim!" Mrs. Braun said to Rafi. "You were out for two days!"

Rafi smiled weakly. He mumbled something. "Meh..."

"You want someone to read the *Megillah*?" his wife asked.

Rafi nodded his head slightly. Mrs. Braun called their son Eli. "Abba woke up!" she said. "Come! He wants you to read the *Megillah*."

Eli came and read. "What about *mishloach manos* and *matanos l'evyonim*?" he asked his mother afterwards.

"I gave already for Abba this morning," Mrs. Braun replied.

"Great!" said Eli. "I would check, though, that Abba fulfills the *mitzvah* that way."

"Why not?" asked Mrs. Braun. "Why is this different from any other *mitzvah* that an agent can do?"

"Abba was sedated and unconscious," replied Eli. "He didn't appoint you his agent."

Eli decided to ask Rabbi Dayan:

"Did my father fulfill the *mitzvah* while sedated? Must he give again now that he recovered consciousness?"

"Rav Yitzchak Zilberstein, *shlita* (*Chashukei Chemed, Megillah* 7b) addresses this question," replied Rabbi Dayan. "He cites from *Aruch Hashulchan* (O.C. 696:3) that when a person travels away from home, his family cannot fulfill *mishloach manos* for him without his awareness, but perhaps they can give *matanos l'evyonim* for him.

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לע"נ ר' שלמה ב"ר ברוך זוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

RENEGING ON RESPONSIBILITY, PART I

Q: Someone asked me to take a package overseas for him. After he gave me the package, I started to worry about taking responsibility for it. If I call him and tell him that I do not want to be responsible for it, to what extent will that limit my liability if something happens to it?

A: When you accepted the package (called a *pikadon*) from this person, you became a *shomer* (guardian) for the package. If you are not being paid to transport it, then you are a *shomer chinam*, and you are not liable if the object is stolen, and certainly not if an *ones* (circumstance beyond your control) causes the package to be lost or damaged. But you are responsible for loss if you are negligent in guarding it.

If you are being paid (with either money or something else of value) to transport it, you are a *shomer sachar*, and you are liable for theft or loss of the package as well (*Shulchan Aruch, C.M.* 185:1; see *Pischei Teshuvah, ibid.* 306:1). But even if you are being paid, if you stipulate that you are taking the package on condition that you are exempt from liability, even if it is a result of negligence, then that condition stands (*ibid.* 291:27, and 305:4).

There are several factors that we must determine in your specific case, however, given that you already accepted the package.

1. May you back out of an agreement to be a *shomer* once you have accepted the package?
2. Once you already have the package, does the owner's agreement to your stipulation indemnify you from liability?
3. In general, what level of liability do you have if you tell him, from the outset, "I am not accepting responsibility"?
4. If you are being paid, what are you liable for when you transport a package on an airplane?

We will answer some of these questions in this issue, and the rest next week.

1. Once someone gives a *pikadon* to a *shomer* for a specific amount of time, the *shomer* cannot force the owner to take it back before that time expires (*Shulchan Aruch, C.M.* 293:1, *Sma* 4). *Rishonim* (see *Rashba, Kiddushin* 13a) question this *halachah*, considering that any *po'el* (worker) is allowed to



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"Rav Zvi Pesach Frank, *zt"l* (*Mikraei Kodesh, Purim #39*), explains that *mishloach manos* is to engender good feelings between the giver and recipient, so that giving on behalf of someone who is unaware does not accomplish the purpose. However, *matanos l'evyonim* is for the poor people's benefit. Therefore, certainly if the family gave from the person's money he fulfills the *mitzvah*, and even if from their own, it is like they granted him the money and then gave it as his agents. Moreover, since *matanos l'evyonim* is like *tzedakah*, there is value in giving it in a discreet manner" (*Y.D. 249:6*).

"Nonetheless, Rav Zilberstein cites his father-in-law, Rav Elyashiv, *zt"l*, that a person who is sedated and unconscious is exempt from *mitzvos*, so that he does not fulfill the *mitzvah* in this state. Therefore, when he regains consciousness he should give *matanos l'evyonim* (or others should give again on his behalf).

"In truth we find that someone mentally incompetent fulfills giving *tzedakah* when poor people got their needs met from his money (*C.M. 290:15*). Similarly, Maharit (1:127) writes that *tzedakah* given from the assets of a child by his guardians, even without his knowledge, serves as a merit for him.

"However, *matanos l'evyonim* is a personal Rabbinic obligation on Purim beyond the regular *mitzvah* of *tzedakah*. Maharil therefore writes that a person cannot give the required *matanos l'evyonim* from *maaser* money" (*Magen Avraham 694:1*).

"This additional aspect of *matanos l'evyonim* cannot be fulfilled when unconscious," concluded Rabbi Dayan. "Therefore, he should give when regaining consciousness."

Verdict: A person can give *matanos l'evyonim* (not *mishloach manos*) for another who is unaware, but not for someone unconscious, who is exempt.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlitza

BAR METZRA #8 (Bordering Property)

Partner in Movable Items

לע"נ ר' יחיאל מיכל ב"ר חיים וזוג' ח'י בת ר' שמואל חיים ע"ה

Q: One of two partners in a truck wants to sell his share. Does the other partner have priority over outsiders?

A: *Bar-metzra* rights apply to real estate, not to movable items. Although Maharik writes that a partner, who is a high-priority *bar-metzra*, has priority rights even in movable items, Shulchan Aruch rules against him (*C.M. 175:51, 53; Sm"a 175:97*).

However, Rama rules that if *beis din* senses that the third party will not be a suitable partner, the remaining partner has *bar-metzra* priority to buy the other share, or even claim it from the outside party, since this is then what is "fair and good".

Shach (175:55) sides with the Shuchan Aruch. He further writes that if a lender sells a debt obligation at a discount, the borrower has no priority to buy it.

However, some write that if the remaining partner is in possession of the partnership item, or will suffer from the new partner, even the Mehaber would concede (see *Pischei Teshuva 175:24; Mas'as Binyamin #27; Mishpat Shalom 175:53*).



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withdraw from his commitment, even in middle of the originally agreed-upon term (see *B.M. 10b* and *C.M. 333:2*). Even if we consider this *shomer a po'el*, why can't he withdraw from his commitment to guard it?

Some answer this question by differentiating between a *shomer chinam* and *shomer sachar*.

The job of a *shomer sachar* is to actively guard the *pikadon* (see *ibid. 303:2*), which makes him a *po'el*, and he may therefore withdraw from his commitment at any time. But a *shomer chinam*, who is not required to actively guard the *pikadon*, only to put it in a safe place, is not a *po'el*, and therefore cannot renege on his commitment (*Machaneh Ephraim, Shomrim 38*, cited in *Nesivos 291:24*; see *Erech Shai 305:4*; but cf. *Aruch Hashulchan 291:19*).

Others write, however, that every *shomer* is in a worse position than a *po'el* because he obligates himself on two fronts: (a) to guard the *pikadon*, and (b) to pay if he was negligent if he was a *shomer chinam* or if it was stolen or lost if he is a *shomer sachar*. While he may renege on his commitment to guard the *pikadon*, he is not released from his liability (*Ketzos 74:1* and *293:2*; see *Chazon Ish, B.K. 23:26*).

2. **The** *poskim* deliberate what the *halachah* is if the *shomer* stipulated, *after* accepting the *pikadon*, that he is not responsible for loss or theft, and the owner agreed to his stipulation. Does that agreement stand?

Some say that such a stipulation is valid only if it was made before the *shomer* accepted upon himself to guard the *pikadon* (*Rema 344:1*, according to *Shach 305:3* and the *Taz*). Once he accepted the object, he is liable, and words alone cannot release him from responsibility; it would take a *kinyan* to negate it.

Other *poskim* rule that even after he accepted the *shemirah* upon himself with a *kinyan*, his stipulation is valid if the owner expressly agrees to it (*Ketzos 344:1*).

Others rule that in regard to a *shomer chinam* and *shomer sachar*, the owner's agreement to this stipulation is valid even after the *shomer* accepted the object, because his obligation to pay stems from the commitment to guard it, and if that commitment is nullified, then so is the obligation to pay.

A *sho'el* (borrower), however, is obligated to pay even for oness. His obligation to pay, then, is independent of his obligation to guard the *pikadon*. Therefore, even if someone stipulates with the owner of an object he borrowed that he is not liable for damages, loss, or theft, and the owner agrees, that condition would take effect only if they made a new *kinyan*. Otherwise, since it is already in the *sho'el's* possession, it is considered his, and it is as though his *own* object was damaged (see *Nesivos 344:1* and *Divrei Chaim, Shomrim 23*).

We will deal with the other questions and reach a conclusion in the next essay, iy"H.

For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, Please contact our confidential hotline at 877.845.8455 or ask@businesshalacha.com

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