

BUSINESS WEEKLY



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

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לע"נ הרב יחיאל מיכל בן ר' משה אהרן אורליאן



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

WRONG JACKET *Baruch Hashem*, the weeks after Tishah B'Av were busy with weddings. Rabbi Dayan was attending another wedding, that of Benzion and Achinoam.

The wedding was very joyous. Benzion's friends danced with vigor, till they dripped with sweat. Many of them removed their jackets and placed them on their chairs while they danced.

Zvi had sat next to David, and they both removed their jackets. While the waiter arranged the table during the dancing, he mistakenly returned Zvi's chair to David's spot, and David's chair to Zvi's spot.

At one point, the music picked up rhythm, and on each side of the *mechitzah*, the *chassan's* and *kallah's* friends began doing shtick.

Zvi and Benzion were known for their "bull-fighting" routine at weddings. Zvi ran back to his seat, grabbed his jacket, and returned to the center. He waved his jacket wildly as Benzion charged at him, and gracefully whipped the jacket around and sidestepped Benzion. The friends cheered with joy at their antics.

Benzion turned around, charging again. Zvi swirled the jacket and snapped it so hard that it tore. He hugged Benzion, and the dancing resumed.

Zvi went to return the jacket to his chair. David stood there with a puzzled look.

"You tore my jacket," David said. "You'll have to repair it."

"I didn't realize it was yours!" exclaimed Zvi. "Anyway, it was part of the wedding shtick. Things sometimes tear or get dirtied while dancing, and people don't make a fuss about it."

"I left the jacket safely on my chair," insisted David. "Why did you take it?"

"Someone must have switched the chairs," explained Zvi. "I grabbed the jacket from my seat. The jackets are almost identical; I assumed it was mine."

The two approached Rabbi Dayan. "*Yeyasher kochacha* on your dancing," Rabbi Dayan said to Zvi. "You were *mesamei'ach chassan v'kallah!*"

"Thank you," replied Zvi. "I mistakenly took David's jacket, though, which tore."

"Am I liable for the damage?"

"The *Mishnah* (B.K. 26a) teaches that a person who damaged is always liable, whether he damaged intentionally or not," replied Rabbi Dayan. "The *Gemara* (B.K. 26b; *Sanhedrin* 72a) adds that even if the person damaged through *ones* – not through his volition, he is liable.

DID YOU KNOW?

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

A FREE LUNCH?

Q: The shul where I am the *gabbai* generally holds a *kiddush* every Shabbos *mevorchim*. Several times a year, someone asks me to arrange a *kiddush* on an "off Shabbos" to mark a *simchah* or a *yahrtzeit*. All I have to do when this happens is call the caterer and ask him to deliver our regular *kiddush* package. He has the keys to our shul, and he comes on Friday afternoon and puts the food directly into his oven, which is always stationed in our kitchen, and ensures that it is set correctly.

On a recent Friday afternoon, when I arrived for *Minchah*, someone asked, "Who's making a *kiddush* this Shabbos?"

I had no idea what he was talking about, but when I went into the *kiddush* room, I found that the caterer had indeed delivered the *kiddush* package. At that point, it was too late to call him.

Amid speculation as to which shul was missing their *kiddush* food that had been delivered to our shul, we decided to serve it, knowing that the food would dry out and be inedible after Shabbos.

After Shabbos, I called the caterer and asked why he had delivered a *kiddush* package to us. "The takeout store was so busy on Friday," he explained, "that I couldn't remember whether you ordered a *kiddush*. I decided to send one to be on the safe side."

"What do we do about payment?" I asked.

"If you want you can pay me," he said, "and if not, don't."

Is our shul required to pay?

A: According to the letter of *halachah*, the shul is not required to pay a penny for the *kiddush*, but it is proper to make a partial payment, as we will explain. Let's begin with a similar *she'eilah* that was posed to BHI recently.

What happens if someone places an order for Shabbos food with a takeout store, and when the package arrives, they find some *cholent* or *kugel* in it that they hadn't ordered or paid for, and it is too



CASE FILE

"Nonetheless, *Tosafos* (B.K. 27b) writes that in 'circumstances beyond his control – *oness gamur*' – a person is not liable. Rama rules accordingly" (C.M. 378:1-3).

"One of the cases on which *Tosafos* bases this principle is that of heirs who slaughtered and ate a cow that their father left them, but which was actually borrowed (B.M. 112a). They are not liable for the full value as one who damaged, but only partial payment for what they benefited" (C.M. 341:4).

"*Machaneh Ephraim* (*Nizkei Mamon* #6-7) and *Imrei Yosher* (2:62) derive from this that a person who damages an item that he thinks is his – is not liable, since it is *oness gamur*" (see also *Ketzos* 25:1; *Minchas Pittim* 380:2).

"*Machaneh Ephraim* infers from the Rashba that he disagrees. *Nesivos* (126:6) and *Maharsham* (1:75) also write that a person who damaged an item he mistakenly thought was his – is liable, even if the true owner also mistook the item, since a person has a great responsibility to make sure that he doesn't damage. Elsewhere (232:5), *Nesivos* differentiates that the heirs had no way of knowing that the cow was not their father's, and is therefore considered *oness gamur*, whereas a person who thought that something was his could have checked" (*Pischei Choshen, Nezikin* 1:20[51]).

"*Rama* (378:9) does exempt one who damages unintentionally during wedding festivities," concluded Rabbi Dayan. "However, this seems limited to cases where the custom is to forgo such damage, or where there is an expectation of reciprocity, such as when people joust or dance together, but not in this case since David put his jacket aside."

Verdict: According to some authorities, Zvi is exempt, since he had no reason to assume that the jacket on his chair was not his. Others hold him liable since he could have checked.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
Dayanim (Judges) #10
Number of *Dayanim*

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

Q: How many *Dayanim* are required to adjudicate?

A: There is a dispute in the *Gemara* (*Sanhedrin* 3a, 5b) whether three *Dayanim* are required *mid'Oraysa* to constitute a *beis din*, or whether a single, learned individual can adjudicate regular monetary matters *mid'Oraysa*, and the requirement for three is Rabbinic (*Sma* and *Shach* 3:1).

In practice, only a *beis din* of three or more *Dayanim* can summon a person and require him to adjudicate before them (C.M. 3:1).

Nonetheless, the litigants can accept the authority of a single *Dayan* with a *kinyan*, and his judgment is then binding (C.M. 3:2).

If a single *Dayan*, or two, adjudicated without the litigants' acceptance of him, the judgment is invalid. However, if he was officially appointed by the government and/or the community, some say he can adjudicate (C.M. 3:2-4).

Although three *Dayanim* suffice, as is customary, a larger panel is viewed positively. There should be an odd number of *Dayanim*, though, to allow a deciding voice (C.M. 3:4; *Sma* 3:11).



BHI HOTLINE

close to Shabbos to call the store?

Clearly, the extra food does not belong to them, because they didn't pay for it.

If they are willing to eat it and pay for it, then since the food is meant for sale, they can certainly use it without notifying the store owner before Shabbos (*Shulchan Aruch, C.M.* 359, *Shach* 4; see BHI issue #440).

What happens if the customer does not want it, but realizes that it will be inedible after Shabbos, and the store owner will no longer be able to sell it?

The best thing to do in such a case is to try to sell it to someone who does want it. This is considered a fulfillment of the *mitzvah of hashavas aveidah*, because the store owner is spared from losing the monetary value of the food (ibid. 267:24, *Shach* 16, and 292:15-17). If selling it for its full price is not practical, he should sell it even for a discounted price or keep it for himself for a reduced price that he will negotiate with the store owner after Shabbos (the "discount price" for meat is generally about two-thirds of the regular price — see ibid. 341:4 — but the exact amount depends on what he would be willing to pay for the benefit he derived from the food).

In your case, however, *halachah* does not require you to pay at all.

The caterer acknowledges that he knew, from the start, that he might be delivering food that you never ordered, and he deemed the risk worthwhile because he was concerned that if you did order it and he didn't deliver, there could be serious consequences. Included in the risk he took was the possibility that if you had not ordered the food, it would be impossible for him to collect money from each participant for the amount of benefit he derived from the food he ate. You, as the *gabbai*, are certainly not responsible for the food, which you never ordered. His delivery of the food is therefore akin to a person who loses something deliberately (*aveidah midaas*), and it is considered *hefker* (ownerless; see *Nesivos* 261:1).

Specifically, in your case, where the caterer told you, "Pay whatever you want," he realizes that he doesn't have a valid claim against you. It is nevertheless proper to compensate him for some of the value of the food (see BHI issue #214, where we explain that even when handling public funds, it is still proper to act *lifnim mishuras hadin*, above the letter of the law).

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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