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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

TRIPPED OVER BRANCHES

Fall was turning into winter. The trees, which had turned flaming colors, were shedding their leaves and turning bare. Strong winds had broken some branches off the trees.

Mr. Stavsky raked the leaves from his property and gathered them in bags for collection by the sanitation department. He tied the broken branches together in bundles.

The evening before pickup, Mr. Stavsky placed the bags of leaves and bundles of branches at the curbside. Some of the longer branches jutted into the sidewalk.

In the morning, Mr. Harush was hurrying to work. He walked by Mr. Stavsky's house, but tripped over the branches and fell sprawled on the ground. He broke the fall with his hand, but sprained his wrist badly and tore his suit.

Mr. Stavsky saw this from his window and hurried outside. He helped Mr. Harush up.

"How could you leave your branches like that!" Mr. Harush screamed at him.

"I'm sorry you got injured," replied Mr. Stavsky. "I put the leaves and branches out for pickup today."

"I was heading to work," Mr. Harush grumbled. "That's not happening, though. Today will be the doctor, and then a few days recuperation. A new suit... You'll have to pay for this."

"You should have watched where you were walking!" replied Mr. Stavsky. "I'm willing to ask Rabbi Dayan about my liability, though."

Mr. Stavsky called Rabbi Dayan and asked:

"Am I liable for Mr. Harush's injury and the damage to his suit?"

"A stationary obstacle left in a public area has the status of *bor* – a pit," replied Rabbi Dayan. "It is subject to the laws of this category of damage" (*C.M.* 411:1).

"A person who digs a pit, or leaves an obstacle in a public area, is liable for physical damage it inflicts on a person" (*C.M.* 410:20).

"The *Gemara* (*B.K.* 27a) teaches that even if the victim stumbled over the obstacle in broad daylight, the person who placed it is liable, since – unlike animals – people look forward when walking, not downward, so that they are not always aware of obstacles in their path" (*C.M.*412:1; *Sma* 410:33).

"Furthermore, the *Gemara* (*B.K.* 30a; *B.M.* 118b) teaches that even during seasons when it is permissible to place trash out in public areas, the owner remains responsible for it, and is liable if it caused injury. Thus, although the branches were set out on collection day, this does not exempt Mr. Stavsky from liability

DID YOU KNOW?

Vendor agreements can have clauses that may be ribbis but can often be corrected with halachic guidance.

Ask your Rav or email ask@businesshalacha.com for guidance and solutions.

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

WHEN DID THE DAMAGE OCCUR?

Q1: I bought a new device, which proved to be defective. I don't know whether the malfunction occurred before or after the sale. If it was delivered dead, the seller must return my money. But if it malfunctioned on my property, I have no claim against him.

What is the *halachah* if we can't verify when it broke?

Q2: I borrowed a gown for a future *simchah*, and when I took it out of my closet to put it on for the *simchah*, I noticed a huge tear.

What is the *halachah* if we can't determine when this tear occurred?

A. Although these two cases seem similar enough, the *halachah* differs, as we will explain.

In regard to the case of a purchased device that is defective, and it is uncertain when it became a defective, there are two *halachos* that seem to contradict each other.

On one hand, we find that if someone bought an animal that was found to be a *treifah* when it was *shechted*, we rely on a *chazakah* that the animal was healthy before it was sold, and since the blemish was first discovered after the buyer took possession of it, he must prove that the blemish predated the sale. If he can't prove it, the sale is final. Even if the buyer hasn't paid for the animal yet — which makes him the *muchzak* (holder) of the money, so we might think that the seller has the burden of proof under the rule of *hamotzi meichaveiro alav haraayah* — he is still obligated to pay (*Shulchan Aruch* 332:11).

On the other hand, we find that if someone bought cheese, and when he opened the package he discovered that the cheese is moldy, and it is impossible to tell whether it spoiled before or after it was sold, the *halachah* follows the principle that *hamotzi meichaveiro alav haraayah* (the burden of proof is on the person who is not currently holding the money). If the buyer hasn't paid yet, he is not obligated to pay

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when they jut out" (*C.M.* 412:5; 414:2; 417:6-7; *Pischei Choshen*, *Nezikin* 8:38).

"However, *Halachah* holds the owner of the obstacle liable only for *nezek* (permanent physical damage, disability). The additional four payments imposed on one who actively injures another – *tzaar* (pain), *ripui* (medical costs), *sheves* (lost wages while recuperating), and *boshes* (embarrassment) – are not imposed on the owner of the *bor*" (*C.M.* 420:3; *Pischei Choshen*, *Nezikin* 7:[8]).

"Furthermore, the liability of *bor* is when the victim was injured by the obstacle itself, similar to one who was injured when falling into a pit, but if he tripped on the obstacle and was injured by the surrounding, ownerless, ground – according to many authorities the owner is not liable" (*C.M.* 411:1; see *Gra* 411:5).

"Finally, *Halachah* exempts damage to inanimate items by *bor* or other obstacles. Thus, although Mr. Harush tore his suit, Mr. Stavsky is not liable for it" (*C.M.* 410:21; 412:5).

"Nonetheless, the *Gemara* (*B.K.* 29a; 56a) indicates that one who maliciously placed an obstacle outside is *chayav b'dinei Shamayim* even for damage to inanimate items," concluded Rabbi Dayan. "If he did not intend to damage, but was negligent, it is questionable whether there is a moral obligation" (*Chazon Ish, B.K.* 2:7; *Pischei Choshen, Nezikin* 1:[1]; 9:[53]).“Thus," concluded Rabbi Dayan, "although Mr. Stavsky remains liable for the branches that he placed at the curb, the practical liability of *bor* is significantly limited in *Halachah*. City law and homeowner's insurance, though, will likely operate differently."

Verdict: A person who puts branches at the curb carelessly remains liable for the damage they cause, but with limitations of *bor*.

MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS
***Dayanim* (Judges) #22**
Compromise After Ruling

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

Q: Can beis din advocate a compromise after rendering their decision?

A: After the *dayanim* rendered their verdict, they may not advocate compromise, even if they were initially authorized to compromise, nor should they say that perhaps they erred and the ruling might be overturned. Some disallow this once the *dayanim* reached a conclusion, even if they haven't issued the verdict to the litigants; others disagree. Another person, though, can advocate a compromise outside of *beis din* (*C.M.* 12:2; *Sma* 12:10; *Shach* 12:4; *Pischei Teshuvah* 12:4).

Moreover, some maintain that this is only if *beis din* pressures the litigants to compromise, but if they gently persuade them and explain the nature of the compromise, it is allowed; others disagree. Some add that *beis din* can state that Torah law is as they ruled, but it is still fair and proper to compromise under the particular circumstances (*Shach* 12:6; *Pischei Teshuvah* 12:5; *Moznayim L'mishpat* 12:4; *Mishpetei Tzedek* 12:2, s.v. *aval*).

To prevent swearing, *beis din* can advocate a compromise even after ruling to require an oath (*C.M.* 12:2; *Shach* 12:7).

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(ibid. 332:16), and we do not say that since the uncertainty arose once the item was in his possession, he is required to pay.

The *Sma* (ibid. 35) explains the difference between these cases. An animal that appears to be healthy has a *chazakah* that it is not a *treifah*, and that *chazakah* is valid until it is proven otherwise. Since cheese will eventually spoil, it does not have such a *chazakah*, and the *halachah* therefore follows the rule of *hamotzi meichaveiro alav haraayah* (see also *Shev Shmatasa* 2:9).

Returning to our cases, when someone buys a new device, the *chazakah* is that it left the factory in working condition. If the item didn't work immediately upon arrival, in which case it is impossible that it was damaged by the buyer, the transaction is null and void (*Pischei Choshen, Geneivah* ch. 12, fn. 83; see BHI issue #501). If it did work when unboxed, and then stopped working, we assume that it became defective in the buyer's domain. Therefore, unless the buyer has proof that it was delivered defective, he is obligated to pay (*Shu"t Netzach Yisrael* 51). [If the item has a guarantee it would obviously cover such a case as well; see also BHI issue #117).]

Now let's consider the second case, in which a borrower is uncertain if the gown she borrowed was torn before she borrowed it. Generally speaking, a *shomer* (guardian, which includes a borrower of an item) who wants to be absolved from paying for damage to the borrowed item must verify his claim by taking an oath that the item was damaged in a fashion that exempts him — e.g., it broke as the result of normal use (*meisah machmas melachah*; see *Shach* 291:44 and 340:7). But if it is uncertain that he ever accepted responsibility as a *shomer* — i.e., it is unclear whether the item was in working order when he received it — he is not obligated to take an oath (*C.M.* 296:4).

Accordingly, in our case, since it is uncertain whether the gown was torn before the borrower took possession of it, the *halachos* of *shomrim* would not be relevant.

We must still consider, however, that perhaps since the defect was discovered in the borrower's possession, it happened after she received it, as explained earlier.

But Tosafos (*Chullin* 51a, s.v. *Hamotzi*; and *Niddah* 58a, s.v. *Ul'inyan*) write that when someone borrows something, it is not considered to be in his possession; it remains in the possession of the owner. Therefore, the uncertainty did not arise in the borrower's possession.

The *poskim* deliberate whether or not we rule according to *Tosafos* (see *Shaar Mishpat* 72:25; *Nachal Yitzchak* 72:32, 2). Consequently, the borrower would not be obligated to pay (*Maharsham* 6:237).

Certainly in our case, where the gown does not have a *chazakah* of being in perfect condition, since it is not brand new, the burden of proof would be on the owner of the gown, who is the *motzi*.

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