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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

TOOL LIABILITY

Mr. Eisner ran a tool *gemach*, lending tools out for use. People would occasionally return the tools broken. Sometimes this was due to misuse, but sometimes through normal use or regular wear and tear.

"I'll repair or replace the tool," some people offered. "I'm sorry it broke."

"I shouldn't have to pay," claimed others. "I used the tool normally!"

"I'm willing to pay partially," yet others stated. "The tool was old."

These incidents led to discussions and sometimes arguments with the borrowers, which Mr. Eisner often found unpleasant. "You need to have a clear agreement beforehand," Mrs. Eisner urged her husband. "Better to be upfront and cover yourself. Whoever wants to borrow – is welcome to do so under those terms!"

Mr. Eisner drafted a terms-of-use agreement, in which he wrote:

1. Borrower is fully responsible for damage to the tool, regardless of reason.
2. Borrower must either pay for repair, when possible, or pay for replacement tool.
3. Lender carries no legal liability for any damage done through use of the tool.

He showed the terms-of-use to his wife. "What do you think?" he asked.

"Seems fine to me," she said. "But check whether this is halachically valid. Also, whether the borrowers have to sign on this."

"I can have them sign," replied Mr. Eisner. "Anyway, it's good to have them sign to cover myself legally. Without a signed agreement, someone can always claim that I didn't clarify the terms with them."

Mr. Eisner arranged to meet with Rabbi Dayan. He showed him the terms-of-use agreement, and asked:

"Are these terms acceptable and binding according to *Halachah*? Do the borrowers need to sign?"

"The *Gemara* (*B.M.* 94a) teaches that a *shomer* – guardian – can stipulate and accept responsibility as a *sho'el* – borrower, who is liable even for *oness* – uncontrollable circumstances," replied Rabbi Dayan. "Although the Torah provides default liabilities for guardians, it is possible to increase or decrease their liability" (*C.M.* 291:27; 305:4).

"According to many authorities, this is based on the principle that in most contractual

BHI HOTLINE

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

WHOSE BENEFITS?

Q: Before Pesach, I received money from a *kimcha d'Pischa* fund. The organization that sent me the money is run by several *gabba'ei tzedakah*, led by a certain *askan* who raises a huge sum of money and then distributes it to those he thinks are needy. This *askan* apparently decided that I need money, so he sent me a check. In reality, I am *baruch Hashem* financially stable, and I certainly am not an *ani* (poor person) who should be supported by *tzedakah* funds.

My question is: Am I allowed to keep the money and distribute it to needy friends or relatives, or am I required to return the money to the *askan* and explain that I'm not needy?

A: The answer to this question is rooted in the concept of *tovas hanaah*, which refers to a side benefit that someone derives from a transaction. For instance, when someone has *matnos kehunah* (the gifts given to a *Kohen*), he is entitled to give it to a *Kohen* of his choice, and he may even gain financially from that choice. (For instance, if a *Kohen's* maternal grandfather is a Yisrael, and he is willing to pay this person a small amount to give the *matnos kehunah* to his grandson, the giver is allowed to accept that payment.)

The same is true for *maaser* and *tzedakah* money. A person may give them to the poor person of his choice, and he may derive *tovas hanaah* from giving it to a specific cause.

There is a dispute in the *Gemara* and among the *Rishonim* whether *tovas hanaah* has monetary value. There are several consequences to this dispute.

The Rema (*C.M.* 37:9; 203:1; 276:6; and see *Shach* 250:1 and 87:82) rules that *tovas hanaah* does not have monetary value. Accordingly, as long as the item that bears *tovas hanaah* is in a person's possession (or in the possession of his heirs), the right to give that item to a person of his choice belongs to the holder. But if he deposited his *maaser, tzedakah,* or the like with someone else, he may not demand that the person return it so that he can distribute it. Since it has no monetary value it is not considered a monetary claim. Therefore, the person

CASE FILE

monetary matters people can agree to terms not warranted by the Torah. Rabi Yochanan maintains that a verbal stipulation suffices and the *shomer* does not even need a *kinyan* here" (see *Sma* 301:7).

"Regarding a borrower who accepts additional liability for *meisah machmas melachah* – damage ensuing from routine use, *Ketzos Hachoshen* (340:1) cites seemingly opposing opinions whether a verbal stipulation suffices, since such liability does not exist elsewhere in the framework of *shomrim*. Due to this dispute, Ketzos rules that the borrower would be exempt unless he had made a *kinyan*.

"However, Nesivos (340:2) maintains that a verbal commitment suffices. He explains that any person who damages through his actions is liable. Nonetheless, the borrower is exempt for damage through routine use because of the lender's permission to use the item in this manner, and the inherent, implicit exemption if such damage occurs. However, if they stipulated that the borrower will be liable – he reverts to be like any other person who is liable also for such damage.

"Aruch Hashulchan (*C.M.* 340:7; 291:57) rules like the Nesivos, provided that the stipulation was made when initially borrowing the item; the borrower enters the *shemirah* with a greater responsibility. However, if he agrees to accept the additional liability only after borrowing, he requires a *kinyan*.

"Nonetheless, one who damages is liable only for the current value of the item. Replacement value possibly enters the realm of *asmachta* – insincere or exaggerated commitment, which certainly requires a *kinyan*. Some maintain, though, that if replacement value is within reasonable realm, it is not considered *amsachta* (see *Rema, C.M.* 207:13; *Pischei Teshuvah, E.H.* 50:9; *Gray Matter*, vol. 4). A signed document is likely considered *kinyan situmta* nowadays" (see *Pischei Choshen*, *Kinyanim* 10:[3]).

"Thus, these terms are valid," concluded Rabbi Dayan, "but the borrowers should sign, especially if you want replacement value."

Verdict: A borrower can accept responsibility also for *meisah machmas melachah*. According to most *poskim*, even a verbal stipulation beforehand is binding. Replacement value might require a *kinyan*.

MONEY MATTERS

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***Dayanim* (Judges) #46**
Restoration of *Semichah*

Based on writings of Harav Chaim Kohn, shlita

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

Q: Is it possible to restore ordination of Dayanim semuchim nowadays?

A: We mentioned, at the beginning of the series, that *Dayanim semuchim* – who are authorized to rule in all areas of Torah – were those formally ordained in Eretz Yisrael in an unbroken chain from Moshe Rabbeinu. This ceased about 1,800 years ago, due to persecutions.

Rambam (*Mishnah Sanhedrin* 1:3; *Hil Sanhedrin* 4:11) suggests that if all the *chachamim* of Eretz Yisrael would agree to appoint *Dayanim* and grant them *semichah*, the chain of *semichah* can be renewed; in this manner *Sanhedrin* will be restored before the coming of Moshiach. He acknowledges, though, that *Am Yisrael* is so scattered that it is almost impossible for them all to agree.

About 500 years ago in Tzfas, Mahari BeRav gathered the Sages of his time who granted him *semichah*. He subsequently granted *semichah* to four of his *talmidim*, including Rabbi Yosef Karo, the author of the *Shulchan Aruch*. However, his initiative drew objection from the Rabbanim of Yerushalayim, headed by Maharalbach, and it was discontinued.

We look forward to the complete redemption and the restoration of *semichah* and the *Sanhedrin*.

BHI HOTLINE

with whom he deposited it may distribute it (ibid. 276:6, as explained in *Shach* 4).

The *Ketzos Hachoshen* (ibid. 2), based on *Shelah*, rules that *tovas hanaah* is not even inherited. Only the person who actually set aside the *tzedakah* (or the like) — which means that he has the *mitzvah* to distribute it — is entitled to choose to whom to give it, and therefore owns the associated *tovas hanaah*. His heirs, on the other hand, have no right to be selective; they are required to distribute it to the first needy person who requests it.

The *Ketzos* adds, however, that a *gabbai tzedakah* who receives money to disburse is different. Although he was not the person who designated the charity, he does have the right to choose to whom to give it, because he acts as an agent of the people, the donors, and therefore has the right to choose to whom to give it (see *C.M.* 37:9).

Applying this principle to your *she'eilah*, the *gabbai* of the *tzedakah* fund has the rights to the *tovas hanaah* and may therefore choose to whom to distribute it — not because it's his own *tzedakah*, but because he receives those rights from the people who gave him the money to distribute.

Had those funds never left his hands — for instance, if he sent checks to each recipient — then if the money is still in the bank account of the *tzedakah* organization, you may not take away the *gabbai tzedakah*'s rights to the *tovas hanaah*. You are therefore not allowed to deposit the check or cash it in order to give the money to a needy recipient of your choice.

But if you received cash from the *gabbai tzedakah*, even though he sent it to you based on an erroneous assumption, it is subject to the above dispute. Since it is in your hands, according to the *Shach*'s explanation of the *Rema*, the *tovas hanaah* now belongs to you and the *gabbai tzedakah* has no right to demand it back. It is possible that according to the *Ketzos*, however, he may demand the money back so that he can have the *tovas hanaah*.

There are numerous other factors to take into account, however.

Some *poskim* maintain that even the *Shach* ruled only that *beis din* can't *force* a person to return *tovas hanaah* that is in his possession erroneously, because it is not a monetary claim, but he is nevertheless halachically obligated to do so (*Ulam Hamishpat* 276:6, who proves this from *Nedarim* 36b).

On the other hand, the specific circumstances may alter the *halachah*. At times, the donor has no interest in the *tovas hanaah* from the recipient, and doesn't care if the recipient gives it to a needy person of his choice. Similarly, the *gabbai tzedakah* might have wanted the recipient to express *hakaras hatov* (appreciation) for being thought of, and he receives that *hakaras hatov* even if that recipient does not really need the money and passes it on to someone else.

Therefore, each case must be examined on its own merits by a competent Rav.

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