

# 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

### HUGE WAVE

Boruch was visiting Israel and got together with some of his friends. They decided to take advantage of the separate beach in Ashdod, and planned to meet there one Friday afternoon.

"What should we do with all our stuff?" Boruch asked. "We have our phones and I'm not happy leaving mine unattended."

"The truth is," said Ezra, "I'm not planning to go into the water. I can watch your stuff."

"Why not?" Boruch encouraged him. "We can take turns. You don't have to lose out!"

"Thanks for considering me!" laughed Ezra. "But sea water burns my eyes, and I don't want to enter Shabbos with my eyes burning. You can enjoy yourselves in the water; I'll occupy myself meanwhile on the beach."

The boys gave Ezra their phones and other stuff, and headed towards the water.

Meanwhile, Ezra found himself a spot about fifty feet from the water's edge, leaving distance from where the waves reached. He wrapped all the items in a towel and started making a sandcastle. He was enjoying himself, making moats, turrets, and "bridges" out of twigs that had washed up.

The wind began picking up a little. The waves moved slightly up the beach, but still not near where Ezra was.

Suddenly, Ezra heard a lot of shouting from the water. He turned around and saw a huge wave heading quickly towards him!

Before Ezra knew it, the wave hit the beach and crashed against the shore, spreading up the sand sixty feet. It saturated the towel and unfurled it, sopping the phones with seawater. One was even washed back into the sea.

When his friends returned from the water, Ezra didn't know what to say.

"Why were you so close to the water's edge?!" said the one whose phone was washed away.

"I was far enough from regular waves," replied Ezra.

After Shabbos, the boys met Rabbi Dayan and asked:

**"Is Ezra liable for the phones?"**

"The primary difference between a *shomer chinam* and a *shomer sachar* – explicit in the *pesukim*," replied Rabbi Dayan, "is liability for theft".

"The *Gemara* (B.M. 93b) introduces another difference, relating to the degree of guarding. A *shomer chinam* suffices with guarding in a manner sufficient under routine conditions,

### 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](mailto:ask@businesshalacha.com)  
for guidance and solutions.



## BHI HOTLINE

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

### OVERPAID

**Q:** I recently got a new job, and I was supposed to be paid a certain amount per month. When I received my paycheck at the end of the month, I realized that there must have been a misunderstanding between me and my employer, leading him to overpay. I called the secretary, and she confirmed that my employer was under the impression that he had paid the correct amount.

Am I obligated to let my employer know about the mistake?

My question applies to both this past month and the future.

**A:** We will first address the salary you were already paid, and then move on to discuss the future.

The *poskim* discuss a case in which someone sends a *shaliach* (agent) to hire workers for four (coins), and the agent hired them for three. The *halachah* is that although the work they did is usually paid at a rate of four coins, since they accepted the job at a price of three coins, they are entitled to only three, and it is as though they were *mochel* (forgave) the additional payment (*Shulchan Aruch, C.M. 322:2*).

Generally, *mechilah* is forgiveness of an existing obligation. In this agreement, however, the employer never became obligated to pay more than the lower amount, because the work was done at that rate willingly. This *mechilah* is therefore considered better than most; whereas a *mechilah b'lev* (in one's heart – i.e., not expressed verbally) is normally the subject of a dispute as to whether it's a valid *mechilah* (see *Ketzos Hachoshen 12:1*), in this case a *mechilah b'lev* would be valid (see *Chiddushei Rabi Akiva Eiger, B.M. 76a; Nesivos 12:5; Chazon Ish, Even Ha'ezer 58:5*).



## CASE FILE

whereas a *shomer sachar* is expected to guard in a heightened and active manner, considering even non-routine circumstances that are not yet *oness*" (*Nesivos* 291:24,30; *Pischei Choshen, Pikadon* 2:2[5])

"Thus, if a *shomer chinam* left an animal in a barn with a door that can withstand normal wind, but not unusual wind, and a storm wind opened the door and the animal went out and damaged – he is exempt, whereas a *shomer sachar* is liable" (*C.M.* 396:8; *Rabi Akiva Eiger, C.M.* 303:2).

"Similarly, if a *shomer chinam* left a flock unattended for a short time, as is customary for shepherds to leave, e.g., for a lunch break – he is exempt, whereas a *shomer sachar* is liable" (*C.M.* 291:12; 303:10).

"Similarly, if a *shomer chinam* crossed animals over a bridge and one knocked another off – he is exempt, whereas a *shomer sachar* is liable, since he could have crossed them one by one" (*C.M.* 303:11).

"In our case, as well," concluded Rabbi Dayan, "since Ezra placed the phones at a distance sufficient for routine conditions – he is exempt, since he is a *shomer chinam*.

"With this, we would like to return to the article, 'Confiscated Calculator' from two months ago, about a teacher who left a confiscated calculator in the trunk of his car overnight. We ruled that he is liable, since leaving items in a trunk overnight is not a normal manner of guarding. However, perhaps this suffices for a *shomer chinam*, since, under routine circumstances, it is rare to break into trunks."

**Verdict: A *shomer chinam* is exempt if he left the item in a manner secure under routine conditions, whereas a *shomer sachar* is required to guard in a heightened and active manner, and consider even unusual circumstances.**



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

**MONEY MATTERS**  
Yored L'sedei Chaveiro  
Property #7 Taking Away  
the Enhancement

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

**Q: My neighbor complained that my kids' bikes littered my yard. One day, I saw that he set up a prefab shed in my yard. When I asked him about it, he said that he was going to remove it. Can he?**

A: The enhancer cannot remove the enhancement against the owner's will if doing so will weaken the owner's property, such as if he planted trees (*C.M.* 375:2)

However, if he built something and wants to remove his structure, he can, since this will not weaken the property (*C.M.* 375:6).

Nonetheless, if the owner already indicated interest in keeping the enhancement and paying for it, he acquired it through *kinyan chatzer* so that enhancer cannot take it back. Similarly, if the property is certainly fit for such enhancement, just as the owner cannot say "remove your wood and stones," so, too, the enhancer cannot say that he will take it, since he made the enhancement with intent to leave it there (*Rema, C.M.* 375:6-7; *Sma* 375:13-14; *Gra* 375:17; *Aruch Hashulchan* 375:11).



## BHI HOTLINE

We discussed in the past (Issue #400) that if a *shadchan* agreed to arrange a *shidduch* for free, and now changed his mind and wants to be paid, he is not entitled to demand payment. Although his work has great value, there is no obligation to pay for it because his work was done as a gift. Furthermore, even if he didn't express clearly that he was planning to do it for free, but that is what he thought, he is not entitled to charge for his services. If he does demand payment, it is considered theft, because the two sides are paying him only because they were under the impression that they are obligated to do so. He must therefore inform them that they are not *obligated* to pay, and if they want to pay nonetheless, it is considered a gift, which he may then accept (*Pischei Choshen, Sechirus* 8:[65]).

Your *she'eilah* appears to be similar to this case, at least in regard to the month you already worked, so you would be required to return the additional money you were paid. Even if the work you did was worth the actual amount you were paid, when you agreed to work for less you were *mochel* the difference, and you are therefore not entitled to it.

As for the future, you may decide that you are only willing to continue working for the amount he thought he had to pay you. You may make this stipulation even if stopping your work now would cause a major loss to your employer (*davar haavud*; see *Choshen Mishpat* *ibid.*); since he thought he had to pay that amount to begin with, he isn't truly taking a loss.

If you are concerned that if you inform the employer that he overpaid, he will not want to pay you the same amount in the future, you may return the money in a way that he won't know that it came from you as repayment of the extra wage he paid you, or you may compensate him by working extra hours for that additional money (see *Sema* 232:7).

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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