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'ORDER IN THE COURT!': IS THERE?

The Din Torah process in contemporary times

Adapted from a Shiur by Dayan David Englander

It is not uncommon for people to question the *Bet Din*'s procedures, action, and motives, especially when they are first exposed to a *Bet Din* as a party to a case. The first step toward understanding how and why a *Bet Din* acts is to attempt to see things from the perspective of a neutral party. As simple as this may sound in principle, it is quite difficult to put into practice.

A *Bet Din* is duty-bound to resolve the matter without unnecessary delay. But for proper resolution, both sides must appear in court to present their case in the presence of each other. For this purpose, the *Bet Din* will summon the opposing party to appear so they may address the claim.

When one turns to a *Bet Din* to resolve a claim, it will summon the defendant to appear before the court to address the plaintiff's claims.

Essentially, a *Hazmana* is but a relaying of the *dayan's* order to appear and respond to a claim. In *Parashat Korah*, Moshe sends a messenger to summon Dattan & Aviram to appear before him. From here the *Gemara* derives the proper procedure of summons to *bet Din*. To avoid the appearance of partiality toward the plaintiff, a *Shaliah* – an emissary – rather than the *Dayan* himself, will approach the defendant in person and summon him in the name of the *Dayan* or *Bet Din*.

In our day, instead of a messenger, the custom of *Batei D*in is to issue a *Hazmana* writ and to rely on the postal authority for delivery. Some *Batei Din* still will attempt to ascertain that the written *Hazmana* arrived at the correct address.

Prior to issuing the *Hazmana*, the *Bet Din* needs to hear some facts about the case for a number of reasons.

Firstly, the *Hazmana* must include the name of the *tovea* (plaintiff), and the basic subject of the case. A defendant must be informed who is making the claim against him so that he may seek resolution or prepare a defense.

Sometimes, the *Bet Din* will require that the *Hazmana*h must specify the amount or the item being claimed, so the defendant can choose to pay up to avoid the indignity of going to *Bet Din*.

The *Bet Din* must also make sure that the plaintiff has the authority to make the claim.

The *Bet Din* may also want to be sure that the case is appropriate for this *Bet Din*. Imagine if, at some point in the *Din Torah*, a litigant were to discover that one of the *Dayan*im also provides kashrus certification to a business owned by his opponent! A *Bet Din* must be careful to avoid even the appearance of partiality. In such a case, they may be referred to a different *Bet Din*.

The *Hazmana* process has a built-in schedule to ensure that it is followed up with. Each *Hazmana* features a date and time, usually about ten days from when it is being sent. If no response is received by the end of the time of the appointment on the *Hazmana*h, a second *Hazmana*h can be sent out.

Although the recipients are obligated to comply with the first *Hazmana*, the prevailing custom is that the *Bet Din* sends a second and third *Hazmana* before declaring him in contempt. But it should be noted that one is still not permitted to simply thumb his nose at *Bet*

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Adapted from a Shiur by Rav Yosef Greenwald on Parashat Mishpatim

Who's Boss: Eved Ivri and The Torah's Message for Employees

והגישו אדוניו אל האלוהים והגישו אל הדלת או אל המזוזה ורצע אדוניו את אזנו במרצע ועבדו לעולם

(שמות כא:ו)

Halacha recognizes two types of workers:

– Employee paid by the hour, e.g., an office manager hired for a 9-5 job

– Employee paid by task, such as a contractor hired to build a deck

The *Gemara* (77b-78a) rules that a worker may sometimes quit a job after beginning it due to the principle of stated concerning — we are servants to Hashem, and not to other humans.

He may quit even in the middle of the day.

He must be paid for the work that he did already.

If his leaving will cause a loss (e.g. a time sensitive job for which there is no one else to replace him), he may not quit.

A contractor may generally not retract without completing the job.

If the

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spotlight

Session II in Halacha Seminar Series for Attorneys

What language in a document makes it enforceable in Bet Din?

These and other business Halacha questions related to the real estate industry were the focus of the second shiur in the Bet HaVaad series for lawyers presented by Dayan Shmuel Honigwachs.

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GENERAL HALACHA

THE HEART OF THE MATTER: Intent in Business Halacha

By Rav Yehonatan D. Hool – Bet HaVaad, Yerushalayim

The Torah discusses the garments that the *Kohanim* wore in their service in the *Mishkan*. The *Gemara* (Zevahim 88b) explains that each one of the garments that the *Kohanim* wore atoned for a different sin. The *Gemara* relates that the *Hoshen HaMishpat*, the breastplate, atoned for erroneous judgments. The *Kli Yakar* (28:15) explains that in every judgment, in addition to the evidence involved, the judge must use his intellect and powers of assessment and evaluation to come to a decision. In Torah literature, it is the heart of the *Dayan* in which the deliberation relating to judgment takes place. It is for this reason that the breastplate, which atoned for erroneous judgment was worn on the heart.

In fact, in every financial transaction between two or more parties, the intent of each party is a crucial element of the overall operation. Sometimes, a limiting condition is explicitly expressed, and other times, the transaction may be bound by certain conditions which, though not expressed explicitly, will nonetheless be implicit and self-understood.

This week's journal will focus on the *Halachic* principles of conditions, assumptions, and circumstantial evidence.

TORT LAW VS. CONTRACT LAW

Generally speaking, a person's financial and monetary activities can be categorized under one of two groupings – those that involve the actions and intentions of one party, and those that involve the actions and intentions of two or more parties. Stealing or causing damage, for example will fall under the first category, whereas loans, buying and selling and employment fall under the second.

The Torah provides detailed laws for both of these sets of circumstances, but there is a fundamental difference between the two. In situations that involve an agreement between two parties, the *Halacha* recognizes that the intentions of the parties constitutes an important part of their mutual commitments. The *Halacha* provides a default position for the law but allows much leeway for the two parties to adapt their agreement in ways that will influence the *Halachic* effect of the agreement. For example, the Torah forbids one to overcharge another when selling him something. If the buyer is overcharged more than a sixth of the value of the item being sold, he may invalidate the sale. However, if at the outset the two parties agree that they forgo their rights in this respect, the *Halachot* of *Ona'ah* – overcharging or underpaying – do not apply.

OWNER IS THE RULER OF THE ASSET

Rav Abramski elucidates this point as follows:

"It is a fundamental rule in the Torah's financial laws, that a person is the sole ruler over his financial assets. Neither the law nor the judge can dictate the fate of his money. This is the way of our holy Torah – ownership belongs solely to the titleholder. This fundamental strand runs through the issues of a person's financial activities as a red thread runs through a white cloth. An individual is the sole decider over his property and assets, to the full extent of the law."

IMPLICIT VS. EXPLICIT

How then does one adapt a situation in order to change the legal effect of one's actions?

The simplest way to do so is to express explicitly a condition at the time of action. For example, someone sells an item to his friend, and says to him, *"I am selling this to you on condition that although I am overcharging you by $100 you will have no claim against me."* In such circumstances- even if it turns out that he has overcharged- the buyer, who agreed to the condition, will have no recourse in *Halacha*.

There are, however, rules as to how to express this condition in order for it to be effective. For example, *Tenai Kafful* – the condition must be stated both ways – *"If "x" occurs then the sale should be valid, but if "x" does not occur then the sale should be invalid."* Another example – the condition should be mentioned before the effect.

These rules are collectively known as "*Mishpete HaTena'im*," and they are required for all *Kiddushin* and *Gittin* (marriage and divorce) that are made upon precondition. When it comes to monetary matters, however, there is a difference of opinion amongst the *Rishonim* if these rules are required. Although the *Rambam, Rabbenu Tam* and the *Rosh* require *Mishpete HaTena'im* for financial transactions too, the *Tur* (241) quotes Rashbam and some Geonim as ruling that these rules do not apply.

The *Netivot HaMishpat* (207:1) quotes *Ateret Zvi* (which in turn is based on the *Sefer Bet Hillel*) as deciding that in monetary transactions that are conditional, *Mishpete HaTena'im* are not required; it is sufficient to declare the condition at the time of the transaction for the transaction to be conditional. The *Mishpat Shalom* explains that the *Mishpete HaTena'im* can be complex and difficult to apply. Furthermore, most people are not aware of them or the correct way to use them. If we were to insist on these rules then it would make it very difficult to make everyday transactions conditional. Thus it has been accepted to adopt the opinion of the *Poskim* who do not require *Mishpete HaTena'im* in financial transactions (*c.f. Aruch HaShulhan* 207:6). Nonetheless, in real estate transactions which have conditions attached, it is customary to write in the contract that all the conditions mentioned were affected in the most effective way possible according to *Hachamim*.

"UMDENA" – A COMPELLING PRESUMPTION

Taking this concept of conditional transactions further, one may be able to restrict the effect of a transaction even without actually expressing a condition. If it is absolutely clear to all that one intends to act only because of certain circumstances, then if the circumstances change in a way that makes the transaction unnecessary or undesirable, one may retract from it.

For example, a man is on his deathbed, and he gives away all his possessions to others. He then recovers and returns to his normal activities. He may retract from all the gifts that he gave away, even if he performed valid *Kinyanim (binding transactional acts)* for all of them, because it is clear to all that he only gave everything away because he thought that he was going to die. As such it can be considered as if he declared explicitly that the gifts are being effected on condition that he does not recover. Thus, if it transpires that he does recover, he may retract from the gifts.

Situations such as this, that create presumptions based on what would be clearly evident to all independent observers, are called "*Umdena*." [In order to oblige someone to pay out money, though, the *Umdena* has to be a compelling presumption beyond any doubt.]

As a result of the above, sometimes an agree-

ment or transaction will include implicit clauses that were not explicitly stated by the parties but are automatically assumed. For example, if everyone in this place/town/country agrees to such conditions, they are assumed to be agreed upon unless stated explicitly otherwise. Thus, with regard to employer-employee agreements, the local custom is binding unless agreed otherwise. So for example, if the local law provides for a payment of severance pay in the event that the employee gets fired, this becomes obligatory in Halacha too, because we assume that both parties to the contract agree to the terms of employment as defined by local custom, unless they specify otherwise.

MATTERS OF INTEREST

Avissar Family Ribbit Awareness Initiative

PURCHASING A HOME UNDER SOMEONE ELSE'S NAME

Sometimes, when a person cannot obtain a mortgage using his own name, he may ask a relative to obtain the mortgage for him. We will refer to the person trying to purchase the home as the buyer, and the one obtaining the mortgage as the relative. The relative would then legally buy the house and take out a mortgage under his own name. Such an agreement would be prohibited under the laws of *Ribbit*, since the bank is loaning the money solely to the relative, who in turn loans the money to the buyer. Therefore, any interest paid by the relative would be prohibited. This prohibition includes directly paying creditors on behalf of the lender to the loaning bank. Due to the *Ribbit* prohibition, anyone seeking to make such a mortgage arrangement must obtain a *Heter Iska*.

In a case where this arrangement is made to purchase the buyer's personal residence, there is another possible solution. Rav Moshe Feinstein z"l permits an arrangement in which the relative and the buyer would purchase the home as a partnership. The buyer advances the money being used for the down payment, while the relative advances the money he borrowed from the bank. Each one would then own a share of the house reflecting the percentage of the purchase price that they contributed. For example, if the buyer advanced 20% of the purchase price as a down payment, and the relative advanced the remaining 80% through obtaining the mortgage, the buyer would own 20% of the home while the relative would own 80%. An additional component of this partnership agreement is the stipulation that the relative agrees to let the buyer buy out his share of the home at his convenience, though he is obligated to buy out the full home once the loan is fully paid up through the monthly principle payments.

Under this agreement, the amount that the relative pays the bank as interest is considered to be the buyer's rental payment for the relative's percentage of the home. The buyer also obligates himself to pay any bills, such as taxes, insurance, and repairs. Since this agreement does not include any loan or interest between the relative and the buyer, there are no *Ribbit* prohibitions.

HALACHOT OF DAILY LIVING

Topics From The Gerald & Karin Feldhamer Ou Kosher Halacha Yomis

Laws related to Berachot

What Beracha is recited on peanut butter (a spoonful of peanut butter eaten plain)?

There are two opinions regarding the *Beracha* on peanut butter. Here, we will discuss the opinion that the *Beracha* on peanut butter is *Shehakol*.

The *Shulhan Aruch* (OH 208:8) writes that one recites *Ha'adama* on cooked beans. The *Rama* adds that if the beans completely disintegrate, one recites *Shehakol*. Therefore, it should follow that the *Beracha* on peanut butter would be *Shehakol*, since the peanuts completely lose their form. However, the *Magen Avraham* 208:13 explains that the *Beracha* on disintegrated beans is downgraded to *Shehakol* because this is not the normal way this food is eaten—cooked beans are normally eaten when they are still identifiable as beans. If so, since most peanuts today are processed into peanut butter, should we recite *Ha'Adama* on peanut butter? Rav Shlomo Zalman Auerbach, *zt"l* said that even today one should recite *Shehakol* on peanut butter, because whole peanuts taste better than ground peanuts, and peanuts are not ground to improve their taste. Therefore, once the peanuts lose their form, the *Beracha* is downgraded to *Shehakol* (see Rabbi Bodner's "Halachos of Brachos", p. 410). However, according to the *Yalkut Yosef,* peanut butter that still tastes very much like peanuts is *Ha'Adama*.

OF INTEREST AT THE BET HAVAAD

Avelut and Even Ha'Ezer: A Surprising Connection

Recently, Rav Yosef Fund, a Senior Posek in the Bet HaVaad's Medical Halacha Center, gave a shiur on the prohibition of women working during a husband's week of *Shivah*. Rav Fund gave the background on this little-known *Halachic* issue which affects many people, and discussed the various solutions that are proposed [e.g. the husband declaring that she should keep her handiwork for his sustenance, or, the woman renouncing her claim to sustenance in exchange for committing to work,etc..].

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Din by flouting a first *Hazmana*.

If they do respond, they can ask for the case to be heard in another *Bet Din*. If, after some time, the defendant has still not scheduled a *Din Torah* with the other *Bet Din*, the plaintiff can ask their chosen *Bet Din* to resume the *Hazmana* process, or you can return to the first *Bet Din*.

The defendant may request a change of date if he needs it. According to *Halacha* one must give a valid reason for postponement but as long as one is acting in good faith, *Bet Din* will try to accommodate.

With the third *Hazmana*, the *Bet Din* will usually issue a warning that it is the final *Hazmana*h and that failure to respond may result in a *Seruv (lit. failure to comply)*. The *seruv* is a grave declaration, conveying to the entire community that the recalcitrant party is a *Mesarev L'Din*, and should be treated with all attendant consequences. It is a punitive instrument of enforcement that most *Batei Din* use very judiciously, so as to preserve its weighty significance for only the most compelling instances. If a litigant feels a *Seruv* is in order, he may request it.

Alternatively, since the defendant is a *Mesarev L'Din*, the *Bet Din* may issue a *Heter Arka'ot*, which is a license to bring the matter before a secular court.

The entire *Hazmana* process can take anywhere from a few weeks to several months, depending on how compliant the defendant is.

If that sounds like a long time, keep in mind that if one were litigating in secular court he would still be months or even years – and hefty legal fees – away from a trial. He would have to hire an attorney to serve and file a complaint, to which the opponents would be given three weeks to respond. If the plaintiff survived their "Motion to Dismiss", he would wait again for preliminary conferences to fight over the discovery process. Then, months of discovery can easily stretch into years of depositions, interrogatories, subpoenas, delaying tactics and all sorts of *shtick*. Then, if the case makes it past "Summary of Judgment" intact, it would go on pretrial order. The protracted trial still hasn't begun, and the litigants have already expended a significant portion of their life and fortune on the legal process.

As justice systems go, you're in the fast track with *Bet Din*.

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Parasha and Halacha

worker was paid up front before he began working, may he still quit?

– Only if he has money left now to return for the work left undone.

Maharik/Rema (Y.D. 333:3) – Yes, and he can repay the rest of the money later.

May one sign a long-term contract with an employer for more than three years?

Rema (C.M. 333) – No

– A rabbi may sign with his community for longer as long as he may still quit in the middle.

The message for us:

Our true job in life is to serve Hashem, our employment is simply the means to maintain a livelihood, and should not control us.

The ears are pierced when wanting to stay because he did not heed this message heard at Har Sinai of being primarily the servants of Hashem.

The Brisker Rav: Our job is our livelihood, but if we are asked who we are, we respond like Yonah (Yonah chapter 1): *Ivri Anochi, V'Et Elohe HaShamayim Ani Yare – I am Jew and I fear Hashem, G-d of the Heavens...*

The Daf in Halacha

Bring the Daf to Life!

מסכת חולין

This Week's Topics

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ROSH KOLLEL OF KOLLEL OHEL YITZCHOK OF LAKEWOOD

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RAV SHMUEL BINYOMIN HONIGWACHS
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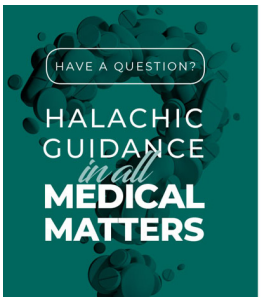
דף ס"ו	THE KOSHER ANIMAL LIST
דף ס"ז	ARE THERE WORMS IN YOUR FISH?
דף ס"ח	BEN PAKUA: A DOUBLE STATUS
דף ס"ט	WALLED CITY: THE FUNCTION OF YERUSHALAYIM'S MECHITZOS
דף ע'	SURROGATE MOTHERHOOD IN HALACHA
דף ע"א	WHAT IS KEDEI ACHILAS PERAS?
דף ע"ב	THE BERACHA OF A BEN PEKUA



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