

ספירם

KNIFE SHARPENING

The following is a record of the presentation given by Rabbi Doniel Neustadt, Rosh of the Council of Orthodox Rabbis in Detroit, to the AKO Va'adim Convention in February 2009, as well as the comments of some of the participants.

Concerns

Food service establishments regularly send out their knives for sharpening, and it appears that there are three potential *kashrus* concerns with this practice, as follows:

- The sharpening company may give the establishment different knives than the ones which the establishment gave them for sharpening. This is an especially likely in cases where the sharpening company actually owns the knives and lends them to the establishment in exchange for the rights to sharpen them. This issue can be avoided if the *Mashgiach* has a *tevias ayin* on the knives and/or marks them.
- Knives are typically very dirty when they arrive at the sharpening facility, and therefore all knives are washed in hot water or a dishwasher before the sharpening begins. This potentially allows non-kosher *b'lios* to get into the kosher knives. See below for more on this.
- The same machine is used to sharpen the (clean) kosher and non-kosher knives, and the friction created by the process does heat up the knives somewhat. If that heat would be above *yad soledes bo*, there would be a potential for *b'lios* to transfer between the machinery and knives. However, in tests which Rabbi Neustadt performed in one sharpening company, the sharpening wheel and the cooling water (where that was used) were consistently cooler than 100° F and were not hot to the touch. As such, it appears that this does not pose a serious concern.

Solutions

As noted above, the simplest way to guarantee that the sharpening company returns the kosher knives to the establishment is to mark the knives and check them when they return.

As for the second issue, that the knives might be washed in hot water before sharpening, a number of suggestions were given:

- Rabbi Neustadt arranged a vendor who has knife sharpening equipment mounted on a truck services would service the kosher stores in Detroit. He washes the knives in the store, sharpens them in his truck right in front of the store, and then gives them right back. This avoids all *kashrus* issues (although they are not *makpid* that he use different sharpeners for dairy and meat).
- Rabbi S. H. Adler reported that in Toronto they have installed a deep fryer in one sharpening company, and a COR *Mashgiach* uses it to *kasher* all knives before they are sent back to the establishments. The *Mashgiach* is requested to come to the sharpening company approximately every 2 weeks, the deep fryer is locked/sealed whenever he is not there, and he seals the knives before they are sent to the stores.
- Rabbi Z. Blech said that in establishments that he certifies, all knives are *kashered* when they return from the sharpening company.

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MATZAH FOR THE ALLERGIC

Introduction

In recent years, more and more people have been diagnosed as suffering from celiac disease or other allergies which make it difficult or impossible for them to eat wheat and certain other grains. This presents a difficulty every *Shabbos* and *Yom Tov*, when one is required to eat *seudos* which include *lechem mishneh*, but the challenge is even more significant at the *Seder* when there is a *mitzvah d'oraisah* to eat *matzah*. This article will discuss the halachic issues and possible solutions for people with such conditions.

Eating matzah when it makes one ill

A person is not required to spend more than 1/5 of their money to fulfill a *mitzvah aseh*, such as *lulav* or *matzah*.¹ Accordingly, the first question we must consider is what if eating *matzah* (or performing some other *mitzvah aseh*) will make the person sick to

¹ Rema 656:1.



the point that they will be **נופל למשכב** or some other form of *choleh she'ain bo sakanah*? Is that justification for them to not perform the *mitzvah*? [It goes without saying that if there is any chance that eating *matzah* will lead to *safek sakanah*, the person should definitely not eat *matzah*.] A number of *Acharonim*² discuss this question, as follows:

- *Maharam Schick*³ discusses whether a *choleh* who eats *matzah* or *marror* against the doctor's orders can recite a *bracha* and appears to hold that if there is no *sakanah* one must perform the *mitzvah* even though it will make him sick.
- *Birkei Yosef*⁴ appears to hold that a *choleh she'ain bo sakanah* is *patur* from *mitzvos aseh*, where performing the *mitzvah* exacerbates or causes his sickness.
- *Aishel Avraham*⁵ suggests that there is no special leniency for a *choleh* except that if the person would be willing to pay 1/5 of his money to avoid the illness caused by the *mitzvah* then he is excused from performing the *mitzvah*.
- *Binyan Shlomo*⁶ presents a long discussion on this question. He brings opposing proofs⁷ and at one point seems to think the question is a *machlokes* between two answers in *Elyah Rabbah* 640:8. However, he later suggests that hurting one's body is considered worse than spending one's money and therefore says that since one is not required to spend more than 1/5 of their money on a *mitzvah aseh* he is also not required to make himself sick (as a *choleh she'ain bo sakanah*). *Tzitz Eliezer*⁸ cites this latter part of *Binyan Shlomo* and accepts it.

Rav Schwartz holds that one can follow the lenient opinion. Accordingly, if a person is unable to eat a *kezayis* of any form of *matzah* without it making him a *choleh she'ain bo sakanah*, he is not required to perform that *mitzvah* at the *Seder*. [See the footnote for a minor change in how such a person recites the *Hagadah*.]⁹ If, however, eating one *kezayis* of *matzah* will not make him too sick or if there are ways for him to fulfill his obligation without becoming sick

(as described below), he would be obligated to perform the *mitzvah*.

We will now consider three possible methods for the celiac to fulfill the *mitzvah* of eating *matzah* on the *Seder* nights.

Oat matzah

Availability

Approximately 20 years ago, Rabbi Ephraim Kestenbaum of London began developing gluten-free oat *matzah* so that celiacs and others allergic to wheat could fulfill the *mitzvah*. His thinking was that oats are one of the 5 grains suitable for *matzah*¹⁰ and oats are also naturally low in gluten, the protein which celiacs react to; most of the medical community therefore believes that it is safe for celiacs to eat oats.¹¹ He therefore bred specific breeds of oats which are particularly low in gluten and also suited for producing *matzah*, and has been producing hand and machine oat *matzos* ever since.¹² Although these *matzos* are quite expensive, they have been a welcome relief for the many celiacs who want to eat *matzah* at the *Seder* without compromising their health.

Two objections have been raised to the production and use of oat *matzos*, as follows:

Production

*Shulchan Aruch*¹³ records that *matzah* may be made from any (or all) of the five grains, including oats, but *Rema* comments that the *minhag* is that all *matzah*

¹⁰ Throughout the generations, the majority of *Poskim* have accepted *Rashi* (*Pesachim* 35a s.v. *shiboles shual*) who translates **שבולת שועל** as oats (using the French word "aveine/avoine" which is similar to the Latin name for oats, *avena sativa*).

In recent years, this was challenged by Dr. Yehudah Felix, an Israeli botanist, who argued that oats did not grow in *Eretz Yisroel* at the time of the *Mishnah* and he cited other indications that oats could not possibly be one of the five grains which have a unique halachic status. According to this position, oats cannot be used for *matzah*, and the other halachos of the five-grains (*challah*, *berachos*, *chametz*) do not apply to them. [His position, that oats, which are relatively gluten-free, are not one of the five grains, would seem to dovetail with those who suggest that the presence of significant amounts of gluten is what differentiates the five grains from rice, corn, and other "grains".]

This suggestion was widely rejected by all contemporary *Poskim* including Rav Moshe Feinstein, Rav Elyashiv (both cited by Rav Ephraim at the end of his article in *Mesorah* 13), and Rav Yosef Dov Soloveitchik (see *M'pninei HaRav* page 69) based on our age-old tradition that **שבולת שועל** is oats. Additionally:

- Dr. Mordechai Kislav (*Sefer HaYovel, Mincha L'Ish*, pages 155-168 & 179-185) disputes Dr. Felix's archeological and other proofs, on academic grounds.
- Dr. Munk (*Techumin* 1 pages 97-100) suggests that what differentiates the five grains from all others is that they contain beta-amylase (which oats do contain), which allows the fermentation to occur before the proteases cause the grains to go rancid.
- Rav Ephraim (ibid.) and Rabbi Kestenbaum (*Sefer HaYovel* ibid. pages 169-170) report that they tested oats and have found that they can become *chametz* (as the five grains are supposed to) and does not become rancid (as other grains are supposed to).

Based on the above, we will assume that oats are **שבולת שועל** and are therefore suitable for *matzah* as per *Shulchan Aruch* 453:1.

¹¹ See, for example, <http://www.csaceliacs.org/InfoonOats.php>.

¹² For more on these *matzos* and information on where they can be purchased, see <http://www.glutenfreeoatmatzos.com/>.

¹³ *Shulchan Aruch* 453:1.

² Many of the sources cited in this section are from *B'tzel HaChochmah* 5:92.

³ *Maharam Schick* OC 260.

⁴ *Birkei Yosef* 640:5.

⁵ *Aishel Avraham* (*Butshetch*) *Tinyana on Rema* 656:1 s.v. *ulai*.

⁶ *Binyan Shlomo* OC 47 (Rav Shlomo Vilna).

⁷ Some of his most direct proofs are from *Gemara, Succah* 25a & 26a and *Shulchan Aruch/Rema* 640:3-4, and some of these proofs can also be found in *Birkei Yosef*, ibid.

⁸ *Tzitz Eliezer* 14:27 (and in 19:22 relating to celiacs). *Avnei Nezer* YD 321 advances a similar line of reasoning in a situation where performing a *bris* on the 8th day would render a child permanently maimed. [Of course, it is more understandable that one would be lenient in that case than in ours.]

⁹ *Biur Halacha* (483:1 s.v. *ad ga'al Yisroel*) says that a person who will not be eating *matzah* at the *Seder* must alter the *bracha* of **אשר גאלנו** (recited at the end of *Maggid*) to remove the wording that implies he will be eating *matzah*. Therefore, instead of saying **אשר גאלנו**... ומרר כן ה' אלקינו... he should say **הגאנו**... ומרר כן ה' אלקינו.

should be made from wheat. *Mishnah Berurah*¹⁴ understands that the *minhag* is based on the assumption that people prefer wheat *matzah*, and therefore notes that if wheat *matzos* are not available then one may bake *matzos* from the other four grains. Accordingly, a celiac who is unable to eat wheat *matzah* would clearly be permitted to bake and eat oat *matzos*.

However, *Maharsham*¹⁵ suggests that a second reason for the *minhag* is based on the *Gemara*¹⁶ which indicates that the *chimutz*-process for some grains is different than for wheat, and we should therefore only bake *matzah* from the grain with which we have the most experience (i.e. wheat). Based on this, *Minchas Yitzchok*¹⁷ says that one should not produce *matzos* from non-wheat grains for those who are unable to eat wheat *matzah*.

Although the *teshuvah* ends on a strict note, Rabbi Kestenbaum¹⁸ reports that when Dayan Weiss was told that there are some people who are so allergic as to be unable to eat wheat *matzah* under any condition, he agreed that such people were permitted to eat oat *matzos*.¹⁹ This leniency is quite understandable in light of *Rema/Maharsham* merely reporting a *minhag*, and is even more appropriate regarding the oat *matzos* made by Rabbi Kestenbaum, since he, in fact, now has many years of experience working with oats and preventing them from becoming *chametz*.

Use at the Seder

A more serious question is whether oat *matzos* as they are manufactured nowadays, are suitable for use at the *Seder*. *Gemara (Pesachim 35a)* says, "...anything which can become *chametz*, may be used for the *mitzvah* of *matzah*", and the *Rishonim* have two ways of understanding this:²⁰

- *Ramban*²¹ holds that this means that the specific mixture of grain and liquid used in creating a *matzah* must be susceptible to *chimutz*. However, *matzos* made from wheat flour and *mei peiros* without water cannot be used at the *Seder* because such a mixture can never become *chametz*, even though wheat flour mixed with water can.

- *Rambam*²² understands that the *Gemara* is providing the criteria for determining which species of grains can be used to create *Seder matzos*, but there is no specific requirement that the specific grain used in creating any given *matzah* should be able to become *chametz*. Therefore, in the aforementioned case of wheat flour mixed with *mei peiros*, the *matzah* is suitable for use at the *Seder* (if one overcomes the concern of לאם עוני).

This *machlokes* is relevant to oat *matzos*, because oats are different than other grains in that they must be heat-treated before being stored and after that treatment they are unable to become *chametz* (as per *Gemara, Pesachim 39a*). If so, according to the understanding of *Ramban* that one may only use *matzos* made from a mixture which could become *chametz* (if left alone for long enough), oat *matzos* would appear to not be acceptable for use at the *Seder* since heat-treated oats cannot become *chametz* even if they are mixed with water!²³ [This concern would not apply to spelt *matzah*, which may be a solution for some people who are allergic to wheat.]

Thus, it turns out that using oat *matzos* at the *Seder* depends on whether one follows the opinion of *Rambam* or *Ramban*. Which opinion is accepted? A number of *Acharonim*, including *Pri Megadim*²⁴ and *Gra"z*²⁵ (both of whom seem to be based on *Magen Avraham*²⁶), appear to follow the strict opinion of *Ramban*. *Chayei Adam*²⁷ cites a number of proofs to *Ramban's* position, and concludes his discussion with the statement that one may rely on *Ramban* in a *sha'as hadchak*, which implies that he agrees it is preferable to adopt the strict opinion wherever possible.

²² *Rambam, Hil. Chametz U'matzah 6:5* as per *Maggid Mishneh* and *Lechem Mishneh* ad loc.

²³ Interestingly, it would appear that the facts noted in the text should obviate the concern of *Minchas Yitzchok* noted in the earlier text. On the other hand, we must consider that in an unpublished *teshuvah* on the topic of oat *matzos* (which covers many of the issues discussed in the text), Dayan Westheim raises another concern with the heat-treatment of oat *matzos*, suggesting that the considerable moisture released during the process might itself cause *chimutz*. He concludes that this does not pose a concern, and *Shevet HaLevi* 9:117 (cited below) concurred with this position.

²⁴ *Pri Megadim* MZ 461:2 discusses the question and appears to take a strict approach, citing *Magen Avraham* 471:5 (among others), and only references *Magen Avraham* 454:1 as an afterthought. [See more on *Magen Avraham's* position in the footnotes below.]

²⁵ *Gra"z* 462:1 citing exactly the same rationale as *Magen Avraham* 471:5 (and in fact, *Magen Avraham* is the source noted in the margin of *Gra"z*).

²⁶ *Magen Avraham* 471:1 (end) appears to follow the opinion of *Ramban* (see *Dagul Miravah* ad loc.) and that seems to have also been the assumption of *Magen Avraham* 454:1. However, *Magen Avraham* 454:1 then suggests (ואפטר לומר) an answer which would agree with *Rambam* (see *Dagul Miravah* *ibid.*). [Rav Akiva Eiger ad loc. actually references *Ramban* on *Magen Avraham's* answer, as if to say that *Ramban* disproves the possibility of saying such an answer.] As noted in a previous footnote, *Pri Megadim* and *Gra"z* appear to have accepted that in essence *Magen Avraham* accepts *Ramban*. See also *Chasam Sofer* to *Magen Avraham* 471:1.

²⁷ *Nishmas Adam, Pesach* #15.

¹⁴ *Mishnah Berurah* 453:2.

¹⁵ *Maharsham* in his comments to *Orchos Chaim* (453:2).

¹⁶ *Gemara, Pesachim 40a*, which is referred to in *Magen Avraham* 453:5 & 9.

¹⁷ *Minchas Yitzchok* 9:49.

¹⁸ Rabbi Kestenbaum in *Sefer HaYo'vel* *ibid.*

¹⁹ There is even indication of this position in the printed *teshuvah* where *Minchas Yitzchok* concludes with a statement that he believes it is highly unlikely that anyone cannot tolerate one *kezayis* of wheat *matzah*, giving the impression that his ruling may partially be based on that understanding. See also *Cheshev HaEphod* III:9 who takes a more lenient (but somewhat similar) stance in a *teshuvah* addressed to Dayan Westheim, *Rav HaMachshir* for Rabbi Kestenbaum's *matzos*.

²⁰ Many of the sources cited in this section are from the article of Rabbi Shmuel Singer in *Mesorah* 15 pages 90-94.

²¹ *Ramban, Milchamos Hashem, Pesachim* 10b.

The reticence of the *Poskim* to rely on the lenient opinion is mirrored in *Shevet HaLevi*²⁸ who, in a *teshuvah* written to the Dayan Osher Westheim, the *Rav HaMachshir* for Rabbi Kestenbaum's oat *matzos*, notes that בשעת הדחק a celiac may rely on *Chayei Adam/Rambam* and eat oat *matzos* at the *Seder* (but should have someone else recite the *bracha* of *al achilas matzah* for him).

However, in recent years another group, known as the Lakewood Matzah Bakery,²⁹ has begun producing gluten-free oat *matzos* which are never heat-treated. Rather, they bake the *matzos* immediately after harvest such that these *matzos* are free of the above concern, and may definitely be used at the *Seder* even according to *Rambam*.

Summary

Theoretically, one may fulfill the *mitzvah* of eating *matzah* at the *Seder* with oat *matzah*, and for many celiacs this is the only available choice. *Poskim* raise two issues with this practice, of which the more-serious (second) one only applies to one brand. Therefore people who are able to perform the *mitzvah* with other *matzos* should refrain from using oat *matzos*, and those who must use them should preferably use the *matzos* produced by the Lakewood Matzah Bakery.

Rice-wheat matzah

A second method for allergic people to eat *matzah* at the *Seder* is actually mentioned in *Shulchan Aruch* (453:2), but is not yet commercially available. *Shulchan Aruch* rules that *matzah* which is made primarily from rice but contains just enough wheat to have a "taste" of wheat, is considered "*matzah*". Not only may one use such *matzah* for the *Seder*, but a person is only required to eat a *kezayis* of the rice/wheat *matzah* and does not have to eat a *kezayis* of wheat.

*Mishnah Berurah*³⁰ notes that this leniency is limited to a rice/wheat mixture and does not apply in exactly the same way if wheat is mixed with other grains. He further notes that some *Poskim* are more *machmir* than *Shulchan Aruch* and hold that even a rice/wheat mixture must contain at least 1/6 wheat³¹ to qualify as *matzah* (as above).

Thus, even according to *Mishnah Berurah's* stricter opinion (which he recommends one follow except in cases of *sha'as hadchak*), if an allergic person had a *matzah* which was 1/6 wheat and 5/6 rice, he could fulfill the *mitzvah* by eating a *kezayis* of that *matzah*. This suggestion would permit many people to eat a *kezayis* (or more) of *matzah* at the *Seder*, because that *kezayis* would contain very little wheat.

Unfortunately, this form of rice/wheat *matzah* is not yet commercially available, and therefore this suggestion is not yet practical.

[In creating such a *matzah*, it is noteworthy that (a) the bakery must make sure that the rice is either not enriched or that the vitamins used are not *chametz* and (b) this *matzah* would be *kitnios* and only permitted for *cholim* (such as a celiac).]

Eating just a kezayis

One last solution for some allergic people is for them to eat wheat *matzah* at the *Seder* but eat the bare minimum amount required. Although most people are required to eat as much as 5 *kezaysim* of *matzah* at each *Seder* – 2 at *motzi matzah*,³² 1 at *korech*,³³ and 2 at *afikomen*³⁴ – the allergic person who is forced to eat wheat *matzah* may suffice with fulfilling the *mitzvah d'oraisah* of eating 1 *kezayis* on the first night of *Pesach* and should eat nothing at the second *Seder*.

Most people's first inclination would be that a person choosing this option should eat his lone *kezayis* of *matzah* at *motzi matzah* when everyone else at the *Seder* fulfills their *mitzvah* and recites the *bracha* of *al achilas matzah*. However, this would mean that the person would not fulfill the *mitzvah* of *afikomen*. Therefore, *Shulchan Aruch*³⁵ rules that he should skip *motzi matzah*, eat *marror* (and no *korech*) and the *Seder* meal (*Shulchan Oreich*). When the meal is finished and the others are ready for *afikomen*, he should wash *hamotzi*, recite the *brachos* of *hamotzi* and *al achilas matzah*, eat his one *kezayis* of *matzah* (with *hesaibah*) and not eat anything afterwards (just like everyone else who does not eat after *afikomen*). In this way, he has fulfilled the *mitzvah d'oraisah* of eating *matzah* on the *Seder* night and of eating *afikomen*.



²⁸ *Shevet HaLevi* 9:117:4.

²⁹ For more on these *matzos* and information on where they can be purchased, see <http://www.lakewoodmatzoh.com/>.

³⁰ *Mishnah Berurah* 453:14.

³¹ The strict opinion cited in *Mishnah Berurah* holds that the mixture must contain a "*kezayis b'chdei achilas pras*" of wheat. To understand that ratio, we must determine the ratio of a *kezayis* to a *pras*. *Mishnah Berurah* 486:1 cites two opinions as to whether a *kezayis* is 1/2 or 1/3 of a *beitzah*, and rules that as relates to *mitzvos d'oraisah* (e.g. *matzah*) one should follow the strict opinion. Similarly, *Shulchan Aruch* 612:4 cites two opinions as to whether a *pras* is 3 or 4 *beitzim*, and *Mishnah Berurah* 612:8 rules that as relates to questions of *d'oraisah* one should follow the strict opinion. Even if we combine both strict positions (i.e. the largest *kezayis* in the smallest *pras*) the ratio of wheat to rice is just 1:6.

³² *Shulchan Aruch* 475:1.

³³ *Shulchan Aruch* 475:1.

³⁴ *Mishnah Berurah* 477:1.

³⁵ *Shulchan Aruch* 482:1 as per *Mishnah Berurah* ad loc.

THE LAW AND KASHRUS

The following is a record of the presentation given by Steven K. Schwartz, Esq. to the AKO Va'adim Convention in February 2009.

Note: The presentation should not be taken as legal-advice; any such advice should be pursued with an attorney.

Freedom of Religion

The American right to "Freedom of Religion" means that a *hashgachah* has the right to choose which *hashgachos* or *Mashgichim* to accept as long as it makes that decision solely on religious grounds.

Negligence

If a *Mashgiach* did not allow a specific item at an event because he failed to notice the kosher-symbol on the package, it could reasonably be argued that he has a "duty of care" to have noticed it and is therefore considered negligent for not having allowed the product to be used. Even so, such a mistake will typically not result in any financial obligation for the *hashgachah*, because it did not lead to "causation of damages".

[In the opposite scenario, where someone contracted with a caterer to provide a kosher party and they did not, the caterer's negligence might in fact result in a financial claim due to emotional distress (for eating non-kosher), and possibly even defamation (for causing the guests to have a lower opinion of the host).]

A *hashgachah* can easily protect themselves from negligence claims by adjusting their contract to (a) require that all ingredients be presented to them a week before the event (so they can have time to make an unrushed decision as to its acceptability), (b) limit their liability with a "liquidation of damages" or "prevailing party provision".³⁶ At earlier AKO Conferences, the Star-K and cRc shared copies of their contract, from which other Va'adim can develop their own contracts.

The COR added that before their *Mashgichim kasher* a facility, they have the owner sign a release form, which clarifies the inherent "danger" of *kashering* and releases them of obligation in case something goes wrong.

Workmen's Comp.

Some *hashgachos* mistakenly believe that if a *Mashgiach* is on a restaurant's payroll or is paid by the *hashgachah* with a 1099 (i.e. as an independent contractor rather than an employee whose

compensation would be reported on a W-2), the *hashgachah* is absolved of any Workmen's Comp. obligations. However, the truth is that whoever controls what an employee does is considered their "employer". Therefore, if the *hashgachah* tells the *Mashgiach* that he has to report at a given time, must turn on all fires, cannot perform certain duties etc., his Workmen's Comp. is their obligation regardless of who signs his paycheck or whether he claims that he is an independent contractor. On the other hand, there was a case of a 4-man *shechitah*-crew which was paid as a unit for every animal they slaughtered; they used their own tools, made up between themselves how to divide the money, and had no paid vacation, and were therefore considered independent contractors.

It is possible for someone to be considered the employee of two employers, and a *Mashgiach* at a restaurant might be a good example of that. Therefore, if the *Mashgiach* was injured at work, the court would have to decide whether the injury occurred while working for the *hashgachah* (e.g. *kashering* livers) or the restaurant (e.g. slicing tomatoes), and the appropriate employer would then be responsible.

Insurance

Hashgachos might consider including in their contract that the restaurants must provide Workmen's Comp. insurance to the *Mashgichim*. Dr. Pollack also noted that every *hashgachah* should have "Director's and Officer's Liability Coverage", which costs very little but can be very helpful in case someone lodges a complaint against you.

Mashgichim who work for more than one *hashgachah*, might consider speaking to their insurance broker to find out what kind of umbrella coverage might cover them for injuries, negligence, and other issues.

Overtime

Labor laws require that if someone works more than a given number of hours per week, he has to be paid overtime. However, there are exceptions to this law for professional and ministerial staff, and therefore a *Mashgiach* will likely not be entitled to overtime. [It was also noted that if the *Mashgiach* claims a parsonage allowance (for tax purposes) he will likely not be able to claim that he is not "ministerial".]



³⁶ Liquidation of damages means that the contract stipulates an exact amount which must be paid in case of negligence. Thus, if the amount was set at \$1,000, then the *hashgachah* might just pay the \$1,000 and not have to be embroiled in a costly legal battle to defend themselves. It was not clear what a "prevailing party provision" is.

PAS/BISHUL YISROEL

PART 3

An ongoing series based on the cRc weekly kashrus shiur

סימן קי"ב סעיף ד' וה'

מקום שאין פלטר ישראל מצוי, לדעת המתירים ליקח פת מפלטר עובד כוכבים, אם הגיע שם פלטר ישראל הרי פת פלטר עובד כוכבים אסורה עד שימכור פלטר ישראל פתו, ולאחר שכלה פת ישראל חוזר פתו של עובד כוכבים להכשירו.

יש אומרים שמי שיש בידו פת או שיש פלטר ישראל, ויש פלטר עובד כוכבים עושה פת יפה ממנו או ממין אחר שאין בידו של פלטר ישראל, מותר לקנות מפלטר עובד כוכבים במקום שנהגו היתר בפת של פלטר, דכיון דדעתו נוחה יותר בפת פלטר זה מפני חשיבותו בעיניו, הרי זה כפת דחוקה לו.

PAS YISROEL IS TEMPORARILY AVAILABLE

א) We have already seen that the *Mechaber* holds that if *pas Yisroel* is available, one is required to choose that bread. This halacha continues with that opinion, and *Shach* 112:14 points out that obviously *Rema*, who holds that you can eat *pas paltar* even if there is a Jewish baker in town, would argue on this halacha. [It is so obvious, that *Pri Megadim* does not even know why *Shach* bothered to say it.]

ב) *Gr"א* 112:11 points out that *Shulchan Aruch* is really repeating his point, i.e. that since he holds *pas paltar* is only permitted due to extenuating circumstances, if that difficulty is not present the *issur* returns. *Chelkas Binyamin* 112:38 explains that the extra *chiddush* of the *Mechaber* in this case is that he is now discussing a town that really does not have a *paltar Yisroel* and the Jewish baker just happens to be passing through temporarily; therefore, one might think that in such cases the Jews may continue their usual practice of considering themselves to be in a difficult situation and be permitted to eat *pas paltar*. So the *Shulchan Aruch* is saying that the leniency of *pas paltar* is so undesirable that even if you have a temporary chance of avoiding it you should do so.

ג) *Shach* 112:13 says that if a Jewish baker comes to town, the bread that one buys from then on from the non-Jewish baker is forbidden, but the bread that people already have at home from the non-Jewish baker remains permitted. There is a question as to whether that is what the *Shulchan Aruch* means to say or if this is disagreeing with the *Shulchan Aruch*, but just about all of the *Poskim* agree that this is the correct halacha.

ד) The case in *Shulchan Aruch* is not so relevant to us, but *Chelkas Binyamin* (*Burim* s.v. *harel*) suggests an opposite case which is considerably more practical – especially for people who travel. For example, a person travels to Japan or Arizona

where *pas Yisroel* is not available and therefore is permitted to buy and eat *pas paltar*. Then, when he comes back home to Chicago, where *pas Yisroel* is available, he realizes that he still has some *pas paltar* in his suitcase.

– Seemingly, our halacha is saying that since the *pas paltar* was bought *b'heter* (because no *pas Yisroel* was available) it remains permitted even if *pas Yisroel* becomes available.

– This seems correct, but one could possibly argue based on the way *Chelkas Binyamin* himself explained the *chiddush* of our halacha. *Shulchan Aruch* is discussing a person who lives in a place where *pas paltar* is permitted for most of the year. That person bought bread as a complete *heter*, so when the Jewish baker happened to come to town it seems “unfair” to say that the bread he already bought is forbidden even if *pas Yisroel* happens to have become available. On the other hand, the person traveling clearly bought his bread as a temporary *heter* since he was temporarily in a place without *pas Yisroel*, so in a way he bought the *pas* knowing that it is not permanently permitted to him, so when he gets home he may not be able to eat it anymore. This is different than *Shulchan Aruch's* case where the *heter* of *pas paltar* gave him a somewhat permanent *kulah*.

– In spite of this, *Chelkas Binyamin's* suggestion seems correct, i.e. that once the person bought the bread *b'heter* on his trip, he may eat it even though *pas Yisroel* is now available.

ה) *Chelkas Binyamin* 112:39 (and *Tziunim* 112:142-143) discusses a question. What if there is no Jewish baker in town but it is known that one will be coming to town in a few hours and the Jew wants to eat? May he buy and eat the *pas paltar* right now since right now there is no Jewish baker so *pas paltar* is permitted, or should we say that there is already not really a *dochak* because the Jews know that the *pas Yisroel* is on its way?

– As he point out, this is dependent on how to reconcile *Shulchan Aruch* 112:16 (who implies you should wait a certain amount) with *Rema* 112:8 (who implies that you do not have to wait at all), and IY”H we will discuss this at that point.

PAS PALTAR IS MORE DESIRABLE**Better or different**

י) *Tur* cites this halacha from the *Rashba* in *Toras HaBayis* and in reference to it asks that *Yerushalmi* says that *pas paltar* is only permitted in places where there is no *pas Yisroel* available which implies that it is only permitted if there is nothing to

eat, but there is no permission to eat *pas paltar* just because you like his style of rolls more than the ones made by the Jew.

r) This seems like a reasonable question to us, but *Beis Yosef* is quite perturbed by it, and before he answers the question he says:

משמע מדבריו שהרשב"א לא ראה הירשלמי הזה או ראה ונעלמה ידיעתו ממנו, שאילו ידעו וזכר ממנו לא היה כותב כן, וזה דבר שלא ניתן ליחשד בכך מאן דנהירן ליה שבילי רקיעא

That is to say, it is not possible for one to simply disprove the *Rashba* based on a *Yerushalmi* that you somehow are thinking he overlooked. You may understand the *Yerushalmi* differently than he does, such that there is a proof, but it is completely unreasonable to think that the *Rashba* just overlooked the *Yerushalmi*. It is good to see such talk once in a while to help remind us of the stature of the *Rishonim*.

n) This would be enough for us, but *Beis Yosef* actually turns the tables on *Tur*; he says that *Tur* only had *Toras HaBayis HaKatzar*, but if one looks at *Toras HaBayis Ha'aruch* they will see that *Rashba* actually addresses this question himself! *Rashba* says that once *Chazal* permitted *pas paltar* they permitted it in any case where it is *פת דחוקה לו*. The case *Yerushalmi* uses is one in which the person has no *pas Yisroel* at all, but in truth if the type of bread he likes is unavailable as *pas Yisroel* that is also considered *פת דחוקה לו* and is permitted.

ט) This explanation is included in *Shulchan Aruch's* words, and we might as well mention again that *Rema* would of course not even need such a sophisticated explanation, as the *pas* is surely permitted.

Cheaper or more convenient

י) Clearly, the decision as to whether the *pas paltar* is more desirable to someone is a very personal decision, and will change from person to person. *Rashba* seems to be saying that this personal decision does not require that the Jew be so disgusted by the *pas Yisroel* that he will have a really hard time eating it (as might be understood as a way to fit this into *פת דחוקה לו*), but rather the standard seems to be that as long as the *pas paltar* is *ערב לו* that is good enough to permit *pas paltar*.

- In a way this is implied by the *Shulchan Aruch's* two cases – the *paltar* produces a bread that the *Yisroel* does not (*ממין אחר*) and that the *paltar* produces a nicer bread than the Jew. The first case (which *Shulchan Aruch* lists second) is where the breads are considerably different from one another (e.g. rye bread vs. white bread), while the second seems to be that the

paltar bagels are just more appealing than the *Yisroel's* bagels.

- It would seem that this issue has another application, which *Chelkas Binyamin* 112:51 is *machmir* on. What if the two breads themselves are equal but the *paltar's* bread is cheaper or more easily available? *Chelkas Binyamin* infers from *Shulchan Aruch's* words "מפני חשיבותו" that the only time the *pas* is permitted is where *it* is more *חשוב*, but if after all is said neither bread is more *חשוב* than the other, then the fact that the person has a preference for one over the other is not enough reason to permit *pas paltar*.

- However, it would seem that the opposite is correct. *Rashba* is saying that to be *פת דחוקה לו* is broadly defined by what is *ערב לו* and even lets one choose the "prettier" *pas* even though it tastes exactly the same as the *pas Yisroel*. That means that the standard is so subjective and personal that it should also allow take into consideration anyone's preferences which are based on cost and convenience.

- A possible proof to *Chelkas Binyamin* can be taken from the previous halacha, where there was a discussion as to whether one who purchased *pas paltar* because there was no Jewish baker available can eat that bread after a Jewish baker becomes available. The whole discussion is discussing a case where the person already had the bread, and presumably any such person would prefer – for financial or convenience reasons – to be allowed to use his bread and not be forced to buy new bread from the Jewish baker. So the discussion (which, in fact results in the bread remaining permissible) seems to presuppose that the *pas*-owners' saving of money and hassle is not a reason to permit the *pas paltar* (even if a *Yisroel* just opened a bakery).

▪ This is not a perfect proof because the implication is that the Jew's bread will sell out quickly and one will be eating *pas paltar* soon enough, so there might not be any real savings or convenience to be allowed to eat the *pas paltar* now instead of in a few hours. With all of this said, my inclination is still to say that one may choose the cheaper or more convenient *pas paltar* over the equally-tasty but more expensive or harder to get *pas Yisroel*.

▪ I was surprised to not see anything in the *Poskim* on this question (and maybe that is because we hold like the *Rema* anyhow such that the bread is permitted in all cases).