

BUSINESS WEEKLY



RESTORING THE PRIMACY OF CHOSHEN MISHPAT UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

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CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

RED WORK *Parashas Parah* reminds the Jewish people to purify themselves with the ashes of the *parah adumah* (red/ auburn cow) in preparation for the *korban Pesach*.

The Torah requires that the cow be without blemish and that "a yoke has not come upon it." *Chazal* expand this disqualification to any work that was done with the cow, based on a comparison to the *eglah arufah* (axed heifer).

Due to its rarity, the red cow was extremely valuable. *Chazal* (*Kiddushin* 31a) relate that Dama ben Nesina, who gave up great financial gain in order not to disturb his father's sleep, was rewarded with a red cow, through which he received his gain.

Our story takes us to the (hopefully near) future.

Yosef had a red calf born in his herd. He raised it with great care, protecting it from blemishing injury, and taking care not to work it in any way. As the calf approached two year's age, he began negotiating with the Beis HaMikdash treasurers to sell them the cow for use as *parah adumah*.

Yosef hired a vet to check that the cow did not have even two black hairs, which would render it invalid for *parah adumah*. "Be careful not to lean on the cow," Yosef warned him. "Even that is considered disqualifying work" (*Mishnah Parah* 2:3).

The vet began checking the cow. The sun shone strongly, and it became hot, so Yosef went to get drinks. Meanwhile, the vet took off his jacket, neatly folded it, and slung it over the cow. When Yosef returned, he threw a fit!

"You used the cow for your jacket!" he screamed at the vet. "You caused me immense financial loss!"

The vet removed his jacket. "The cow's in perfect shape," he said. "The jacket did nothing to it. Look!"

"Halachically, though, any work done with the cow disqualifies it," replied Yosef, "even placing clothing on it not needed for the animal, but for a person's benefit!"

Yosef sued the vet for \$1,000,000 before Rabbi Dayan.

"Is the vet liable for disqualifying the cow?"

"The *Mishnah* (*Gittin* 52b) addresses halachic damage that is not physically noticeable (*hezek she'eino nikar*)," replied Rabbi Dayan, "for example, one who defiled ritually pure food of another. The offender is liable only if he damaged intentionally, but not if he damaged accidentally" (C.M. 385:1).

"Although a person is usually liable even for accidental damage, Rabban Yochanan explains

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

RENEGING ON RESPONSIBILITY, PART II

Q: Someone asked me to take a package overseas for him. After he gave me the package, I started to worry about taking responsibility for it. If I call him and tell him that I do not want to be responsible for it, to what extent will that limit my liability if something happens to it?

A: In the previous essay we discussed two disputes among the *poskim* that relate to this situation: 1) Can a *shomer* (guardian) renege on his commitment to guard a *pikadon* against the will of its owner once he has already made a *kinyan* on it? 2) If the owner does agree to release him from his commitment, does his consent exempt the *shomer* from responsibility?

The *poskim* also deliberate what the *halachah* is if someone said that he is not accepting responsibility for a package, but without explaining exactly what he means to include in that disclaimer. There are vast differences of opinion in this matter:

1. Some *poskim* write that this statement indemnifies him from *all* responsibility, even if the loss is caused by his own negligence (*Shulchan Aruch*, C.M. 72:7 and 305:4).
2. Some *poskim* go even further, stating that even if the *shomer* inflicts direct damage on the *pikadon* with his own hands, he does not have to pay (*Chiddushei Rabbi Akiva Eiger*, *ibid.* 305:4, who proves his position from the *Mordechai*, but see *Ketzos Hachoshen* 72:14 and *Nesivos* *ibid.* 23 who disagree with his proof and maintain that if the *shomer* directly damages the object, he is obligated to pay).
3. Some write, however, that the *shomer* is absolved from payment only if the item is stolen or lost, but if he was negligent in guarding it, he is obligated to pay, because the owner would never agree to release him from the basic responsibility of not being negligent (*Shu"t Bach* 138; *Shu"t Mabib* 3:187; *Shu"t Maharit* 2, C.M. 116).



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that here, in principle, a person is exempt for halachic damage, but the Sages fined a person who damaged intentionally so that people would not do so wantonly. Some compare *hezek she'eino nikar* to *grama* (incidental damage), which also does not carry legal liability" (*Aruch Hashulchan* 385:1).

"The *Gemara* then cites a *Braisa* that one who works with another's red cow is legally exempt and carries only a Heavenly obligation. The *Gemara*'s discussion seemingly indicates that he is exempt even if he worked the cow intentionally. However, Rambam rules that this is like the other cases in the *Mishnah*, and if the offender did so intentionally, he is liable" (*Chovel Umazik* 7:4).

"Raavad (*ibid.*) disagrees and explains that since, in principle, *hezek she'eino nikar* is exempt, the Sages fined the offender only when damaging maliciously in order to harm the other, but not when doing work for his own benefit. Rambam does not make this distinction, since the offender is aware of the damaging consequence" (*Meiri, Gittin* 53a; see also Raavad on Rif, *Kesubos* 44b).

"Ramban (*Dina d'Garmi*) also exempts, even when intentional, for a different reason. He follows the opinion that the Sages fined only in the particular, common, cases of halachic damage listed in the *Mishnah*, and we do not extrapolate to other cases. However, Rambam (*Chovel Umazik* 7:2) follows the opinion that the fine of intentional *hezek she'eino nikar* applies to any similar case, which is also the simple reading of the *Shulchan Aruch*" (*Mishneh Lamelech ibid.*; *Shach* 385:1).

"The *Acharonim* question," concluded Rabbi Dayan, "whether accidental *hezek she'eino nikar* carries at least a Heavenly responsibility" (*Pischei Choshen, Nezikin* 1:[53]).

Verdict: Some *Rishonim* exempt a person who does work with another's red cow, but the Rambam and other *poskim* hold him liable if he did so intentionally.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

BAR METZRA #9 (Bordering Property)

Houses and Apartments

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

Q: Do the rights of bar-metzra apply also to houses and owned apartments?

A: Rabbeinu Tam ruled that *bar-metzra* rights apply only to fields, which are not separated by barriers and can be worked efficiently together, but not to houses, which are separated by walls (*Tosafos*, B.M. 108b; *Sefer Hashar* #32). However, most *Rishonim* and the *Shulchan Aruch* rule that *bar-metzra* rights apply also to houses, since doorways can be made in the separating walls, and even if not, the adjacent houses can still be used efficiently through a joint courtyard (*C.M.* 175:53; *Sma* 175:98).

Similarly, apartment owners have *bar-metzra* rights in adjacent apartments or those immediately above/below them. Moreover some maintain that since the apartment owners jointly own the land on which the building is built, they have *bar-metzra* status as partners also for other apartments in the building, when they have reason to use a nearby apartment such as for children, a home office, etc. (*C.M.* 175:51; *Ba'er Heitev* 175:89; *Pischei Choshen, Metzranus* 11:26[13,61]).



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- Other *poskim* rule that even if the *shomer* expressed clearly that he wants to be absolved from responsibility for negligence, the owner's consent does not help, because they equate negligence with inflicting direct damage on the *pikadon* (*Rabbeinu Baruch in Hagahos Ashir* i, B.M. 7:17; see *Tumim* 72:23; *Machaneh Ephraim, Shomrim* 21; *Pischei Teshuvah* 196:5).

The *Acharonim* dispute how to rule in such cases. Some rule that we follow the approach of the *Shulchan Aruch* (#1 above), absolving the *shomer* of all damages, even those due to negligence (*Shvus Yaakov* 1:19). But others rule that there is still a *sfeika d'dina* (uncertainty in *halachah*), because we might rule according to the latter two approaches that maintain that the *shomer* is responsible if he was negligent (*Shu"t Lechem Rav* 222; see *Divrei Geonim*, 96:66).

In any case, it seems clear that if he said, while accepting the package from the owner, that he does not accept the responsibility of safeguarding it at all, then he is certainly not required to pay for any loss, because he doesn't even become a *shomer* at all.

Let us move on to another *sh'ailah* relevant to your situation. How must a person safeguard a package he agreed to transport on an airplane, assuming he does not make a statement releasing him from liability?

The *halachah* will often depend on the size and nature of the package.

If it is a small item that fits into carry-on luggage, then a *shomer chinam*, who is responsible only for negligence, is nevertheless permitted to place it in his checked luggage, unless it is so valuable that most passengers would not send it under the plane. If it is that valuable and he did check it in his luggage, he would be responsible for its loss or theft. A *shomer sachar*, on the other hand, would always be responsible for loss or theft, even if the item was not valuable and he was not considered negligent for having checked it.

If the package was too large to be carried on board, and the *shomer* placed it into his suitcase and it was lost by the airline, he is not liable for it, because we rule that if the owner of a *pikadon* realizes that a *shomer* will typically give this item to someone else to safeguard, then the *shomer* is absolved from having to pay even if the second *shomer* cannot pay (*Shulchan Aruch* 291:22, with *Shach* 32). Since the owner of the package knew that it was too large to take on board, he gave it to the *shomer* with full knowledge – and therefore, implied consent – that the airline would be handling it. The *shomer* was therefore not negligent in handling the object; rather, he did exactly what he was expected to do, and he is therefore not liable (*Avkas Rochel* 132, who argues with *Mabit* 1:196, and *Pischei Teshuvah* 225:5; see *Divrei Geonim* 95:69 for another reason to absolve the *shomer* in this case).

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