THE WERDIGER EDITION

BUSINESS WEEKLY

RESTORING THE PRIMACY OF CHOSHEN MISHPAT

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

Issue #638 | Mikeitz | Friday, Dec 23, 2022 | 29 Kislev 5783

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

WRONG EDITION

Elementary Publishers prints schoolbooks, mostly for use in elementary schools. One of their books was an English reader, which was widely used. Since some of the passages were about holidays, they printed also a "Jewish" edition, which reflected Jewish holidays in these passages.

Yesod Yeshivah ordered a box of these readers through a Jewish distributor. The order form clearly stated on it: "Jewish edition."

When the readers arrived, the box was brought to the classroom. The teacher, Mr. Sofer, distributed a reader to each student, affixing a sticker on it to write the name.

Mr. Sofer then opened the reader and thumbed through it. He noticed that the holiday passages were not reflective of Jewish holidays and inappropriate for the yeshivah!

"There's a mistake with the books," Mr. Sofer said to his class. "Please return them; we'll have to order new ones." He put the readers back in the box.

After class, Mr. Sofer contacted the distributor about the error and asked to send the edition they had ordered. "I'll bring you the Jewish edition immediately," he said. "Please have the other readers ready for pickup when I bring the new ones."

When the distributor arrived, he saw the stickers. "I'm going to have trouble selling these books to other schools as brand new," he said. "I may have to sell them as 'used in new condition.' I'll accept the books back, but expect you to cover the depreciation due to the stickers."

"It was your mistake in sending the wrong edition," argued Mr. Sofer. "I naturally assumed we received the edition we ordered. It's expected that students write their names or put name stickers on when distributing new books."

"I would like to consult Rabbi Dayan on this issue," said the distributor. He called and asked:

"Is Mr. Sofer responsible for the depreciation of the books?"

"The *Gemara* (*Chullin* 50b-51a) teaches that if a customer slaughtered an animal that turned out a *tereifah* in a manner that clearly occurred before the sale, it is considered a *mekach taus* – erroneous purchase due to the defect. The customer is entitled to a full refund, even though the animal is now worth significantly less. This is because

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

HIT-AND-RUN

Q: Reuven was traveling abroad, and he told Shimon that if he would drive him to the airport on Sunday and pick him up on Thursday, he could use Reuven's car in the interim.

Shimon gladly agreed.

One night, while the car was parked near Shimon's house, a hit-and-run driver left a huge scratch on the car, which cost $500 to repair.

Is Shimon obligated to pay?

A: There are many aspects to this she'eilah, and we will break it down one step at a time.

First we must determine what Shimon's status was in this arrangement. Is he considered a sho'el (borrower) who is liable for oness (circumstances beyond his control), or is he a socher (renter) who is not liable for oness?

A *sho'el* uses someone else's object without rendering any sort of payment. Since he is the only one benefiting from the arrangement, he is responsible for damage that occurs, even due to *oness*. A person who *does* render any sort of payment for the use of an object is classified as a *socher*, and he is not obligated to pay for *oness* (see *Bava Metzia* 94b).

In our case, Shimon is not the only one benefiting from the arrangement, because Reuven is getting driven to and from the airport in exchange for the use of his car. Shimon is therefore a *socher*, who is not obligated to pay for *oness*; he is obligated to pay only for theft or loss.

This brings us to the next question: Is hit-and-run damage considered *oness* or theft?

It is clear that since the car was damaged by another driver — through no fault of Shimon — it is an *oness*, because even if Shimon had been in or near the car, he could not have prevented the other driver from inflicting the damage. (Even if the car was stolen after he parked it at the curb and locked the doors, there are reasons why he might not be obligated to pay, as we will discuss, *iy"H*,

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it was expected that the customer would slaughter the animal" (*C.M.* 232:11; *Sma* 232:29; see, however, *Pischei Teshuvah* 232:6 regarding a *teriefah*).

"Rambam (*Hil. Mechirah* 16:6) derives a principle from this: If the customer damaged the merchandise further through normal use, before realizing that it was defective – he is exempt from that additional damage" (*C.M.* 232:13; *Sma* 232:29).

"This *halachah* is stated in the context of defective merchandise, but the same seems true regarding an erroneous sale of the wrong product, when the error is due to the seller and not immediately noticeable. Even a variation in the item, which makes it a different type, is considered an erroneous sale, such as white wheat instead of brown wheat. Similarly with different editions" (*C.M.* 231:1).

"However, if the difference between the editions is easily noticeable, e.g., if they have different covers, or if the shipping invoice stipulates to inspect the books before using, Mr. Sofer could no longer claim that he was not at fault. Furthermore, some write that if the customer could easily check, but neglected to do so, he forfeits a claim of defective merchandise. This might not apply, though, to different merchandise, which is clearly a void sale" (see *Pischei Teshuvah* 232:1; *Pischei Choshen*, *Geneivah* 13:[29]).

"It is typical to place a sticker, or write a name, when distributing books to students," concluded Rabbi Dayan. "Thus, if Mr. Sofer did not discover the error until afterward, he is not liable for the damage, and the distributor cannot charge him for the depreciation" (*Pischei Choshen*, *Geneivah* 13:[28]).

Verdict: In cases of defective merchandise or an erroneous sale due to the seller's error, the customer is not liable for further damage that he inflicted through normal use before noticing the defect or error.

MONEY MATTERS

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***Dayanim* (Judges) #26**
Zabl"a

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: What is the zabl"a (zeh borer lo echad) process?

A: In a place where there are permanent *Dayanim* (appointed by the community), they can force the litigants to adjudicate before them. Similarly, if there aren't permanent *Dayanim*, but the defendant refuses to adjudicate in his city, any local *beis din* of three can force him to adjudicate before them (*C.M.* 3:1).

However, if the litigant is willing to adjudicate in his city, but refuses to adjudicate before the *beis din* suggested by the plaintiff, the *beis din* should be chosen through the *zabl"a* process.

Thereby, each party chooses one *Dayan*, and – so that there will be and odd number – the two *Dayanim* choose a third *Dayan*. In this way, each party is assured that one *Dayan* will stand for his legal rights. If the *beis din* is being authorized also to judge a compromise, the third *Dayan* must be accepted by the litigants. Some write that nowadays, regardless, the practice is that the litigants jointly choose the third *Dayan* (*C.M.*, *Shach* and *Aruch Hashulchan* 13:1).

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in the next issue.)

We have already resolved your *she'eilah*; since Shimon was a *socher*, and the damage was an *oness*, he is not liable for it.

Let us now examine two more *she'eilos* that would have arisen had Shimon been a *sho'el* instead of a *socher*.

A *sho'el* is generally liable for *oness*, but is absolved of payment in two instances: *meisah machmas melachah* and *b'alav imo*. Would either of these two *halachos* apply to this case?

Meisah machmas malachah means that the borrowed item died (or broke) during normal, intended use, and the borrower is not liable for it (*Shulchan Aruch, C.M.* 340:3).

Now, had the damage been caused through no fault of the *sho'el* while he was driving, it would be subject to a dispute among *Rishonim* whether it would qualify as *meisah machmas melachah*.

Some authorities (*Ramban*, *B.M.* 96b; *Rema* 340:3 with *Shach* 5) say that the reason a borrower is not liable in a case of *meisah machmas melachah* is because the lender was negligent in giving him an item that could not survive normal use. In the case of a car that was damaged by a different vehicle, the owner was not negligent, so according to these *poskim*, the *sho'el* would be liable.

Others (*Ramah*, cited by *Tur* 340:6 and *Shulchan Aruch* 340:3) write that the reason a borrower is absolved in a case of *meisah machmas melachah* is because the owner knew that his item could get damaged during normal use, and when he allowed the borrower to use it, he agreed to forgo payment if it died (or broke) under those circumstances. According to these *poskim*, a borrower of a car is not liable for damage caused by another driver because the owner gave it to him knowing that this could happen.

Given this dispute, we cannot obligate the borrower, who is the *muchzak* (holding the money), to pay (*Maharashdam* 435).

In this case, though, the damage was not caused *during* the actual use, but while the car was parked at the curb. This would not qualify as *meisah machmas melachah*, because that is limited to damage that occurs specifically due to work the borrower did with the borrowed item. Since this damage could have occurred without the item being lent it is a regular *oness*, not *meisah machmas melachah* (*Nesivos* 340:5; see *Mishpetei HaTorah* 1:35).

If, however, the owner generally parks his car in his garage, and he lent it to the borrower realizing that the borrower doesn't have a garage, and the borrower would have to park it at the curb, then according to the latter list of *poskim*, the owner took into account when he lent it the possibility that the car would be damaged while it was parked, and the borrower is absolved (see *Mishpetei Hachoshen,* p. 442).

B'alav imo would not apply in this case, because in order to qualify as such, the owner must provide some sort of service to the borrower at the time of the handover (*Shulchan Aruch* 346:1). In this case, it's exactly the opposite — the borrower is providing a service to the owner by driving him to the airport — so it does not qualify as *b'alav imo* (see *Mishpetei Hachoshen* p. 539).

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