

BUSINESS WEEKLY



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

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Dedicated in honor of the Sheva Brochos of Yitzchok and Rena Alter



CASE FILE

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לע"נ הרב אהרן בן הרב גדליהו ע"ה

HOW MUCH?

Mr. Gross owned a small clothing store, from which he sustained his family. Business was seasonal and spotty, though, and had been very slow the past few months. He borrowed \$5,000 from his cousin, Mr. Klein, which he agreed to repay little by little.

Each month, Mr. Gross paid back a few hundred dollars in cash. He kept an Excel sheet of his payments.

Half a year later, Mr. Gross's computer crashed, and he had to reformat it. He was unable to recover the Excel file of his payments.

"I lost the Excel file of my payments," he told Mr. Klein. "I'm sure that I paid back at least \$2,500, but I think the true number is about \$3,000."

"I also don't have a record," Mr. Klein replied. "I also cannot say for sure, but my impression is that it was closer to \$2,000. I don't recall getting even \$2,500, although I cannot negate it."

"I'm sure about \$2,500," said Mr. Gross, "even though I can no longer prove it."

"If you say so," said Mr. Klein, "but I'm not convinced..."

That evening, Mr. Gross was talking with his wife. "I have to settle what we owe Mr. Klein," he said.

"He doesn't seem to trust you about the \$2,500," Mrs. Gross said. "I would just as well assume \$2,000, and pay him the remaining \$3,000."

"I'm not sure that we can do that, or even pay more than \$2,000," said Mr. Gross. "If we return more than we borrowed, it might be considered *ribbis!*"

"I didn't think of that," said Mrs. Gross wife. "Ask Rabbi Dayan!"

Mr. Gross called Rabbi Dayan and asked:

"How much am I required to repay Mr. Gross? May I pay more to appease him?"

"The *Mishnah* (B.K. 118a) teaches that a borrower who says: 'You lent me, and I don't know whether I repaid you' is liable," replied Rabbi Dayan. "This is because he has a *chezkas chiyuv* (status quo of debt), and the questionable repayment does not undo the definite obligation" (C.M. 75:9).

"This is when the lender claims that he was not repaid. However, if the lender



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

STOLEN RENTAL

Q. I rented a car from my friend, and one morning when I left my house, I was shocked to find that the car had been stolen during the night. Am I liable for it?

A. A *socher* has the same liability as a *shomer sachar* (paid guardian; see *Shulchan Aruch*, C.M. 307:1), so we will begin by delineating the *halachos* of a *shomer sachar* in such a case.

A *shomer sachar* is liable for loss and theft of a *pikadon* (object given to him to safeguard), but not for cases of absolute *oness* (ibid. 303:1). An absolute *oness* is a circumstance completely beyond a person's control, such as an armed robbery. But a *shomer sachar* is liable for an ordinary theft that would not have occurred had he guarded the *pikadon* carefully. The *Rishonim* debate what the *halachah* is in a case in which a theft occurred, but the circumstances of that theft were beyond the *shomer's* control (*geneivah b'oness*). Examples of such an *oness* would be if the *shomer* fell ill and was unable to guard the *pikadon* at the time of the theft, or if he secured the *pikadon* properly but thieves dug a deep tunnel into his property and stole it.

Some *Rishonim* rule that since a *shomer sachar* is liable for theft, which is often nearly an *oness*, it is reasonable to assume that he is liable even if the theft occurred in an extreme case (*Tosafos*, B.K. 57a; *Shulchan Aruch*, loc. cit. 303:2).

According to these *poskim*, if the *shomer* wasn't guarding the animal at the time of the theft — even if it is obvious that he could not have protected it had he been there — he is liable, because a *shomer sachar* is responsible for any loss that falls under the category of theft unless he was guarding the item personally during the theft and was physically incapable of protecting it (*Sma* 303:2).

The reason for this *halachah* is that since the theft occurred while he was responsible for the *pikadon*, it was his *mazel* that caused its loss (*Perach Shoshan*, C.M. 1:2), and when he agreed to guard the *pikadon*, he accepted responsibility for all circumstances of





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is also uncertain whether he was repaid, the borrower is not legally liable, but the *Acharonim* dispute whether he has a moral obligation (*latzeis yedei Shamayim*).

"Taz (75:10) writes that there is not even a moral obligation. Maharashdam (C.M. #40) also cites such an opinion. This also seems to be the conclusion of *Shach* (75:65,67). However, Maharashdam disputes this, and writes that unless there is a valid loan document the borrower is not liable but has a moral obligation. Chazon Ish (C.M. 7:3) also rules this way" (see also *Pischei Teshuvah* 75:21).

"This same dispute would seemingly apply if the borrower definitely paid partially, but neither he nor the lender remember how much.

"In this situation you are not required to pay more than \$2,000, since Mr. Klein is also unsure how much you repaid. According to some authorities, you have a moral obligation to pay \$2,500. There is no prohibition of *ribbis* when there is a Heavenly obligation to pay, or when you may owe that much" (*Avnei Nezer*, C.M. #22; *Bris Yehuda* 5:10).

"However, since you are sure that you paid at least \$2,500, paying \$3,000 for the good feelings of Mr. Klein would seem *ribbis mi d'Rabbanan*.

"Nonetheless," concluded Rabbi Dayan, "if the lender is not expected to know how much was repaid, or the doubt arose through the negligence of the borrower – such as if the repayment was to a third party, or if the borrower was appointed to keep the record and lost it carelessly – some write that the borrower would then be liable for the questionable amount" (see *Nesivos* 75:5; *Pischei Choshen*, *Halva'ah*, ch. 2, note 78).

Verdict: When neither the borrower nor the lender knows how much was repaid, the borrower is liable only for what he definitely still owes, but, according to some, has a moral obligation on the questionable amount.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS

Dayanim (Judges) #27

Zabl"a Choosing Dayanim

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

Q: Who can be chosen to serve on the panel of *zabl"a*?

A: Each litigant can choose a *Dayan* greater or lesser than the *Dayan* chosen by the other litigant, provided that he is upright, knowledgeable, and G-d fearing (*Sma* 13:6; *Shach* 13:4; *Aruch Hashulchan* 13:1).

Rashi indicates that each *Dayan* should advocate for the one who chose him. Nonetheless, *Tur* cites from the *Rosh* that he must rule justly, without favoritism or prejudice. All he can do is ensure that the claims of that party are considered fully and carefully. He may not deliberate unjustly, or trick his colleagues to accept his opinion with false argument. This is included in tilting justice (C.M. 13:1; *Sma* 13:4).

If one party chooses someone unworthy, the other party is not required to adjudicate before him until a worthy *Dayan* is chosen (*Rema* 13:1; *Sma* 13:7).

Poskim write that it is preferable that the community establish a regular *beis din* of three, since *Dayanim* chosen through *zabl"a* sometimes seek to improperly vindicate the one who chose them (*Shevet Halevi* 8:302).



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theft (*Nesivos*, loc. cit. 5 and *Divrei Mishpat* 1).

Other *Rishonim* argue that even a *shomer sachar* is absolved in such extreme cases of theft (*Tosafos*, B.M. 42a, s.v. *Amar Shmuel*), and the *poskim* argue as to the final *halachah* as well (*Sma* 303:2, with *Shach* 4).

The early *Acharonim* debate what — according to the latter opinion of the *Rishonim* — is classified as an *oness* that absolves a *shomer sachar* from liability, and what falls under the category of a typical theft for which he is liable.

Some *poskim* say that if he secured the *pikadon* according to the typical standards in his locale, and it was stolen despite those measures, it is considered an absolute *oness*, and these *poskim* would absolve him from payment. Therefore, if he secured a *pikadon* in his house, which is locked with a typical lock used in his locale, he is not liable if it is stolen (*Maraham ben Chaviv*, in *Ginas Vradim*, C.M. 1:1; see *Darkei Moshe*, C.M. 306:1).

Other *poskim* argue that a theft is considered an *oness* only if the *shomer* did the best possible job of securing it — to the point where we cannot think of any additional measures he could have taken to prevent the theft (*Mishpat Tzedek* 2:8, cited in *Knesses Hagedolah*, *Hagahos HaTur* 303:4).

According to these *poskim*, the *shomer* would have to keep the object locked in a safe in order for it to be deemed an *oness* that would absolve him of liability.

Ginas Vradim (loc. cit.) absolves the *shomer* from payment for a different reason: If he guards the *pikadon* in a manner that is typical for that locale, it is as though the two parties agreed that if he guards it in this manner, he will not be liable for theft and loss (See also *Aruch Hashulchan* 303:7 and *Pischei Teshuvah* 291:8).

Others argue that since a *shomer sachar* is always liable for theft, he would be absolved from payment only if such an agreement was verbalized (*Perach Shoshan* [written by a disciple of the *Ginas Vradim*] loc. cit., cited in *Chiddushei Rabbi Akiva Eiger* 303:2).

Returning to your case, it is wholly apparent that parking a car at the curb and locking it is considered a proper way to guard it. According to the *Ginas Vradim*, then, you are not obligated to pay, because since you secured it properly, it is as though you conditioned liability to cases in which you did not lock the car. Furthermore, according to the opinions that maintain that if an item is guarded in the typical manner, then theft of that object is considered an absolute *oness*, you certainly are not obligated to pay.

In addition, some *poskim* say that the Torah compares a *socher* to a *shomer sachar* only with regard to liability for typical theft and loss, but a *socher* is not liable for theft that occurs when he takes proper measures to safeguard the *pikadon* (*Shu"t Chasam Sofer*, C.M. 16; *Erech Shai* 307, following the opinion of *Shu"t Maharshach* 2:169; cf. *Mishneh L'Melech* 10:1 and *Chiddushei Rabbi Akiva Eiger* 72:2 and *Ketzos Hachoshen* 72:5). According to these *poskim* as well, you are not liable for the car.

[See our previous issue, where we discuss the possibility of being absolved because of *meisah machmas melachah*.]

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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