

BUSINESS WEEKLY



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

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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

WITHOUT PERMISSION

Dani owned a motorbike, which he kept in his shed. One evening he found it missing.

"What happened to the motorbike?" Dani wondered. "I hope it wasn't stolen!"

Later that night he spied Benjy returning it. "Who gave you permission to use my motorbike?" Dani confronted him.

"No one...", acknowledged Benjy. "I needed the bike to get quickly across the neighborhood. I didn't think that you wouldn't agree to lend it, so I just took it."

"That is totally unacceptable," Dani reprimanded him. "It's like stealing!"

"I apologize," said Benjy. "I know it was wrong, but I really needed the bike."

Dani looked at the motorbike. "I see that you also ruined it," he said. "The handlebars are cracked, and the seat support is bent!"

"The bike is still usable," replied Benjy. "I'll pay you the loss in value or repair cost."

"No way!" said Dani. "You buy me a motorbike and take the broken one!"

"Buy a motorbike?!" exclaimed Benjy. "That's a tremendous expense! I have no use for a motorbike on a regular basis."

"That's your problem," insisted Dani. "You took it without permission and broke it. I don't want a broken motorbike."

"You can either repair it, or sell it and buy a comparable, used motorbike with the additional money," suggested Benjy.

"Why should I have to do that?" argued Dani. "You had no right to use the motorbike!"

Dani and Benjy approached Rabbi Dayan and asked:

"Does Benjy have to buy Dani a motorbike?"

"A person who 'borrows' without permission, against the owner's will, is tantamount to a thief," replied Rabbi Dayan (C.M. 359:5).

"A thief is required to return the stolen item when it is intact. However, if it got ruined or changed significantly, the *Mishnah* (B.K. 93b) teaches that the thief is required to pay the full value of the item, and he is left with the ruined item. He cannot return the ruined item and add the loss in value, unlike a borrower or one who damages (C.M. 354:5).

"Nonetheless, Rambam (*Hil. Gezeilah* 2:15) rules that if the owner prefers his broken item and the loss in value, he can demand it. The commentators question why this is so; seemingly, the thief acquired the item on account of the change (*shinui*). Regardless, Shulchan Aruch rules like the Rambam (*ibid*; Sma 362:23).

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On subjects and principles of
Choshen Mishpat

By: Harav **Chaim Kohn** Shlita
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לע"נ ר' שלמה ב"ר ברוך וזוג' מרת רייכלה בת החבר יעקב הלוי ע"ה ווייל

GUEST AS A GUARDIAN

Q. I am traveling to a different city for a wedding, and I am borrowing an apartment from a friend who is traveling to Eretz Yisrael that week. My friend

graciously told me that I may use anything in the house. What are my obligations in terms of safeguarding both his apartment and its contents?

A. If you damage an object proactively — even by mistake — it is obvious that you will be liable for that damage like any other *mazik*. If, however, something gets damaged as *meisah machmas melachah* — it dies as the result of normal use — you will not be liable for the damage (*Shulchan Aruch, Choshen Mishpat* 340:1). If you overuse an item, however, then you will be liable if it breaks.

If one of your minor (i.e., under bar or bas mitzvah) children damages an object, since they are not responsible for their damages, according to the letter of the law, you are not responsible for those damages either (*Choshen Mishpat* 349:3 & 424:8; also see BHI # 167).

Nevertheless, it is possible that you will be liable as a *shomer* in the latter case.

In regard to the apartment itself, real estate (*ibid.* 301:1), and anything connected to the ground (*mechubar l'karka*; see *ibid.* 95:1 with *Shach* 8) are not included in the *halachos* of *shemirah*. Therefore, unless there was a specific condition made, along with a *kinyan*, obligating you to pay for such damages, you are not liable (see *Kovetz Teshuvos* 1:216).

In regard to the contents, some *Poskim* say that a borrower is liable even if no *kinyan* was made on the borrowed object (*Choshen Mishpat* 340:4).

We find a case in the *Gemara* (*Bava Kamma* 48a; *Choshen Mishpat* 393:3) in which a woman entered someone's house to bake, and the homeowner left due to a *tznius* issue, since her arms would become exposed during baking. While he was out of the house, his animal ate her baked items and was harmed by them. The *Gemara* rules that since the woman knew that the homeowner would have to leave because of the *tznius* issue, she became obligated to guard his animal, and she is



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"Moreover, the *Gemara* (B.K. 97a) addresses the case of a person who took someone's boat without permission. He is liable for any damage incurred through the use (C.M. 363:5).

"Raavad (cited by Shitah Mekubetzes) asks why the person is not liable for the full value of the boat, following the rule in the *Mishnah*, since it is no longer intact? He provides two answers:

"First, one who borrowed without permission is different from a thief in this specific regard; he suffices with returning the damaged item and paying the lost value, like other borrowers (C.M. 344:2).

"Second, when the item is still usable for its initial function, although somewhat ruined, even a thief can suffice with returning the item and adding the loss in value (see Sma 354:11).

"Chazon Ish (B.K. 20:3-4) and Nesivos (363:6) rule also according to the first answer of the Raavad, whereas Rashba and Gra (354:13) cite only the second answer.

"Chazon Ish furthermore understands the Raavad as saying that if the damage is minimal, so that the item is not considered "changed," even a thief can return it as is ("*harei shelcha l'fanecha*"), and he is not obligated to pay the lost value. It is questionable whether the Rashba and Gra understood this way. Moreover, it is written in *Chiddushei Rabbeinu Chaim Halevi* (*Hil. Gezeilah* 2:15) that the Rambam seemingly requires paying any lost value.

"Thus," concluded Rabbi Dayan, "Benjy does not have to buy a new motorbike, but must pay the lost value or repair cost."

Verdict: A person who "borrowed" without permission, and the item was partially ruined, but still usable for its initial function, can return the item and pay the loss in value or repair cost.



MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

MONEY MATTERS Minhag Hamedinah

Common Commercial Practice #8
Common Practice on Unresolved
Halachic Issues

לע"נ ר' יחיאל מיכל ב"ר חיים זוג'ל ח'ל בת ר' שמואל חיים ע"ה

Q. Can minhag hamedinah be utilized to resolve questionable halachic issues?

A: There is a halachic dispute whether a customer can make a claim of defective merchandise for damage that is readily noticeable.

Maggid Mishneh (*Hil. Mechirah* 15:3) rules that the customer forfeits his claim in such a situation, since he didn't bother to check; other *Poskim* disagree. This dispute is not fully resolved among the *Poskim* (see Sma 232:10; *Pischei Teshuvah* 232:10).

Nonetheless, several *Acharonim* write that in places where the civil law is that the customer cannot claim defective merchandise under such circumstances, or if there is a time limit for claims of defective merchandise, and most of the city people follow the civil law, this establishes a valid *dina d'malchusa* or *minhag hamedinah*. Thus, even if the *halachah* is not according to the Maggid Mishneh, it is like people accepted upon themselves to follow this opinion (Maharsham 3:128; Maharshdam Y.D. 101, 182; Chazon Ish, *Likutim C.M.* 16:1).



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therefore liable for the damage to the animal.

It would appear from this *Gemara* that she became responsible for the *shemirah* even without having made a *kinyan*. This *Gemara* therefore seems to contradict the opinion that a person cannot be responsible as a *shomer* without a *kinyan* (*Ri'az, Kuntres Haraayos, Bava Metzia* 81b, *Kava D'Kashyasa* 24).

There are several answers offered to resolve this difficulty.

1. A *kinyan kesef* is enough to make a person responsible as a *shomer* (*Machaneh Ephraim, Shomrim* 7 and *Nesivos* 291:12; see also *Nesivos* 306:1 and 340:8. See, however, *Erech Shai* and *Minchas Pittim* 306, *Imrei Binah, Halvaah* 82).

This woman received something of monetary value from the homeowner when he allowed her to bake in his house, and that served as a *kinyan kesef* to make her liable as a *shomer* (*Machazeh Avraham* (Yafeh), *Bava Kamma* loc. cit.).

2. The woman purchased the right to use the oven by making a *chazakah* when she used it, and through a *kinyan agav* (additive *kinyan*), she accepted to serve as a *shomer* (*Nesivos* 95:1; cf. *Mishpetei Hachoshen* p. 447).

It would seem that your situation is similar to that of this woman, and the above approaches explaining how she became obligated to guard the homeowner's animal apply to you as well.

Although some *Poskim* deliberate whether a *shomer* becomes responsible for guarding an object with the above-mentioned *kinyanim*, they maintain that the only *kinyan* that would suffice to obligate a *shomer* is when it enters his property — similar to him making a *kinyan* of *hagbahah* or *meshichah*. (See *Mishpetei Hachoshen* loc. cit.) It is still clear from that *Gemara* that a *shomer* could become obligated to guard an item without that type of *kinyan*. Furthermore, it is possible that he becomes liable due to a *kinyan chatzer* (see *Choshen Mishpat* 313).

But the *Poskim* discuss what type of *shomer* you are in this case — a *shomer chinam, socher* or *sho'el* — and whether there is a difference between objects that you would typically use in the course of borrowing someone's house and objects that you would not normally use, such as a Chanukah *menorah* (see *Mishpetei Hachoshen* p. 423.)

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

