

# 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

Rabbi Meir Orlian  
Writer for the Business Halacha Institute



## BHI HOTLINE

לע"נ הרב אהרן בן הרב גדליהו ע"ה

### KICKED BY A PASSERBY

Simcha was making a *siyum* with his friends at his house. He came home from yeshiva on his skateboard and rushed into his house, leaving the skateboard strewn on the sidewalk.

The *siyum* was underway when Naftali came running along. He didn't notice the skateboard lying there and inadvertently kicked it and

sent it rolling along forcefully. The skateboard careened toward the street and crashed into the neighbor's car, which was parked outside Simcha's house.

Naftali rubbed his foot and was happy that he wasn't injured. He moved the skateboard aside. Meanwhile, the neighbor, Mr. Stein, heard the noise and came out. He saw that the skateboard made a long scratch in the paint of the car.

"What happened?!" Mr. Stein asked Naftali. "The car is scratched!"

"There's a *siyum* at Simcha's house," Naftali explained. "Someone left his skateboard on the sidewalk. I was running along and didn't notice it; it rolled into your car."

"Go enjoy the *siyum*," Mr. Stein said. "Afterward, we'll have to talk about the damage."

After the *siyum*, Naftali and Simcha came to talk with Mr. Stein.

"The scrape will have to be painted," Mr. Stein said. "It will cost a few hundred dollars. Who's going to pay?"

Naftali and Simcha looked at each other.

"The skateboard shouldn't have been there in the first place," Naftali said. "It was Simcha's fault for leaving it there; he should be liable!"

"I acknowledge that I shouldn't have left the skateboard there," Simcha responded, "but you should have looked where you were running. You sent the skateboard rolling!"

"You each think that the other is responsible," said Mr. Stein. "The truth is, I think that you're both responsible. Maybe you should split the liability?"

"Or, perhaps neither of us is liable?" replied Naftali and Simcha.

The three approached Rabbi Dayan. Mr. Stein asked:

**"Who is liable for the damage to the car?"**

"The *Gemara* (B.K. 27b) teaches that people are not generally expected to look down when walking in a public thoroughfare. Therefore, if Simcha wrongly left his items on the sidewalk where people walk, and Naftali inadvertently trampled it, Simcha usually does not have a claim against him for breaking it (C.M. 412:1).

"However, if Naftali did not merely trample the item but rather kicked it forcefully and thereby damaged something else, *Rosh* (B.K. 1:1) rules that he alone — not Simcha — is liable for the subsequent damage. This requires some explanation and background knowledge.

"Damage done by an inanimate item that is stationary is included in the category of *bor* (pit), which is exempt (based on a derivation from a *passuk*) from damage to other inanimate items (C.M. 410:21; 411:1).

"However, the *Gemara* (B.K. 3b, 6a) teaches that when the item is flung by wind, animals or people and damages while moving, it takes on another character.

"When flung by the wind or dragged by animals, it is included in the category of *aish* (fire), which typifies damage that moves, so that the owner of the item is liable even for damage to other inanimate items (*Rema* 390:10; *Sma* 390:25, 411:1).

"When a domesticated animal flung the item, the owner of the animal may share in the subsequent damage, according to the circumstances (*regel, keren* or *tzroros*) along with the owner of the item, who remains liable as *aish* (C.M. 411:4-5).

"However, when a passerby flung or kicked the item forcefully, even inadvertently, and it damaged,

### THE COST OF CHOICE

**Q:** At the jewelry store I own, customers sometimes ask to take home a few pieces so that they can choose one. What level of liability does such a customer have if a piece is damaged or destroyed due to an *oness* (circumstance beyond his control)?

**A:** We might think, at first glance, that the customer is obviously liable, because the *Shulchan Aruch* (*Choshen Mishpat* 200:11) states that if someone takes an item from a store conditionally, so that he can decide if he likes it and whether he wants to buy it or return it, he is liable for any *onsim* that occur from the moment he takes it.

Upon further analysis, however, we find several reasons why he may not be liable.

The *Rishonim* state that the person taking the merchandise can be viewed as either a buyer or a borrower, and they explain why he would be liable in either of the two cases.

Some state that as soon as he takes the object (i.e., he makes a *kinyan* on it), it is considered his unless he retracts, and he is therefore the one to suffer any loss.

According to the second approach, because the seller is allowing the customer to take it home to decide whether he wants to keep it or return it, the customer is considered the sole beneficiary during that trial period (*kol hahana'ah shelo*). As such, he is considered a borrower, who is responsible for an *oness*, because only he benefits from the borrowed item.

But three criteria must be met in order for the client to be liable for *onsim* (*Shulchan Aruch* 200:11; *Nesivos* 186:1):

1) The price must be fixed (i.e., there is a price tag on it). If there is no set price, the client cannot be considered a buyer, because he has no idea how much he is expected to pay (see *Shulchan Aruch* 200:6 with *Sma* 13). He also cannot be categorized as a borrower, because we cannot say for certain that *kol hahana'ah shelo* because he doesn't know the price. And if he ends up having to pay more than he wants to, he won't be considered the sole beneficiary (cf. *Chochmas Shlomo* 200:11).

2) Demand for the item must exceed supply. If the item is readily available elsewhere, then both sides benefit equally from the transaction (because the seller isn't guaranteed to be able to sell the item, because it could

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## CASE FILE

*Rosh* rules that he is liable, not the item's owner, because the passerby is considered negligent in this regard. Although a person who tramples an item while walking in a public thoroughfare is usually not liable for it, since people are not expected to look down while walking, he is not expected to fling something wildly. Therefore, he alone bears liability for the subsequent damage, like a person who actively and intentionally damaged, even for damage to inanimate items (C.M. 411:3; *Aruch Hashulchan* 410:43, 411:4).

"Thus, Naftali alone bears liability for the scratch," concluded Rabbi Dayan. "He is considered as having actively damaged, so that Simcha is not liable, even though the skateboard was his."

**Verdict:** A person who inadvertently trampled something wrongly left in a public thoroughfare is exempt. However, if he flung the item forcefully and thereby damaged something else, he is liable like a person who actively damaged, even for damage to inanimate items.



## MONEY MATTERS

Based on writings of Harav Chaim Kohn, shlita

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

### MONEY MATTERS

Shabbos and Yom Tov

#6

#### Insurance Agent

**Q:** I own an insurance company. The sales agents work on a commission basis, but some also have a base salary. Can I allow a non-Jewish agent to schedule meetings with potential clients and put policies in force on Shabbos?

**A:** We mentioned that when the non-Jew shares in the profit, and it is typical to operate in this manner, it is permissible if he chooses to work of his own accord on Shabbos.

Thus, if the insurance agent works on a commission basis and wants to schedule appointments on Shabbos of his own accord, it is permissible, because he is working for his own interests.

Nonetheless, he cannot put the policy into force on Shabbos, because that is the company's issue, and regarding that it is considered as if you're doing business on Shabbos.

If the agent also has a base salary, some *poskim* allow it nonetheless, because the non-Jew is also working for his commission (*Shaarei Teshuvah* 245:2, citing *Noda b'Yehudah* 2:29). However, others do not allow this (*Chasam Sofer* O.C. #59).

In practice, it seems that this depends on the ratio of base salary to commission; i.e., whether the commission is a significant part of the salary, so that we can say that he is working for himself.

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## BHI HOTLINE

be bought elsewhere), and there is a debate whether he is considered a buyer in regard to having liability for *onsim* (*Nesivos* 186:1).

3) Some say that the customer has to lift the object with specific intent to buy it if he likes it; others say that even if he lifted it without that specific intention, we assume that this is what he had in mind when he took the item from the store (*Sma* 200:29; see *Halachah L'Moshe, Mechirah* 4:14; *Beis David*, *Choshen Mishpat* 103; *Shu"t Imrei Yosher* 2:70; *Ulam Hamishpat* 2:11).

In your case, it is unlikely that the customer has specific intent to purchase the items he took, so according to some *poskim*, he is not liable.


In addition, nowadays a seller generally has as equal an interest in making a sale as the buyer has in obtaining the object, because most items are mass-produced and can be purchased in many places, so the buyer is not the sole beneficiary in this transaction (i.e., and is halachically not considered a borrower). Although some *poskim* rule that he still qualifies as a buyer if the price is fixed, many *Rishonim* disagree. [Nevertheless, some rule that if the seller specifically told the buyer the price, then we assume that the buyer lifted it with intent to buy it if he liked it, and he is therefore liable for *onsim* (see *Machaneh Ephraim*, *Shomrim* 24; *Shu"t Imrei Yosher* 2:70, but see *Lechem Yehudah* v.2, 41b).].

Some *poskim* write that this is true if the buyer took home only one item, but if he took multiple items intending to choose one — as is the case with jewelry or *esrogim*, for example — he is not liable for *onsim*. He can't possibly plan to purchase the items when he lifts them, because he obviously has no intention of buying all of them. The *poskim* debate, however, whether the customer is liable for *onsim* on at least one of them (*Imrei Yosher* and *Ulam Hamishpat*; see also *Pis'chei Choshen*, *Pikadon* 1:73).

Given the numerous reasons why the customer might not be liable, if you would like to ensure that you do not take a loss in a case of an *oness*, you should state explicitly, before allowing a customer to take home merchandise, that he is liable even for *onsim* (*Choshen Mishpat* 305:4). Even without that stipulation, however, if the items get lost or are stolen, the customer is liable, because your allowing him to take them home and choose from among them is tantamount to a payment of sorts, for his safeguarding the items. This makes him a *shomer sachar*, who is liable for loss or theft of the items he was paid to safeguard.

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