

# BUSINESS WEEKLY

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HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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## STORY LINE

by Rabbi Meir Orlan

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## Mobile Mishap

Yossi was rushing home from his dorm for Shabbos. He packed up quickly, stuffed his wallet in his pocket, and headed out. Before leaving the building, Yossi reached into his pocket to check that he had taken his cell phone. He didn't find it, so he ran upstairs and grabbed the phone, which was sitting on the table.

On the way to the train, Yossi was confronted by thugs armed with knives.

"Give us your wallet," they demanded. "And your phone."

Of course, Yossi complied, and they ran off. Shortly after arriving home, Yossi received a call on the house phone from his roommate, Ezra.

"You accidentally left your phone in the room," Ezra said. "And I can't find mine. Did you take it by mistake?"

"You're kidding!" cried Yossi. "I really took

your phone?"

"It seems so," said Ezra. "Haven't you tried using the phone since you left?"

"You'll never believe what happened," Yossi apologized. "On the way to the train, I got mugged! They took my cell phone. I guess that means yours is gone."

"Wow! Sorry to hear," said Ezra. "Are you okay?"

"Baruch Hashem, I'm okay," replied Yossi. "Just a bit shaken. They also took my wallet; I had to cancel my credit cards. I'm really sorry about your phone."

"What should I do with your phone?" asked Ezra.

"Use it meanwhile," said Yossi. "I guess I'll have to buy you a new one after Yom Tov."

"It's not your fault," said Ezra. "You were mugged."

"Still, I took your phone without permission,

and it's gone," said Yossi. "It's my responsibility, isn't it?"

"I'm not convinced you're liable," said Ezra. "I suggest we raise this with Rabbi Dayan when you return."

After Shabbos, Yossi and Ezra met with Rabbi Dayan. "Am I liable for Ezra's cell phone?" Yossi asked.

"There are a number of factors to consider here," replied Rabbi Dayan. "A thief is liable for the stolen item, even if it is subsequently lost through uncontrollable circumstances. Thus, had you knowingly stolen Ezra's cell phone, you would be liable even if you lost it later through armed robbery (see C.M. 303:3; Nesivos 182:2; Pischei Choshen, Geneivah 4:5[18])."

"What difference does it make, then, whether I knowingly stole the phone or took it by mistake?" asked Yossi. "Either way, I took

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## Bought from a Borrower

I purchased merchandise from a Jewish merchant. Yitzchok called me and, after proving that the merchant owes him money, requested that I send my payment to him rather than to the merchant. He based this claim on the principle of shibuda d'Rabi Nasan, the case where Reuven lends \$100 to Shimon and Shimon lends \$100 to Levi, and Reuven is considered Levi's virtual lender - obligating Levi to pay the money he borrowed directly to Reuven. My hesita-

tion in paying Yitzchok is that the merchant is secular and will likely reject this halachic principle and use legal means to collect the money, thereby causing me to suffer a loss.

**Q: If I have such a concern, am I obligated to pay Yitzchok rather than the merchant?**

**A:** The Rema (C.M. 86:9) addresses a case in which Reuven is a custodian for a gentile's object and Shimon approaches Reuven and

asks for the item, invoking the principle of shibuda d'Rabi Nasan because he lent money to that gentile. Rema rules that if Reuven is concerned that giving the item will cause him a financial loss, he is not obligated to do so. It would seem that similarly, if you are concerned about suffering a loss by not paying the merchant directly, you are not obligated to expose yourself to any risk.

However, there are grounds to distinguish between your case, which involves a loan,

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it without permission. Doesn't that make me liable?"

"There is an extensive discussion in the Acharonim about whether someone who mistakenly stole is considered a thief," said Rabbi Dayan. "If the item is intact, he obviously has to return it. The question is whether he has the liability of a thief when the item cannot be returned, such as in your case."

"I understand," said Yossi. "What is the halacha?"

"Ketzos Hachoshen (25:1) addresses this issue in the case of a judge who mistakenly handed money from the innocent party to the other litigant," replied Rabbi Dayan. "He argues that the judge does not carry the liability of a thief if he did not intend to steal."

"But isn't a person who damages liable whether he did so accidentally or not?" asked Ezra.

"Yes; the Gemara (B.K. 26b) derives from the verse 'petza tachas petza' that even one who

injured or damaged unintentionally is liable," answered Rabbi Dayan. "However, there is no parallel source to impose the absolute liability of a thief on one who stole unintentionally."

"You mentioned that there's discussion about this," noted Ezra. "Do other Acharonim argue?"

"Yes, because when the judge mistakenly took the item, he willingly handed it over to the other party," replied Rabbi Dayan. "They also argue about when a person intends to acquire an item for himself, mistakenly thinking that he had permission to do so. However, if the person had no intention of acquiring the item, because he thought it was his, and it was subsequently lost through uncontrollable circumstances, many exempt him from liability (see Nesivos 25:1; Machaneh Efraim, Gezeilah #7).

"Thus," concluded Rabbi Dayan, "Yossi is not liable for the cell phone."

and the Rema's case involving a custodian. If thieves threaten to harm a custodian if he does not hand over the valuable items he is guarding, he may give those items to the thieves (C.M. 292:8). The custodian is not expected to behave any differently than the owner would, and the owner would certainly give away his valuable items to save himself from danger. Therefore, even in cases where one could invoke the principle of shibuda d'Rabi Nasan, when it is assumed that the owner would give away his object to save himself from harm, a custodian may do the same.

This rationale, however, is limited to a custodian. A borrower is obligated to repay the money in all circumstances even if he will suffer harm by doing so. Accordingly, in the case of a loan, Levi is obligated to pay the money that he owes directly to Reuven (his virtual

lender) even though there is a risk that Shimon will force Levi to pay him a second time (Shaar Mishpat 86:10, cited by Pischei Teshuvah 86:7). Some disagree and contend that even in the case of a loan, Levi is not obligated to put himself at risk. The rationale is that Levi would not even be obligated to pay Shimon (his actual lender) if that could cause him to have to pay a second time. Therefore, there is no reason to obligate Levi to pay Reuven (his virtual lender) if it may cause him to pay a second time (Avnei Hachoshen; see also Chazon Ish, B.K. 15:39, who disagrees with Shaar Mishpat on other grounds).

Consequently, if there is a reasonable concern that you would expose yourself to risk by paying Yitzchok rather than your merchant, you cannot be forced to pay Yitzchok.

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## Lost and Found #11

**Q: I found a sweater and publicized my find. A person claimed that he lost his sweater and provided a description of it. What simanim (identifying features) are considered sufficient to return the sweater to him?**

**A:** There are three levels of simanim.

1) Absolute identification (muvhak b'yoser): A feature that uniquely identifies the particu-

lar item, such as a stain, hole or scratch in a specific place, a name tag, etc. This is certainly sufficient (C.M. 262:3; 267:6-7).

2) Reasonable identification (muvhak or beinoni): Something that provides reasonable likelihood that this is his lost item, such as the place where the sweater was left, the number of items left together, a non-standard weight or measurement, special knot, or wrapping. This identification is sufficient

for a person with an honest reputation, but not for someone suspicious.

3) Poor identification (garua): Something that many such items manifest, such as color (blue sweater), long or short, or standard measurement. This is not valid identification, since it is possible that even if he lost such a sweater, the one you found is not his, but belongs to someone else who lost a sweater of similar color or size.

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