



BUSINESS WEEKLY

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UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA



STORY LINE

By Rabbi Meir Orlian

STOLEN COLLATERAL

Mr. Miller had been unemployed for a while, but was expecting to start a new job shortly. "We need to borrow \$5,000 to carry us through next month until the first pay check comes," he said to his wife.

"Whom can we borrow from?" Mrs. Miller asked.

"I'll ask Jack Braun," Mr. Miller replied. "He's been helpful in the past."

"I can lend you \$5,000 for a month or two," Mr. Braun said, "but I can't afford to risk losing the money. Can you give something as collateral until the loan is repaid?"

"I'm not sure what we have worth that amount," said Mr. Miller. "Let me check with my wife."

"There is a diamond necklace that I wear on special occasions," Mrs. Miller said to her husband. "It was recently appraised at \$6,000. We can give that as collateral."

Mr. Miller brought the necklace over to Mr. Braun. "I'll put it away safely in my wife's jewelry box," Mr. Braun said. He wrote out a check for \$5,000.

A week later, the Brauns returned home from a simchah and saw one of the windows ajar. Things were strewn around the floor, drawers were open, and the breakfront was bare of its silver items. "We've been burglarized!" Mr. Braun cried out.

Mr. Braun ran upstairs to the bedroom. His wife's jewelry box had been emptied. Missing also was Mrs. Miller's diamond necklace!

Mr. Braun notified Mr. Miller of the unfortunate incident. "I'm very sorry to hear," Mr. Miller said sympathetically. "However, you are responsible for the necklace. We should not have to repay the loan, since the necklace was stolen. If anything, you should pay us the \$1,000 difference!"

"I disagree; the two issues are unrelated," objected Mr. Braun. "You have to repay the loan, regardless. On the other hand, since I received nothing for watching the necklace, I am an unpaid guardian (shomer chinam) and not liable for its theft" (C.M. 291:1).

"Let's ask Rabbi Dayan," they agreed. The two approached Rabbi Dayan and asked: "Who owes whom?"

"No one," ruled Rabbi Dayan. "Mr. Braun loses the right to collect the \$5,000 loan, but is not liable for the excess \$1,000."

"Why is that?" asked Mr. Miller.

"The Mishnah (B.M. 80b) teaches that one who lent with collateral is considered a shomer sachar (paid guardian), who is liable for its theft," replied Rabbi Dayan. "However, the Gemara (82a) subsequently links



BHI HOTLINE

BORROWED ON CONDITION

I asked my neighbor if I could borrow his car for a

couple of weeks while he would be out of town. He gladly agreed but stipulated that I pick him up from the airport when he returns and that I make sure to park on the correct side of the street when alternate side parking is in force. A tree fell on the car the day before his return and I was not able to pick him up from the airport.

Q: Am I categorized as a shoel (borrower) who is liable for the damage to the car even though an oness (circumstance beyond one's control) occurred, or am I categorized as a socher (lessee) who is exempt from an oness? Additionally, am I obligated to reimburse him for the cost of the ride back home from the airport since I agreed to drive him home and was unable to do so?

A: The definition of a shoel is kol hahanaah shelo, meaning that the borrower has all of the benefit from the relationship and the owner receives nothing. When the owner receives any form of benefit from this relationship, he is categorized as a socher rather than a shoel and is exempt from liability when an oness occurs.

Accordingly it would seem that when the borrower is responsible to park on the correct side of the street to avoid getting a ticket, the owner thereby benefits from the relationship and the borrower is categorized as a socher. This, however, is not true since the

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STORY LINE

this issue to a dispute regarding someone who is holding a lost item until its owner comes. Rav Yosef considers him a shomer sachar on account of the benefit of the mitzvah, whereas Rabbah considers him a shomer chinam" (C.M. 267:16).

"What is the ruling?" asked Mr. Braun.

"The Shulchan Aruch rules like Rav Yosef, that the lender is a shomer sachar and liable for the stolen collateral," answered Rabbi Dayan. "He must pay its value in excess of the loan. However, the Rema rules like Rabbah, that the lender is a shomer chinam and not liable. He concludes that on account of the doubt we do not extract payment. This is also the conclusion of later authorities. Thus, Mr. Braun does not have to pay the excess \$1,000" (C.M. 72:2; Shach 72:22).

"But if I am a shomer chinam and not liable for the necklace," asked Mr. Braun, "why shouldn't I be able to collect the full \$5,000 of the loan?"

"Tosafos (s.v. Neima, Lo) explains, based on Shmuel's opinion in the Gemara (op. cit.), that there is an unstated understanding that if the collateral is lost or stolen, the borrower will not repay the loan," replied Rabbi Dayan. "This is also the intention of the Mishnah that the lender is like a shomer sachar. When the collateral is equivalent to the loan, it cancels out; when it is worth more, the borrower is exempt from paying the loan — but the lender does not have to pay the excess amount" (Sma 72:15; Shach 72:20; Pischei Choshen, Halvaah 8:[24]).



MONEY MATTERS

Adapted from the writings of Harav Chaim Kohn, shlit

BEIS DIN AND CIVIL COURT #9

Permission to Litigate in Civil Court (II)

Q: In what situations is a person granted permission to litigate in civil court?

A: When the defendant refuses the summons of beis din, some write that beis din will grant permission to sue in civil court only when there is indication that he is liable. However, the general practice nowadays is to grant permission even when beis din does not know whether he is liable (see Nesivos and Aruch Hashulchan 26:2; Erech Shai 26:2).

When a person is sued in civil court without permission of beis din, he should have the plaintiff summoned by beis din to adjudicate there. Otherwise, it would be construed as accepting the civil court as a binding authority. Meanwhile, the defendant is permitted to respond and defend himself against the claim in civil court to prevent loss. (See Rema C.M. 22:2, 388:5; Maharsham 1:89.)



BHI HOTLINE

Gemara (B.M. 94b) writes that a borrower who feeds and guards the borrowed animal remains a shoel. The critical factor is whether the benefit provided is payment for using the object. A borrower uses the object free of charge. Feeding and guarding the borrowed animal is maintenance of the animal rather than compensation for its use (Machaneh Ephraim, she'eilah 3).

Alternatively, the reason feeding the animal is not considered a payment is that while the borrower has possession of the animal he is considered its owner (see Rashi, Sanhedrin 72a, d.h. "aval"). For that duration of time it is as if he is feeding and guarding his own animal rather than the owner's animal, and thus remains a shoel who is liable for oness (Ohr Same'ach, she'eilah 1:1). There is no doubt that the owner's other stipulation that you pick him up from the airport is considered an additional benefit, and once he is set to receive that additional benefit, your position changes from a shoel to a socher who is exempt from oness.

Moreover, it is logical that you are not obligated to reimburse the owner the cost of the ride home from the airport since the simple understanding of that commitment is that you would drive his car to the airport to pick him up. It was not a commitment to assure the owner that he would have a ride home. Therefore, once the oness occurred that prevented you from picking him up, you have no halachic obligation to make arrangements or pay for another means of transportation from the airport to his home.

For questions on monetary matters, Please contact our confidential hotline at 877.845.8455 ask@businesshalacha.com

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BHI'S ANNUAL BRUNCH
ON SUNDAY, MAY 17 WILL ADDRESS
10:00 - 1:00



THE FAR-REACHING TENTACLES
OF PONZI
SCHEMES
AND OTHER SCAMS

**WHEN THE SCHEME IMPLODES, IT'S ALL OVER THE NEWS.
BUT WHAT HAPPENS IN THE AFTERMATH?**

Get answers to fascinating questions that BHI has dealt with from victims, employees, and acquaintances who were shocked to discover that they were entangled in the mess.

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CHAIM KOHN
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THE LEGAL ANGLE
RABBI PROFESSOR
AARON TWERSKI
Professor, Brooklyn Law School

**SCHEMES AND SCAMS PANEL
DISCUSSION 11:00 AM**

**OPEN QUESTION
FORUM 11:45 AM**

THE MODERATOR
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DOVID ZWEIBEL

Agudath Israel, Executive Vice President