BUSINESS WERDIGER EDITION WEEKLY
Restoring the primacy of choshen mishpat

Issue #262 | Shlach | Friday, June 12, 2015 | 25 Sivan 5775

UNDER THE AUSPICES OF HARAV CHAIM KOHN, SHLITA

STORY LINE

By Rabbi Meir Orlian

LEAVE IT!

Levi spotted his friend Yisroel coming up the block pulling a shopping cart. "You look busy," Levi said.

"Yes, I bought challah and a boxed birthday cake from the bakery, fruit and other groceries," Yisroel replied. "The car wasn't available, so I took the shopping cart."

"Are you in a rush?" Levi asked. "I want to discuss something with you."

"I have time," Yisroel replied.

While they were talking, Yisroel got a phone call. "I've got to run," he said suddenly. "I forgot that I have a doctor's appointment now and I'm already late. Can I leave the shopping cart in your backyard? I'll pick it up later."

"You're welcome to leave it there," said Levi. Yisroel brought the shopping cart around the back.

While Yisroel was at the doctor, it rained. When he returned two hours later, he told Levi, "The doctor's office was a madhouse!" I hope you brought the shopping cart in when it rained."

"Oh, my — I forgot all about it!" exclaimed Levi. The two went out back. The box was soaked and the cake was ruined.

"I expected that you would take the cart inside when the rain began," said Yisroel. "It was negligence to leave it outside."

"I allowed you to leave the cart in the backyard," said Levi, "but never accepted responsibility for it."

"Who did you think would watch it while I was gone?" asked Yisroel. "When you said that I could leave the shopping cart there, I assumed you intended to take care of it."

"I wasn't really thinking," replied Levi. "Things in the backyard usually don't need watching. I also didn't expect you to be away so long. One thing is clear, though: I never accepted responsibility for the cake."

"Let's ask Rabbi Dayan," suggested Levi.

Levi and Yisroel went to Rabbi Dayan. Yisroel asked: "If Levi told me that I can leave my shopping cart in his backyard, is he liable if the contents got ruined in the rain?"

"The Gemara (B.K. 47b; B.M. 81b) teaches that a person is liable as a guardian only if he accepted responsibility for the item," replied Rabbi Dayan. "If he granted permission to leave it in his property without accepting responsibility, he is not liable."

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MAISAH MACHMAS MELACHAH

You wrote in a previous column that a borrower is liable when a tree falls on a borrowed car since borrowers are liable even for accidents. This reminded me of when my friend borrowed my car and hit a pothole and damaged the car. The ruling we received was that the borrower's liability depends on whether he was negligent.

Q: Why is a borrower liable when a tree falls on the car, even though he was not negligent, but when one drives over a pothole he is exempt if he was not negligent?

A: Of all custodians, a shoel (borrower) bears the greatest liability. The reason is that he has all of the benefit of the relationship and thus is liable even when the borrowed item becomes damaged due to circumstances beyond his control. The one exception is if the borrowed item becomes damaged due to usage in the normal manner (maisah machmas melachah): for example, if someone borrowed an animal to transport packages and the animal died in the middle of the journey (C.M. 340:1). The rationale for the exemption is the borrower's claim that he borrowed the item to use and not to merely watch it as a custodian (B.M. 96b).

Rishonim wonder why a shoel should be exempt; generally he is liable when the borrowed object gets damaged due to circumstances beyond his control and thus should surely be liable when the object becomes damaged during use. One answer is that since the owner

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Levi asked, "What constitutes accepting responsibility?"

"Saying 'Leave it with me' is considered accepting responsibility," answered Rabbi Dayan. "Simply saying 'Leave it,' or 'Put it down' is a dispute among the Tanna'im; Shulchan Aruch rules that it is not viewed as accepting responsibility. Therefore, Levi bears no liability" (C.M. 291:2-3).

"Is it all a function of language?" asked Yisroel.

"No, it also depends on circumstances," replied Rabbi Dayan. "For example, some maintain that permission to leave an object inside one's house implicitly includes accepting responsibility, since only the homeowner will remain present (Shach 291:8).

"Similarly, the Rosh (Respona 94:2, 4) writes that someone who was traveling and gave permission to place something on his donkey is considered as accepting responsibility. If he will not guard the item — who will? Only in a secure place, or where the item's owner may remain present, do we view the statement 'Leave it' as permission to place the object there without acceptance of responsibility" (See Nesivos 291:2, 8; Pischei Choshen, Pikadon 2:20-24).

"I should add, though," concluded Rabbi Dayan, "that although Levi is not liable as a guardian for leaving the shopping outdoors, he was required to have brought it in as hashavas aveidah. The mitzvah entails not only returning lost items, but also protecting another Jew's property from damage. However, neglect of doing hashavas aveidah does not carry financial liability" (see C.M. 259:9).

MONEY MATTERS

Adapted from the writings of Harav Chaim Kohn, shlita

BEIS DIN AND CIVIL COURT #14

Compromising

Q: Can beis din issue a ruling based on a compromise?

A: Halachah favors compromise. Thus, at the outset of the litigation, beis din should offer the litigants the option of compromise. Moreover, it is recommended that the Dayanim avoid attempting to rule only according the letter of the law, due to doubts in Halachah and disputes that have accumulated over the generations. Furthermore, in cases where it is not possible to verify the truth, or where an oath is required, the Dayanim can force a compromise. Ideally, the compromise should not vary from the likely ruling more than a third (pesharah hakrovah ladin). For a compromise to be binding, the parties must make a kinyan sudar beforehand (C.M. 12:2, 5, 7, 20).

Regardless, almost all arbitration agreements signed when litigating in beis din nowadays explicitly authorize beis din to rule according to the letter of the law and/or based on a compromise.

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knew that his object was going to be used for a particular task that it was incapable of performing, the owner was negligent and must suffer the loss (Ramban, B.M. 96b; Sema 340:3; and Shach 340:5).

Others explain that the exemption is rooted in the owner's awareness that in the course of the intended use of the object, it could become damaged, and since the owner was aware of that risk, he forgoes his right to seek reimbursement if the object does become damaged (Rashba, cf. Machaneh Ephraim, She'eilah 4).

A practical difference between these approaches can be seen if someone borrowed an animal to ride through the wilderness and armed robbers stole it. According to the second explanation, the shoel is exempt since the owner was aware of this possibility and knowingly agreed to that risk (C.M. 340:3). According to the first explanation, since the oness is not connected with the work the animal was borrowed to do, it cannot be said that the owner lent a defective animal (Shach 340:5).

Consequently, when a tree falls on a car, all opinions agree that it is not maisah machmas melachah since neither rationale applies (i.e., the car was not defective and the owner would not anticipate that a tree may fall on his car; see Nesivos 5). On the other hand, driving over a pothole is a common occurrence that an owner would anticipate. Therefore, if the driver was negligent he would certainly be liable, but if he was not negligent, according to the second explanation he would be exempt.

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