

# BUSINESS WEEKLY

under the auspices of  
HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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## STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

## Four Flats

Chaim had an old car that he would regularly rent out to the fellows of his kollel for a nominal fee.

Moshe asked if he could use the car for the afternoon to do some errands.

"With pleasure," Chaim said. "However, before you take the car, I'd like you to read this statement of terms."

1. The user of the car shall pay \$0.30 per mile.

2. The user of the car is fully liable for damages, even for uncontrollable circumstances (oness) and even for damage due to malfunctioning (meisa machmas melacha). "Wow, that's quite stiff!" exclaimed Moshe. "Usually, a person who rents something is liable only for loss and theft, but not beyond that."

"I know, but I don't want a headache," said Chaim. "This way, I know that I'm legally

covered if anything happens."

Moshe took the keys from Chaim. "Thanks a lot," he said. "I expect to be back within two hours."

While Moshe was in a store shopping, he heard gunshots and saw frantic police activity in the parking lot. When he returned to the car after things had quieted, he saw that all four car tires had been punctured!

Moshe called Chaim. "You'll never believe what happened!" he exclaimed.

"What?" asked Chaim, concerned.

"All four of your tires got punctured in a shoot-out in the parking lot," Moshe said.

"I'll have the car towed to the mechanic and have him replace the tires," said Chaim.

"You're responsible for them, though. Remember, the agreement included liability even for uncontrollable circumstances and malfunctioning!"

Moshe thought of his nearly empty bank account and the various loans he had taken over the past year. "I never expected that this would really happen," he said to Chaim. "It clearly was not my fault at all!"

Later that day, Chaim related the story to his chavrusa (study partner). "I know it's tough for Moshe to pay," Chaim said, "but he read the terms and agreed to them."

"I'm not sure that your agreement is legally binding," said his chavrusa. "Your terms are an additional obligation beyond the regular responsibility of a renter. Acceptance of an additional obligation usually needs a signed contract, a kinyan (act of transaction), or a handshake, at least."

"It seems to me that an agreement is an agreement," said Chaim, "but I'll check with Rabbi Dayan."

Chaim called Rabbi Dayan and presented

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## Danger in the Night

One night, vandals broke part of my fence that borders a path many people use. I realized that many of the boards might have protruding nails, so, knowing that many people walk by, I removed the dangerous boards that were adjacent to the path.

**Q: Was I obligated to remove the potential hazard immediately, in the middle of the night, or was I permitted to wait until the next day to remove it?**

**A:** You are correct that you must remove the hazard from the edge of your property since it constitutes a bor (literally, a pit, but also the term used for any hazard that does not move by itself). Since the bor was on the edge of your property adjacent to a public path, you are obligated to remove it. However, were you obligated to remove the hazard in the middle of the night?

It would seem that precedent for this is the case of one who properly secured an animal

in its pen, but the animal escaped during the night (see B.K. 55b). The halacha is that the owner is exempt from damages that his animal may subsequently cause. The significance of the fact that the case occurred at night is that even if the owner is aware that his animal escaped, he is not obligated to search for it in the dark of the night (Tosafos, B.K. 55b and Tur 396:2). Seemingly, the same principle should apply in your case and you could have waited until morning to

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the issue. "Is reading the terms legally binding," he asked, "even if not accompanied with any kinyan?"

"A renter who agreed to be responsible for uncontrollable circumstances (oness) is liable, even without a signed contract or kinyan," answered Rabbi Dayan. "There is a dispute, however, whether this applies also to meisa machmas melacha.

"The Gemara (B.M. 94a) teaches that a guardian (shomer), who is generally exempt from uncontrollable circumstances (oness), can stipulate and accept responsibility as a borrower (sho'el), who is liable even for oness," explained Rabbi Dayan. "The Torah provides default liabilities for guardians, but it is possible to increase or decrease their liability. According to many authorities, this is based on the principle that in many monetary matters a person can agree to terms not warranted by the Torah. Rabi Yochanan maintains

that the renter does not even need a kinyan here. The benefit of his enhanced reputation as a trustworthy person, by accepting the additional liability of oness, brings him to commit sincerely even without a kinyan (C.M. 291:27; 305:4)."

"And what about meisa machmas melacha?" asked Chaim.

"The Ketzos Hachoshen (340:1) cites opposing opinions as to whether a borrower who accepts liability for meisa mechamas melacha suffices with verbal stipulation alone," replied Rabbi Dayan. "The Nesivos (340:2) holds that a verbal commitment suffices. On account of the stipulation, the renter is like any other person who used the item without permission and is liable for damage. Aruch Hashulchan (C.M. 340:7; 291:57) also rules this way, provided that the stipulation is made when receiving the item; thus he enters the shemirah (guardianship) with a greater responsibility."

remove the hazard.

Actually, the two cases are not truly parallel. In the case of the animal, the owner would have to go searching for his missing animal without any clue where it may be hiding. Since that is an almost impossible task, he is exempt from making the effort. In your circumstance, there is no need to search for the hazard, since it is resting visibly next to the path. Accordingly, you are obligated to remove the bor from your property immediately, even in the middle of the night.

Also, in the case of the animal, there is only a minor concern that the animal may eat or trample someone else's property, so Chazal exempted the owner from searching for his animal in the middle of the night. In contradistinction, the likelihood of someone becoming injured on an unexpected bor is greater, and thus it must be attended to - even in the

middle of the night.

The Maharshal (Yam Shel Shlomo, B.K. 6:2), however, uses the case of the animal to generalize to all cases of potential damage; therefore, even in the case of bor, one would not be obligated to exert himself during the night to remove the hazard. On the other hand, one could argue that in those places where there are lights, one would be obligated to search for one's animal even in the middle of the night, since it should not be difficult to find (see Halachah L'Moshe, Hilchos Nizkei Mammon 4:1).

Either way, when feasible, one should certainly make an effort immediately to either remove a hazard or cord off the property in order to prevent injury. Thus, your choice to remove the dangerous boards in the middle of the night was the preferred course of action.

*For questions on monetary matters, arbitrations, legal documents, wills, ribbis, & Shabbos, please contact our confidential hotline at 877.845.8455 :: ASK@BUSINESSHALACHA.COM*

## Lost and Found #13

**Q: I publicized an aveidah. What should I do if two people claim the item and both provide identification?**

**Alternatively, if the claimant cannot provide identification, but says that he will recognize his aveidah if I show him the item, what should I do?**

**A:** If two people provide identification, you should not return the item to either one,

since you do not know who the true owner is.

You should retain the lost item until one party accedes to the other, or until they come to an agreement between themselves (C.M. 267:7).

However, if one person is able to give a more detailed identification of the item than the other, or if he brings witnesses who attest that the item is his, you should return it

to him (C.M. 267:9, 12; Shach 267:10).

Showing the lost item to a potential owner is acceptable only to a talmid chacham who is considered honest. Therefore, if you found a standard item that does not have specific simanim, you can keep it.

However, if you found it in a beis medrash or kollel, and the item is not new and would be recognizable to its owner, you should publicize it (C.M. 262:21).

## DID YOU KNOW?

If you sign an agreement, you are bound by its terms - even if you do not fully understand what it says, such as portions written in a different language or in fine print.

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