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Restoring the Primacy of Choshen Mishpat

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לע"נ הרה"ח ר' נחמיה  
ב"ר שלמה אלימלך ז"ל

BY HIS SON, R' SHLOMO WERDIGER

## STORY LINE

by Rabbi Meir Orlan

Halacha Writer for the Business Halacha Institute

## Damaged Display

Shmuel Bender and Asher Beckerman were friends from youth. They also sat next to each other in class. Shmuel felt fortunate to be a close friend of Asher, whom he admired greatly.

One day in class, Dr. Nussbaum posed a difficult question to the students. Asher raised his hand and provided the answer.

"Excellent!" exclaimed Dr. Nussbaum. "Let's now explain in detail what Asher answered." Asher typed away on his notepad, taking notes as Dr. Nussbaum spoke.

Shmuel reached over good-naturedly and slowly began to shut the screen of Asher's computer. "You don't need to take any notes," he said. "You already know the whole lecture!"

Asher instinctively shot his hand out to keep the screen open. His hand accidentally hit the left side of the screen with force. The edge of the screen blackened and lost its display.

"Look what you did!" Asher complained to Shmuel. "You ruined the screen!"

"Sorry, I didn't mean to do that," Shmuel said. "Try restarting it."

Asher shut his notepad and restarted it. The screen flickered to life, but the left third remained damaged with black and white lines running from top to bottom.

Shmuel peered over at the screen. "Maybe you can adjust the window," he said. Asher adjusted the window of his Word program and was able to move it into the usable part of the screen.

"I can use the computer like this for programs and dialogue boxes," Asher said. "But it cuts down the window size significantly and is very inconvenient to use."

"Can the screen be fixed?" Shmuel asked.

"I suppose I can have it replaced," said Asher.

"What will it cost?" asked Shmuel.

"About \$100," said Asher. "It also means that

I won't have the computer for a week; that's also a problem."

"It really was an accident," said Shmuel. "I wasn't trying to do any damage."

"I don't know if that makes a difference," said Asher. "You had no right to touch my computer."

"True," replied Shmuel, "but I didn't damage the screen; you did when you hit it!"

"You made me hit it," responded Asher. "It's clearly your fault that I damaged the screen."

"I acknowledge that it was wrong of me to touch your computer," said Shmuel, "but that alone doesn't make me liable for damage that you did."

"It's not just that you touched my computer," argued Asher. "You startled me and caused me to shoot my hand out instinctively."

Later that week, they saw Rabbi Dayan in the beis midrash.

"Here's our chance to resolve our issue,"

*continued on reverse side*

## Witness Protection

Submitted by  
E. W.

## FROM THE BHI HOTLINE

A friend of mine approached me about loaning him money to expand his business.

**Q: Is there an advantage in having witnesses sign the loan document, or should I just have the borrower himself sign?**

**A:** The power of collection changes when there are witness on a loan document. If a borrower defaults on a loan that was issued in the presence of two witnesses with a kinyan

or signatures, the lender is empowered to collect from encumbered property. This means that if the borrower sells real property subsequent to the loan, the lender may repossess that property from the buyer for repayment. The reason is that since there were two witnesses, it is assumed that they publicized the fact that a loan was issued; consequently, the borrower's land is encumbered. As such, the buyer should have confirmed whether the borrower had enough assets to repay the

loan before purchasing the property because of the risk of repossession by the lender.

When a loan is not issued in the presence of witnesses, it is not public knowledge. There is no way for a buyer to know that he was purchasing encumbered property. Therefore, his purchase is protected and the lender may not repossess that property for collection of the loan (C.M. 39:1, 69:2).

Today, the manner of encumbering property has changed. It is no longer the presence of

*continued on reverse side*

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Shmuel said to Asher. "Let's ask Rabbi Dayan!"

Shmuel and Asher sat down with Rabbi Dayan and related what had happened.

"It is important to distinguish between actively damaging," replied Rabbi Dayan, "and causing damage."

"A person who actively damages another's property is liable even if the damage was unintended and not willful. He is even liable if the situation was not completely under his control (C.M. 378:1).

"On the other hand, a person who did not actively damage, but only caused damage indirectly, is not legally liable according to most authorities," continued Rabbi Dayan. "This is called grama (causation). Frightening someone without physical contact and causing him to become sick or injure himself is considered grama (420:32; Rama 386:3; Shach 386:24)."

"It seems strange that there is never legal liability for causing damage," said Asher.

"A person is liable for inevitable, immediate causation or for cer-

tain common cases," replied Rabbi Dayan. "This is called garmi, but it requires a separate, extensive, discussion (386:1)."

"So I don't have to pay for the screen?" asked Shmuel.

"Although grama is not legally obligated, the Gemara (B.K. 56a) notes that there is a strong moral responsibility to pay, chayav b'dinei shamayim," replied Rabbi Dayan. "According to some authorities, the person is considered wicked if he doesn't pay. However, this applies only when he intended to damage or should have considered the outcome, not when unexpected damage occurred accidentally (Shach 32:2; Pischei Choshen, Nezikin 3:39)."

"Thus, although Shmuel had no right to touch Asher's computer, he did not intend to damage it, nor did he have reason to expect damage to occur to the screen," concluded Rabbi Dayan. "Therefore, he does not have to pay Asher for the screen. Nonetheless, it is derech erez to chip in partially for the repair as a means of appeasing Asher."

two witnesses that encumbers property. Liens are created through legal means and witnesses are not necessary to generate them. This is partly because in the time of Chazal, the function of witnesses was to publicize the loan so that potential buyers could protect themselves. Nowadays, people are very private about loans and great effort is invested to assure that others do not become aware of it. Accordingly, authorities write that a lien is generated in accordance with the laws and customs of the land, rather than what is written in Shulchan Aruch. The rationale is that a lien is created when two parties agree to the conditions of the agreement (semichus da'as), and the semichus da'as that people have in our times is based on local laws. Once it is accepted that semichus da'as is based on present business practices, one need not be concerned that a halachic lien will supersede them (Erech Shai

60:9, Igros Moshe C.M. II 62, HaYoshor VeHatov VI 33).

Based on the above, in order to have a lien on the borrower's property, there is no benefit if you have witnesses. Nevertheless, there are other advantages to having a documented loan that bears the signatures of two witnesses. One advantage is that it is more difficult for the borrower to claim that the document was forged if the witnesses' signatures are on it (Shach 46:10). Also, if only the borrower signs, there is a dispute whether the borrower is believed if he claims that the loan was repaid. If two witnesses sign, it is very difficult for the borrower to effectively claim that the loan was repaid as long as the lender bears the note (C.M. 69:2 and Shach 14). For these reasons, it is in your best interest to document the loan and have two witnesses sign the loan document to strengthen your ability to collect the loan.

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## Shomrim: Guardians #3

**Q: I placed my shopping bags outside the supermarket and promised a boy \$5 to watch them while I got my car. One bag was stolen. Is he responsible for the theft?**

**A:** If the boy did not touch the bags, there is a dispute on this issue. The Gemara (B.M. 99a) teaches that just as a purchase requires a kinyan (act of acquisition) to confirm the transaction, a guardian also requires a kinyan to assume legal responsibility for the item.

The Rambam (Hil. Sechirus 2:8) accepts this ruling literally. Tosfos and the Rosh maintain, however, that once the owner relies on the guardian and leaves the area, the guardian becomes obligated, even without a kinyan.

The Shulchan Aruch is inconclusive on this matter (C.M. 291:5, 303:1, 307:2, 340:4), but the achronim lean towards the opinion that a kinyan is required (Shach 291:13; Aruch Hashulchan 291:14). Therefore, if the boy did not make an appropriate kinyan on the bags,

he does not become legally responsible for them. This is true even for a shomer sachar, although he forfeits his payment if he did not watch properly (see 301:1). To assume legal responsibility, the boy would have to pick up or move the bags, have them placed in his property, do a kinyan sudar, or give a handshake. However, he does bear a moral responsibility to pay if the theft was caused by careless negligence (Aruch Hashulchan 291:15; Imrei Bina, Hil. Pesach #5).

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