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Restoring the Primacy of Choshen Mishpat

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STORY LINE

by Rabbi Meir Orlan

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Remnants

Rabbi Dayan walked into class and greeted his students.

"Today," he announced, "we begin the final topic of maseches Bava Kama. The last mishnah (119a) discusses a very relevant and common issue in business halacha. See if you can figure out what the topic is."

"It talks all about launderers, tailors and carpenters, threads and wood shavings," said Menachem. "How is that relevant?"

"Think beyond the specific examples mentioned," Rabbi Dayan encouraged him. "What is the theme of the mishnah?"

"It is about remnants," Menachem answered. "If you hire a worker and there is material left over, to whom does the excess material belong?"

"Excellent," confirmed Rabbi Dayan. "Can anyone provide practical examples of this topic?"

"My parents recently had the bathroom retiled," said Aharon. "The contractor who did the work charged the tiles directly to their card. There was almost half a box of tiles left."

"My sister recently got married," added Benry. "My mother chose a fabric with her at the seamstress, who then went and bought the amount of material she needed. There was a bag of fabric cuttings left."

"My parents just redid our roof," piped up Chaim. "The contractor used standard shingles and never really got into their cost. I think he took the extra shingles home."

"We just had a carpenter build a wooden deck in our backyard," added David. "We wanted the remaining wood for a tree house, but he only let us have the little pieces."

"Our gardener laid sod," Ephraim chipped in, "and there were a bunch of leftover

squares."

"You've all pointed out how relevant this question is," said Rabbi Dayan. "What do you think the halacha is? Who gets to keep the remainder — the worker or the employer?"

A big argument broke out in the class. "Of course the remainder belongs to the employer," said Aharon. "He paid for the materials."

"What are you talking about?" retorted Benry. "The materials are included in the total price of the job with the contractor. It's not the employer's business what the materials cost."

Rabbi Dayan quieted the students. "The answer to this question is very variable," he said.

"What does it depend on?" asked Chaim.

"Our mishnah provides some guidelines,"

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Double-Parked Damage

Someone double-parked next to my car, and although I was careful as I was pulling out, I scratched his car as well as my own.

Q: Am I obligated to pay for scratching the other car, and if so, how much?

A: There is a difference whether you scratched a car that was parked legally (bireshus) or one that was double-parked illegally (shelo bireshus). The question of

your liability hinges on this issue. If you scratched a car that was legally parked, you are certainly liable for the damage. The amount that you would have to pay is the repair cost. This assumes, however, that normally people would repair this damage. In a circumstance in which people would not repair the damage — for example, the car is very old or already badly damaged — instead of paying repair costs, you would be liable to pay for the loss of value that

resulted from the damage, which may be nominal, depending upon the circumstances (see Chazon Ish, B.K. 6:3).

If you scratched a car that was double-parked despite your efforts to avoid damaging the car, you are exempt from paying for the damage. You may not, however, seek reimbursement for the damage to your car from the person who parked illegally.

The Gemara (B.K. 27b) teaches that one who trips and breaks a container that was left in

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explained Rabbi Dayan. "When a person provides material to a tailor, the tailor can keep small remnants of fabric; large, usable pieces belong to the employer. The same is true for someone who gave wood to a carpenter. When work is done at the employer's premises, though, even small remnants are the employer's."

"What difference does that make?" asked David.

"The implication of the mishnah is that the remnants should belong to the employer, who provided the material, unless they are insignificant to him," explained Rabbi Dayan. "When work is done at the employer's premises, though, the remnants are readily available to him, and he might have some use even for small ones. Thus, the contractor cannot take any remnants without permission (Sma 358:14)."

"Why did you say the law is very variable, then?" asked Ephraim. "You've provided defined guidelines."

"The details of this law depend on trade standards and vary from time to time, place to place, and case to case," replied Rabbi Dayan. "The Shulchan Aruch summarizes as follows: Whatever the customer is particular about is his; what he is not particular about is the worker's. In all of these kinds of issues we follow the common practice (C.M. 358:10-11).

"Furthermore, the rules of the mishnah apply if the homeowner bought or paid for the materials separately," added Rabbi Dayan. "However, if they agreed on a total price for the job and the contractor bought the materials on his own, the remnants will usually be his, unless there is a common practice otherwise. He agreed to give a finished product for this price (Mishpetei HaTorah, B.K. #130).

"Of course, if the customer grants explicit permission or clearly does not care about the remnants," concluded Rabbi Dayan, "the worker can keep them in all cases."

the street is exempt from paying the owner for it. The rationale is that people are not expected to be extra careful while they are in motion. Obviously, that does not apply here, since a car is a large object that one is expected to see, and a driver is certainly expected to watch his driving.

However, a different principle can be inferred from that discussion. Halacha rules 'avid inish dina l'nafshai', a person may act unilaterally to enforce his rights. For instance, if someone fills a street with containers, making it impossible to use the street, it is permissible for you to break those barrels directly in order to use the street, and you are exempt from paying for the damaged containers. You are not required to exert yourself to stack containers placed by someone else or move them out of the way when they were

placed there illegally (Tosafos, B.K., 28a, d.h. meshaber). If, however, the one who broke the containers was damaged by some of the shards of the broken objects, the owner of the containers is exempt, since the "damager" brought this damage upon himself. In the event that the container owner left a path wide enough for people (or cars) to pass, one who damages the containers is liable since it was not necessary to damage the containers, despite the fact that the container owner acted improperly by placing them in the street (C.M. 412:2).

Consequently, if the person double-parked, leaving you without sufficient space to get out, you must attempt to carefully drive through the space that is open, but if you drove in a careful and acceptable fashion and still scratched his car, you are not liable.

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Lost and Found #4

Q: If the government requires turning in lost items to police regardless of the owner or circumstances of the lost item, is that also a halachic requirement?

A: There is a halachic principle that dina d'malchusa dina, the law of the land has validity. However, there is significant discussion among the authorities about when this rule applies (C.M. 369:6-10).

Regarding treasures lost at sea, which one is permitted to keep, the Rema writes that if the king or beis din instituted that they must be returned, one must do so. The Rema writes a similar rule regarding returning a stolen item, even after the owner abandoned hope of reclaiming it (C.M. 259:7; 356:7).

This seemingly indicates that the rule of dina d'malchusa applies also to hashavas aveidah. However, some Acharonim write

that between individuals, dina d'malchusa applies only when there is also an institution of beis din to this effect; then the law becomes common practice. Or it applies between individuals where there is an ethical recommendation (lifnim mishuras hadin) to return the lost item. Where there is absolutely no halachic basis to return an item, the rule of dina d'malchusa does not apply (see Shach 356:10; Ketzos 259:3).

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