

# BUSINESS WEEKLY

under the auspices of  
HaRav Chaim Kohn, shlita



Restoring the Primacy of Choshen Mishpat

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BUSINESS WEEKLY FOR THE MONTH  
OF KISLEV HAS BEEN DEDICATED

לעלוי נשמת  
מיכל שרה אידל בת ר' יוסף  
BY SHAMMAI BIENENSTOCK

## STORY LINE

by Rabbi Meir Orlian

Halacha Writer for the Business Halacha Institute

## Wear and Tear

*Am Yisrael recently suffered a tragic loss with the passing of Maran Harav Ovadiah Yosef, zt"l. The greatest tribute to such an outstanding talmid chacham is to share his Torah l'iluy nishmaso. The following article is based on a responsa of his (Yabia Omer, vol. II, C.M. #7).*

At the beginning of maseches Pesachim, Moshe decided to join the Daf Yomi shiur in his shul. As he didn't have a large Shas and his eyesight wasn't very good, Moshe asked his neighbor Shlomo if he could borrow a large-print Gemara Pesachim.

Shlomo took his gemara out of the bookcase. "It's practically brand new," he said. "It's almost never been used."

Four months later, at the conclusion of maseches Pesachim, Moshe invited Shlomo to join the siyum celebration. At the siyum, Moshe returned the gemara to Shlomo.

"Thank you very much for allowing me to use your gemara," he said emotionally. Shlomo looked at his gemara. It was worn. The corners were no longer sharp, the pages had fingerprints and smudges, the gold-colored lettering on the cover was faded, and some pages were creased.

"I'm glad you used my gemara," Moshe said. "But I lent you a sefer that looked brand new, and it's now damaged. You'll have to buy a new volume to replace this."

"I'll do that out of appreciation, but I'll bet I'm not really liable," said Shlomo. "When you lent me the gemara, what did you expect? That I would leave it on the bookshelf? When you use a sefer on a regular basis, there is an expected degree of wear and tear."

"I didn't expect it back brand new," said Shlomo. "But you could have been more

careful. You didn't have to lean on it or hold the pages between your fingers. It's hard to believe that this happened from using the gemara 45 minutes a day!"

"It wasn't just 45 minutes," said Moshe. "I reviewed the Gemara each day after the shiur and also learned with my son on Shabbos. If you want, Rabbi Dayan is scheduled to speak soon; we can ask him afterward."

When Rabbi Dayan finished speaking, they approached him.

"I lent my gemara to Shlomo so he could learn the daf," said Moshe. "It was in brand new condition, but he used it extensively and now it's worn. Was he entitled to use it so much, or does he have to buy a new gemara?"

"Harav Ovadiah Yosef, zt"l, addresses this question," replied Rabbi Dayan. "He rules that one who borrows a gemara is allowed

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## Pendant Problem

I bought a gold necklace with a warranty. After the pendant broke twice, the jeweler agreed that it was defective and offered me store credit since the style I purchased was discontinued. He also said that since the cost of gold had increased, the replacement necklace would be shorter to compensate for the increase in the cost of gold. Because I have a warranty, I expect a replacement for the one that I purchased, or at least one that is comparable in terms of length. The

jeweler claims that the warranty only guarantees store credit for the purchase price.

**Q: What is encompassed in such a guarantee, the value or the actual necklace? Additionally, may I request my money back or must I accept store credit only?**

**A:** Since both of you agree that the necklace was defective, you, as the customer, have the right to cancel the sale. When a

sale is canceled due to a defect, retroactively, the transaction never took place. Therefore, even if the value increased, the customer may not claim more than what he originally paid.

Another consequence of canceling a sale is that the merchant cannot insist that the customer take another comparable necklace. Once the sale is voided, nothing compels the customer to take a replacement for the defective item. This is true even if there is a

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to use it extensively. He is not liable for wear and tear, as this is included within meisa machmas melacha, damage ensuing from typical use (C.M. 340:1)."

"What is this based on?" asked Shlomo.

"The Gemara (B.M. 29b) teaches that one who borrows a sefer Torah may read only parts that he is already familiar with, which do not require intensive touching and rolling," answered Rabbi Dayan. "He may not learn a new portion, though, since that requires extensive handling."

"That sounds like it's against your ruling," noted Moshe. "A person who borrows a sefer should not use it extensively either!"

"Although it seems so at first glance, many Rishonim differentiate between a sefer Torah and other sefarim, such as gemaros," explained Rabbi Dayan. "A sefer Torah is intended primarily for straightforward

reading; a gemara is intended for intensive studying. The more a person learns, the more he delves. In fact, when he reviews the masechta, he is more likely to flip around from one part to another.

"Therefore, there is no difference between learning a new portion and reviewing something familiar," continued Rabbi Dayan. "When you lent the gemara, you were aware that it would entail handling."

"Is this distinction between a sefer Torah and other sefarim cited in the Shulchan Aruch?" asked Shlomo.

"The Sma (267:28) cites it from the Maggid Mishneh," replied Rabbi Dayan. "Although there is a question regarding the correct text version, Harav Ovadiah, zt"l, proves from the Rishonim and the version of the Beis Yosef that this is the halacha. Thus, as long as Moshe used the gemara reasonably, smudges and creases are fair."

warranty. A warranty guarantees the customer that he/she will receive a refund of his/her money without having to prove that the item was defective at the time of sale. It does not guarantee replacement of the defective merchandise.

So in your case, since the merchant does not have the same item in stock, the original sale is canceled and the merchant must refund your money. If you want to purchase another necklace, it is a new transaction and you must pay the current price for the jewelry.

If the merchant has the ability to replace the item, can he force the customer to accept that replacement, or may the customer cancel the sale based on the defect? Regarding large appliances, it is common to order a particular model to be delivered to one's home. If that appliance is defective, the customer cannot cancel the sale and demand a refund, since the merchant

retains the right to fulfill his obligation to deliver a functioning model. In contrast, when a customer purchases a particular item, a kinyan (proprietary act) at the time of the sale is the extent of their agreement. From then on, there is no ongoing agreement (hischayvus) between the merchant and the customer. Therefore, if the merchandise is then found to be defective, the sale is canceled and the customer may demand a refund.

Nevertheless, if the merchant has numerous units in stock, the intention of the parties may be to make a binding agreement that obligates the seller to replace the defective item, and in that case the customer may not demand a refund. The same applies when common business practice (minhag hashocharim) is that a merchant cannot be compelled to refund a customer's money if he has the means to replace the defective merchandise.

*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 #15**

**MONEY MATTERS**

**Q1: Instead of publicizing an aveidah, can I simply hang the lost item on a nearby bulletin board or fence?**

**Q2: If I find a lost item with a clear name and address, do I have to bring it to the owner? Is it acceptable to leave it in his property?**

**A1:** When you find a lost item, you are re-

sponsible for it as a shomer (guardian), and cannot leave it in an unsecure manner.

Therefore, you cannot hang it on the bulletin board or fence unless you are sure that the owner will pass by shortly or that no one else will take the item from there. Otherwise, there is a chance that it might be stolen (C.M. 267:1; Hashavas Aveidah K'halacha 3:6-8).

**A2:** You are required to care for the aveida until it is returned to its owner. However, it suffices to notify him, and he should arrange to retrieve it from you.

You can also leave the item in his property if it is secure there, e.g. an enclosed yard or in the mail slot, or if he is expected to arrive shortly and will see it (Pischei Choshen, Aveidah 7:1-2[2]).

**DID YOU KNOW?**

In times of cash flow difficulty, paying one's employees on time takes precedence over paying vendors' invoices.

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