

Shomrim Part II

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

HOW MUCH PAYMENT MAKES SOMEONE A SHOMER SACHAR:

As we said in Part 1 of this series, a *Shomer Sachar* is paid to watch an object and, therefore, has more liability than a *Shomer Chinam*.

How much does one have to be paid to become a *Shomer Sachar*?

The Shach states that as long as a person is paid the value of a *perutah*, that is enough to make him a *Shomer Sachar*. The Rema says that even if he is not given the money as a payment, but is presented with it as a gift, that is sufficient to make the guardian a *Shomer Sachar*. As we explained, the Torah evaluates a person's mind and determines that once he receives any sort of compensation, the amount of responsibility expected of him goes up. Thus, even if he is given something as a gift or a show of appreciation for watching the item, the greater level of responsibility is to be expected of him.

The Rema also speaks about a middleman who takes merchandise from one party in order to sell it to customers. The agreement was that he will sell the merchandise for at least a \$100 and give that amount to the one he got the merchandise from, with him keeping any profit he can make above that amount. He says that the middleman has the status of a *Shomer Sachar* on the merchandise in his possession. Since he has the potential of making a profit, even though this is not certain as he may not find a buyer for more than \$100, a higher level of liability is placed upon him.

THE SHOMER SACHAR'S LEVEL OF SHEMIRAH:

There is a *machlokes* in the Gemara in Bava Metzia whether a *Shomer Sachar* is permitted to sleep at times when people normally sleep. The Gemara also discusses whether a shepherd who is paid to watch other people's sheep is permitted to go back to the city at times when self-employed shepherds generally have a break. Another discussion there is a case where a shepherd is herding sheep over a bridge and one of them pushes another into the water and kills it. The gemara concludes that he is liable because he should have taken hold of them as they crossed the bridge. From the entire discussion, the Nesivos Hamishpat derives a fundamental difference between that of a *Shomer Chinam*

and a *Shomer Sachar*. While the unpaid guardian merely has to put the items in a safe location, the *Shomer Sachar's* job is to physically sit with them and guard them.

A *Shomer Sachar* actually has an additional obligation of *shemirah* that a *Shomer Chinam* does not have. The halacha is that a *Shomer Chinam* has to store an object he is watching behind a door that can withstand a "*ruach metzuyah*", a normal wind. A *Shomer Sachar* has to lock it behind a stronger door that can withstand a "*ruach she'iano metzuyah*", an unusually powerful wind. In other words, he has to think about all possibilities and take all possible precautions. If he falls short of either obligation, he is required to pay for any damage or loss.

IS AN EMPLOYEE A SHOMER SACHAR?

The Pischei Teshuva discusses a case where an employer entrusts an item with his employee. The employee is paid by his boss to do his job, but not specifically to watch this item. He posits that even though the employee is not specifically paid to watch this object, since he is watching it for someone who pays him, that is enough to make him a *Shomer Sachar*.

AN UNPREVENTABLE THEFT:

There is a *machlokes* amongst the Rishonim regarding a *Shomer Sachar's* liability when an object is stolen in a way that he could not have prevented. An example of this is if a *Shomer Sachar* did everything that could be expected of him by storing the object he is watching behind an iron wall that cannot be penetrated by thieves, but the thieves were so adept at their job that they tunneled under the ground and stole the object.

Another example is if a *Shomer Sachar* is watching an object and begins to feel unwell or faints and is no longer able to protect it. Once he is incapacitated, the item is stolen. In such an instance, he performed all of his duties to the fullest extent that he could have, but the item in his care was still stolen. In most cases of theft, there is some negligence on the *Shomer's* part, but in these cases, the *Shomer Sachar* was not negligent at all.

Tosafos says that the *Shomer* would be exempt in such a case because he did perform all of his duties. The Shach rules like Tosafos. However, the Shulchan Aruch cites an

opinion that disagrees and says that once the Torah declared that a *Shomer Sachar* is liable for theft, he must pay when the object is stolen, even if it was no fault of his own. The only exception would be if he was physically there at the time and tried to prevent it but couldn't because he was overpowered. The Nimukei Yosef suggests a third opinion that a *Shomer Sachar* would be liable in the case of the tunnel because he was capable of physically watching the item which would have prevented the theft. However, in the case where he became incapable of watching the item due to becoming unwell, he is *patur* because it is not his fault that he could no longer perform his duties.

The Sema points out that even the opinion that holds that the *Shomer Sachar* is liable only says so in a case where what happened to the object could be labelled as "*geneivah*." If some other form of damage occurs to the object, the *Shomer Sachar* is exempt from paying compensation if he did his due diligence and the thing that occurred was not in his power to stop.

DOES HE GET PAID WHEN THE OBJECT IS LOST?

If an object in the care of a *Shomer Sachar* is damaged or lost through an *ones*, does he still get paid even though he didn't fulfill his duties?

The Poskim say clearly that he does get paid in the case of an *ones* for the work that he did, since he did do his job and the object was lost through an unforeseen event. In a case of *geneivah* or *aveidah*, the *halacha* would depend on whether or not the *Shomer* has to pay for the loss. If he has to pay compensation for the object, he is considered to have fulfilled his duties, and he does get paid. If he doesn't have to pay – for example, if the owner was with him while he was watching the object – most *Poskim* hold that he does not get paid since he did not fulfill his duties.

SHLICHUS YAD:

The Torah says that all *Shomrim* are liable, even for unavoidable losses, if they are "*sholayach yad*" – if they take possession of the object for themselves. Thus, if a *Shomer Chinam* is *sholayach yad* and then the item is stolen, he is obligated to pay.

The simple way to understand this rule is that once a *Shomer* takes the item for himself, he becomes a *gazlan*, and is no longer a *Shomer*, and a *gazlan* is obligated to pay for any damage that occurs to an item that he stole. Even if the *Shomer* returns the item to its place, he remains a *gazlan* and

can't go back to being a *Shomer*.

While some Rishonim do understand *shlichus yad* this way, others learn differently and say that *shlichus yad* is a separate category than a regular *gazlan*. One difference that they note is that a regular *gazlan* is not necessarily liable for damages to an item that he took if he stole it with the intention to pay the owner, while a *Shomer* is. The Ramban adds that if a *Shomer* is moving an item for its own good and, while he is moving it, decides that he wants to keep it for himself, he could not be considered a regular *gazlan*, as he never physically stole the item, but he is considered a *sholayach yad*.

The Shulchan Aruch notes that if a *Shomer* picks up a barrel of wine that he is watching in order to *steal* just one cup, he is considered to be a *sholayach yad* on the entire barrel. While he only is a *gazlan* on the one cup that he actually stole, he has the unique status of *shlichus yad* on the rest.

One leniency that a *Shomer* who is *sholayach yad* has over a *gazlan* is that a *gazlan* is *koneh* an item he steals and becomes liable for it if it gets damaged as soon as he picks it up. A *Shomer*, however, has permission to pick up the item; therefore, he only becomes a *sholayach yad* if he actually takes or uses it for himself.

THINGS THAT A SHOMER IS NOT LIABLE FOR:

The Mishnah in Shavuot learns from the *pesukim* that the halachos of *Shomrim* only apply to things that are moveable and have inherent value. They do not apply to land, slaves, documents, objects belonging to *hekdesh* or a non-Jew. A person entrusted with any of those things is not liable for *geneivah*, *aveidah*, or *ones*. There is a *machlokes* whether he is liable for damage or loss through his negligence. Most opinions hold that he is not, while some say that he is liable as a *mazik*.

If a *Shomer* gives over the thing he is watching to someone else, it is considered worse than *peshia* and he could be liable for that.

One final note, is that "*hekdesh*" refers to items that are owned by the actual treasury of the Bais Hamikdash. It does not refer to the property of a *shul* or *yeshiva*, as those institutions are actually owned by a person; therefore, the laws of *shemirah* generally do apply to their possessions.

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