YESHIVAT HAR ETZION

ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

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**TALMUDIC METHODOLOGY**

**By Rav Moshe Taragin**

**Shiur #02: The Definition of a *Shomer Sakhar***

Two different *mishnayot* (*Bava Metzia* 93a and *Shavuot* 44a), delineate four different types of *shomrim* and three corresponding payment models. A *shomer chinam,* or someone who watches an item without charge, never pays for damages unless he was grossly negligent (*peshiya*). By contrast, a *shoel,* or borrower, always pays for loss unless the item broke during usage – *meita machmat melakha*. A *shomer sakhar,* or paid watchman, has mid-range liability – he must pay for gross negligence as well as for theft and is excused from accidents, for which a *sho'el* must pay. The Tannaim debate whether a renter's or *sokher* payment model resembles that of a *shomer chinam* or that of a *shomer sakhar*, but regardless there are only three payment models (*Bava Metzia* 93a). Similarly, the Torah’s list of *shomrim* in Parashat *Mishpatim* includes only three sections.

How similar is a *shomer sakhar* to a *shomer chinam*? Is a *shomer sakhar’s* responsibility to watch similar to that of a *shomer chinam* with additional liabilities in situations of minor accidents? Or do a *shomer sakhar's* "watching" duties fundamentally **expand**? According to the latter possibility, the *shomer sakhar* has agreed not just to guard against negligent damages, but, more expansively, to protect the item against any predictable events. When an item is stolen, he is considered delinquent in his original responsibilities and must render payment for that delinquency.

The Rambam's comments may indicate that he views a *shomer sakhar* as adopting additional liabilities rather than expanded guard duties. In *Hilkhot Sekhirut* (1:2), the Rambam contrasts a *sho'el,* who pays for major accidents, with a *shomer sakhar,* who doesn’t pay for major accidents. The Rambam thus implies that theft and loss, for which a *shomer sakhar* **does** pay, are minor accidents. The *shomer sakhar* isn’t delinquent in not preventing these, but has simply accepted liability to pay for these events. By obligating the *shomer sakhar* to pay for “minor accidents” the Rambam appears to view him as accepting payment liabilities and not expanded guardianship.

In contrast to the Rambam, Rashi in *Bava Kama* (45a) clearly establishes that a *shomer sakhar* adopts expanded guard duties. The *sugya* in *Bava Kama* discusses the responsibilities of a *shomer* to pay for **damages** which the *pikadon,* or deposited item, inflicts on third party victims. The gemara remarks that a *shomer chinam* may acquit himself with moderate preventative measures, whereas a *shomer sakhar* must provide more intensive prevention – or *shemira me’ula*. The gemara asserts this difference without identifying the source for this distinction. It is logical that a *shomer sakhar* will incur greater obligation toward the **owner**, since the owner paid him and they agreed to certain conditions. Why should a *shomer sakhar* incur greater obligation to the third party victim who didn’t pay him?

Rashi claims that just like a *shomer sakhar* pays for theft and loss, to the original owner, similarly he pays for third party damages unless he did everything necessary to prevent them. Evidently, Rashi believes that a *shomer* *sakhar* accepts more expanded "guarding" responsibilities than a *shomer* *chinam* does. Just like his expanded guardianship renders even theft and loss as a product of his negligence, similarly he is obligated to guard against third party damages. Had a *shomer* *sakhar* merely incurred greater liability toward the owner, his responsibilities could not possibly be expanded to third parties.

The most compelling *nafka mina* of how to view a *shomer* *sakhar* is the **scope** of thefts and losses he is obligated to remunerate. The gemara in *Bava Metzia* (42a) claims that unlike other deposited items, "*kesafim* *ein lahem shemira ela be-karka”* (money must be buried underground). Presumably, a *shomer sakhar* who buries money underground would not be obligated to pay for thefts since he provided reasonable supervision.

Various Rishonim disagree, based upon a *sugya* in *Bava* *Kama* (57a) which seems to conclude that a *shomer sakhar* is responsible for *all* thefts, even if they occurred in a non-preventable fashion. This is indeed the position of Tosafot in *Bava Kama* (57a) and the Rosh in *Bava Metzia* (42a). As the Rosh asserts, the *shomer sakhar* pays for all events that are categorized as theft – even if he didn’t display negligence. The Ramban agrees in principle with Tosafot and the Rosh but offers a different logic that the *shomer sakhar* may not acquit himself by placing the item in the ground. He explains that *shomer sakhar* is obligated to *personally* guard the item rather than merely assure its safety. A potential *nafka mina* would be a situation in which the *shomer* *sakhar* physically guarded the item, but it was stolen from under his eyes. Tosafot and the Rosh would mandate payment since an 'act' of theft occurred, whereas the Ramban would acquit the *shomer* since he performed a personal act of supervision.

It is clear that Tosafot and the Rosh view a *shomer sakhar* in one light, whereas the Ramban views him in an entirely different light. Tosafot view the *shomer sakhar* as incurring added liabilities independent of guard duties. He must pay for theft and loss even if he wasn’t negligent, simply because these events were covered in the 'policy' which he agreed to with the owner. The Ramban, however, views the *shomer sakhar* as incurring added guardianship duties. The *shomer sakhar* must also personally guard the item, rather than merely prevent damage. Failure to do so shortchanges the owner and betrays the original agreement, a delinquency that mandates payment.

Perhaps these two divergent opinions are already latent in an intriguing debate between Rabba and Rav Chisda about a *shomer sakhar's* ability to take normal recesses during his *shemira* (*Bava Metzia* 93b). It is acceptable for typical watchmen to take casual naps as well as to actually temporarily suspend their duties and travel to the city, as normal people typically do (presumably for vital shopping). For example, a *shomer chinam* has the ability to take these minor breaks, presumably by placing the item in a protected area. He is not obligated to compensate damages to the item *even if he may have prevented the damage had he been present.* Would a *shomer sakhar* enjoy similar privileges? Is he allowed to temporarily withdraw himself, albeit by placing the item in a safe location? Rabba argues that he would be able to – and would not pay for *any* losses that occur during the intermission. Rav Chisda disagrees, claiming that a *shomer sakhar* must pay for any damages that his presence may have helped avert. The owner of the item can claim, "I have paid you so that you provide *additional* guardianship [and your failure to do so renders you negligent].”

This debate parallels the two models outlined above. Rabba appears to augment the *shomer's* liability coverage. Since he doesn’t possess expanded guardian duties, he may take standard intermissions during which his coverage is suspended. By contrast, Rav Chisda conceives of a *shomer sakhar* as possessing expanded guardian duties demanding his constant supervision. In fact, the Ramban, who requires *personal* supervision, cites Rav Chisda, who holds uninterrupted *shomer* activity is necessary. The Ramban viewed the *shomer sakher* as possessing expanded guardianship duties and therefore appears to endorse Rav Chisda who doesn’t allow the *shomer sakhar* to enjoy temporary “breaks.” In theory, the two positions can be regarded autonomously as well: even though the Ramban demands personal guardianship, he doesn’t necessarily have to agree with the Rav Chisda. Namely, the *shomer* *sakhar* may be allowed to take an intermission, but while **on duty** must provide physical guardianship. By contrast, Rav Chisda could theoretically disagree with the Ramban: Even though *a shomer sakhar* isn’t allowed to take intermissions, he may be allowed to indirectly protect the item without personal supervision. However, the two positions state the same logic: a *shomer sakhar* is not merely a standard *shomer* who accepts payment liability. He dramatically expands his *shomer* duties, which may require personal interaction as well as uninterrupted guardianship