

## “Arba'ah Shomrim Hen”

### “Can You Please Watch My Trek Lush 29 SL Mountain Bike for a Minute?”

Bava Metzia 93a

#### Teacher's Guide

Who is responsible when an object – a bicycle or car, a smartphone or laptop, a wallet or jewelry – is given to a friend for safekeeping and gets lost, stolen, or ruined? This is a question whose answer is often not clear-cut. The issue of who foots the bill for the loss gets complicated when someone other than the owner enters the picture. Such cases may be: when I ask a friend to watch my computer for me; when I leave my car in the care of the attendant (watchman) of a private parking lot; or when I rent a bike. In this shiur we will search for answers to the question “Who is responsible?” Through classic Talmudic passages about *shomrim* (watchmen), we will learn the underlying principles that determine accountability, applying the Torah's values of justice and fairness to everyday life situations.

This class addresses **key questions** such as:

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#### KEY QUESTIONS

- What is the Torah's framework for determining who is responsible when a loss takes place?
- Can I be held accountable for the loss of someone else's property just because he left it in my possession?
- Is a friend who does me a favor by guarding my object just as responsible as a paid watchman or guard?
- What responsibility does someone have if he rents an object, and it gets lost, stolen, or ruined?
- How does the halachah view the accountability of someone who repairs other people's objects in his or her own shop or home?

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#### CLASS OUTLINE

##### **Section I. *Shomer Chinam* – The Unpaid Guardian**

**Case 1.** Trek Lush 29 SL Mountain Bike Crushed by a Truck in Italy

**Case 2.** Monique's Four Acrylic Paintings Trampled on a French Sidewalk

##### **Section II. *Shomer Sachar* – The Paid Watchman**

**Case 3.** Designer Coat Stolen from Hilton Coatroom

**Case 4.** Car Destroyed by Freak Fire in Private Parking Lot

##### **Section III. *Socher* – The Renter**

**Case 5.** Rented Tuxedo Gets Lost at Wedding Weekend

##### **Section IV. *Uman* – The Craftsman**

**Case 6.** Client's Computer Stolen from Computer Repairman's Home

**Note:** This shiur is not intended as a source of practical *halachic* (legal) rulings. For matters of halachah, please consult a qualified *posek* (rabbi).

Here is Bava Metzia 93a as it appears in the classic edition of the Talmud.

מסורת הש"ס

לא תפסוק... (מסורת הש"ס)

מוסף רש"י

יכול היה לומר לעבר... (מסורת הש"ס)

השוכר את הפועלים פרק שביעי בבא מציעא

הניחא וכו' פלוגתא במסכת גיטין: אלא אירי ואירי כשאין מעלה... (מסורת הש"ס)

צג. עין משפט נר מצוה

הניחא לזמאן דאמר אין הרב יכול לומר לעבד עשה עמי ואיני ונדך שפיר אלא לזמאן דאמר איכול הרב לומר לעבד עשה עמי ואיני ונדך מאי איכא למימר אלא אירי ואירי בשאין מעלה להן מונוות ובהא פלוגי דמר סבר יכול ומר סבר אין יכול וכו' ויחזן דאמר יכול הרב שביק מתנותיו ועבד כברייתא אלא דכולי עלמא משל שמים הוא אוכל ולא מצי קציץ ומאי קוצין דאמר רבי הושעיא מונוות דכוותיה גבי בהמתו תבן קנחין לה אלא כהא קמפלגי דמר סבר משלו הוא אוכל ומר סבר משל שמים הוא אוכל: מרתני' קוצין אדם על ידי עצמו על ידי בנו ובתו הגדולים על ידי עבדו ושפתו הגדולים על ידי אשתו מפני שיש בהן דעת אבל אינו קוצין על ידי שפתו ובתו הקטנים ולא על ידי עבדו ושפתו הקטנים ולא על ידי בהמתו מפני שאין בהן דעת ויהי שוכר את הפועלים לעשות בנמנע רבעי שלו הרי אלו לא יאכלו אם לא הודיען פודה ומאכילין ונתפרסו עגוליו נתפתחו כביותו הרי אלו לא יאכלו אם לא הודיען מעשר ומאכילין ויחזיקו אכילין מהלכות מדינה אבל לא מן התורה: גמ' שומרי פירות אמר רב לא שנו אלא שומרי גנות ופרדסים אבל שומרי יתות וערימות לאו כעושה מעשה דמי אמאי ממונא כעושה מעשה דמי ושמואל אמר ולא שנו אלא שומרי גתות וערימות אבל שומרי גנות ופרדסים אינן אוכלים לא מן התורה ולא מהלכות מדינה קא סבר משמר לאו כעושה מעשה דמי מתיב רב אחא בר רב הונא דהמשמר את הפרה כמטמא גורים ואי אמרת משמר לאו כעושה מעשה דמי אמאי ממונא כעושה מעשה דמי אמר רבה בר עולא גזירה שמא יזין בה אבר מתיב רב כהנא דהמשמר ארבעה וחמשה מקשאות הרי זה לא ימלא כריסו מאחד מהן אלא מכל אחד ואחד אוכל לפי חשבון ואי אמרת משמר לאו כעושה מעשה דמי אמאי אוכל אבר רב שמי בר אשי יבעקורין שנו עקורין והלא נבגרה מלאכות למעשר שלא נמלא פיקס שלהם אמר רב אשי כוותיה דשמואל מסתברא דתנן וואלו אוכלין מן התורה העושה במחזור לקרקע בשעת גמר מלאכה ובתלוש כו' מכלל דאיכא דלא קא אכיל מן התורה אלא מהלכות מדינה אימא סיפא ואלו שאינן אוכלין מאי אינן אוכלין אילימא שאין אוכלין מן התורה אלא מהלכות מדינה היינו רשאי אוכלין לאו שאין אוכלין לא מן התורה ולא מהלכות מדינה ומאי ניהו לעושה במחזור לקרקע בשעה שאין גמר מלאכה וכל שכן שומרי גנות ופרדסים: מרתני' ארבעה שומרים הן שומר חנם והשוואל נושא שכר והשוכר וישומר חנם נשבע על הכל והשוואל משלם את הכל וישומר שכר והשוכר נשבעים על השבורה ועל השבויה ועל המתה ומשלמין את האבידה ואת הגניבה: גמ' מאן תנא ארבעה שומרים אמר רב נחמן אמר רבה בר אבבה רבי מאיר הוא אמר ליה רבא לרב נחמן מי איכא דלית ליה ארבעה שומרין אמר ליה הכי קאמינא לך מאן תנא שוכר כנושא שכר רבי מאיר הוא והא רבי מאיר איפכא שמעינן ליה דתניא שוכר כיצד משלם ר' מאיר אומר כשומר חנם ר' יהודה אומר כשומר שכר רבה בר אבבה איפכא קתני אי הכי ארבעה שלשה ניהו אמר רב נחמן בר יצחק ד' שומרין ודיניהם שלשה ההוא רעיא דהוה קא רעי חיזתא אנדרא דנהר פפא שריג דאדא מינייהו ונפלת למיא אתא לקמיה דרבה ופטריה אמר מאי הו"ל למעבד הא

הניחא וכו' פלוגתא במסכת גיטין: אלא אירי ואירי כשאין מעלה... (מסורת הש"ס)

עין משפט נר מצוה... (מסורת הש"ס)

**[Note:** This topic of taking responsibility when watching other people's possessions is vast. This class deals only with three of the four types of shomrim (unpaid watchman, paid watchman, and the renter), not the borrower (see Source 2 below). We will first establish the basic foundations of the laws (in the beginning of Section I and in Section II), and that will then enable us to hone in on three more conceptually oriented issues: what gives one the status of a watchman at all; what is the basis of the Tannaitic debate over a renter; and what is the status of a craftsman.]

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## SECTION I Shomer Chinam – Watching an Object without Getting Paid

### Case 1. Trek Lush 29 SL Mountain Bike Crushed by a Truck in Italy

**A.** *After two weeks biking through the Italian Alps, Russ and Jay, both grad students in Italian literature, descended to Milan, where they were booked at the Olinda Hostel. Outside a drug store on a medium-sized city street, Russ signaled Jay to stop.*

*Russ asked, "Can you please watch my bike for a second while I go into this drug store? I need some contact lens solution."*

*"No problem," said Jay, and Russ entered the store.*

*Jay set Russ's Trek Lush down on the sidewalk and, looking to exercise his semi-fluent Italian, got into an absorbing and animated conversation with an elderly Italian gentleman, always keeping a vigilant eye on Russ's bicycle. To his surprise, two large men with sunglasses suddenly appeared, lifted up the bike, jumped into a nearby car, and sped away before Jay could even react!*

### Is Jay responsible for Russ's stolen bicycle?

**B.** *Imagine if the case ended slightly differently – we'll call this Scenario B. Jay was speaking with the elderly Italian gentleman, and let his back face Russ's bike, so he did not notice the large truck backing into the driveway on the sidewalk. Nor did he notice the crunching sound of the bike under the chassis of the truck. However, Jay did hear the screams when Russ discovered his demolished bike.*

### Is Jay responsible for Russ's broken bicycle?

**C.** *Now consider a third possible ending – Scenario C: What if Jay **did** notice the truck, and called out to the driver, who, surprisingly, ignored Jay? If the outcome ended up the same – a crushed Trek Lush – **would Jay have to pay?***

The Torah itself directly addresses these questions, in the context of the general issue of “When am I responsible for a loss to my friend’s property?” In a group of passages in *Parshat Mishpatim*, the Torah lays down the foundations of this area of civil law.

**Source 1. Shemot (Exodus) 22:6-8 – The Torah discusses someone who guards another person’s property.**

6. If a man gives his friend money or articles for safekeeping, and that deposit is stolen from the man’s house – if the thief is found, he shall pay twofold.

(ו) כִּי יִתֵּן אִישׁ אֶל רֵעֵהוּ כֶּסֶף  
אוֹ כְּלִים לְשֹׁמֵר וְגִנַּב מִבֵּית  
הָאִישׁ אִם יִמָּצָא הַגָּנֵב יִשְׁלַם  
שְׁנַיִם:

7. If the thief is not found (forcing the watchman to prove his innocence), the homeowner shall approach the judges, [to swear] that he has not laid his hand upon his neighbor’s property (taking an oath would be sufficient to absolve him of compensation).

(ז) אִם לֹא יִמָּצָא הַגָּנֵב וְנִקְרַב  
בְּעַל הַבַּיִת אֶל הַאֱלֹהִים אִם  
לֹא שָׁלַח יָדוֹ בְּמִלְאֲכַת רֵעֵהוּ:

8. For any sinful matter (Rashi: when witnesses expose the watchman as having really stolen the object and having made a false oath), for a bull, for a donkey, for a lamb, for a garment, for any lost article, concerning which he will say, “This is it” (one of Rashi’s explanations: This object that you swore was stolen, was really in your possession the whole time), the plea[s] of both parties shall come to the judges, [and] whoever the judges declare guilty shall pay twofold to his neighbor.

(ח) עַל כָּל דְּבַר פְּשָׁע עַל שׁוֹר  
עַל חֲמוֹר עַל שֶׂה עַל שְׁלָמָה  
עַל כָּל אֲבֵדָה אֲשֶׁר יֹאמַר כִּי  
הוּא זֶה עַד הָאֱלֹהִים יָבֹא דְבַר  
שְׁנֵיהֶם אֲשֶׁר יִרְשִׁעוּ אֱלֹהִים  
יִשְׁלַם שְׁנַיִם לְרֵעֵהוּ:

**Verse 6** seems to relate to all three scenarios of our case: **If a man** – Russ – **gives his friend** – Jay – **money or articles** – a mountain bike – **for safekeeping** – “Can you please watch my bike for a second...?” “No problem.”

But what does the Torah say about the other elements of our case – a. what happened to the object and b. how well the person watched the object?

We are going to address Scenario A first – the stolen bicycle: “Two large men with sunglasses lifted up the bicycle and jumped into a nearby car.” **And the deposit is stolen from the man’s house.** Should it make a difference whether it was stolen from his house or in front of him on the street?

What is the ruling? **[He must swear] that he has not laid his hand upon his neighbor’s property** – based on this verse, Jay has to take an oath that he did not use Russ’s bicycle (more on how this translates into modern practical halachah later). Taking an oath will absolve him from payment.

We now have two remaining questions to answer:

- i. What if, instead of getting stolen (as in scenario A above), it gets **destroyed** (as in scenarios B and C)?
- ii. What if the person watching is negligent and **turns his back** on the object (as in scenario B)?

To find answers to our questions, we now turn to the classic Mishnah that is the starting point of any discussion of a guardian's responsibility over property.

**Source 2. Mishnah, Bava Metzia 93a – This Mishnah is the key source in the Oral Torah about the four types of watchmen.**

There are four types of watchmen: the unpaid watchman, the borrower, the paid watchman, and the renter. [If the watchman does not have the object or animal when the owner comes to retrieve it,] **the unpaid watchman takes an oath (and thereby is absolved of responsibility) over everything (whatever he claims happened to the object or animal)**; the borrower pays for any type of loss; the paid watchman and the renter take oaths if [the animal or object they were watching or renting] was broken, taken captive, or died, but they must pay for a loss or theft.

אַרְבָּעָה שׁוֹמְרִים הֵן. שׁוֹמֵר חָנָם, וְהַשׂוֹאֵל, נוֹשֵׂא שְׂכָר, וְהַשׂוֹכֵר. שׁוֹמֵר חָנָם נִשְׁבַּע עַל הַכֹּל, וְהַשׂוֹאֵל מְשַׁלֵּם אֶת הַכֹּל, וְנוֹשֵׂא שְׂכָר וְהַשׂוֹכֵר נִשְׁבָּעִים עַל הַשְּׂבוּרָה וְעַל הַשְּׂבוּיָה וְעַל הַמֵּתָה, וּמְשַׁלְּמִין אֶת הָאֲבֵדָה וְאֶת הַגְּנֵבָה:

In case C above, Jay was not negligent, but the bicycle got destroyed by a truck. This Mishnah says that an unpaid watchman takes an oath over “everything,” even though the Torah only speaks of theft. What is the source for this?

The Rambam (Maimonides) explains:

**Source 3. Rambam, Mishnah Torah, Hilchot Sh'eilah Ufikadon 4:2 – How do we know that an unpaid guardian is not liable for damages beyond his control?**

2. Since the Torah absolved an unpaid guardian from theft, he is **certainly** absolved from losses that are even more beyond his control, such as if [the animal he was watching] was broken, or was taken captive or died.

ב הַיֵּאֵל וּפְטִיר הַכֶּתוּב אֶת שׁוֹמֵר חָנָם מִן הַגְּנֵבָה, קָל וְחֶמֶר מִן הָאֲנֻסִין הַגְּדוּלִים כְּגוֹן שְׂבוּרָה וְשְׂבוּיָה וּמֵתָה:

Is an unpaid guardian liable if he is negligent?

[Just to sharpen the issue, What if the loss of the object came about through **passive negligence**, e.g. Jay left the bicycle unattended, and then it was demolished by a truck? If someone who was **not** a *shomer* brought about the destruction of another's property **indirectly**, he is morally liable, but a court could not force payment – פְּטוֹר בְּדִינֵי אָדָם וְחַיִּיב בְּדִינֵי שָׁמַיִם – (Bava Kamma 56a). This is classified as indirect damage, גְּרָמָא. But how do we rule if he **is** classified as one of the four watchmen?]

A shomer chinam (an unpaid watchman) **is** liable for negligence. Rashi (in the context of a related Talmudic passage) says that this is rooted in the biblical verse (Shemot 22:8) we quoted in Source 1 above: For any **sinful matter** (דְּבַר פְּשָׁע) ....

#### **Source 4. Rashi, Bava Metzia 95a “Ashomer Chinam” – What is the source in the Torah that a shomer chinam is liable for negligence?**

... An unpaid guardian – where liability for negligence is mentioned in the Torah: “For any sinful matter.”

(א) שׁוֹמֵר חֲנָם - דְּקָתִיבָא בֵּיהּ  
פְּשִׁיעָה עַל כָּל דְּבַר פְּשָׁע:

According to Rashi, the verse teaches us: In any case where an unpaid guardian was negligent – whether animal or object – he must compensate. In our case: even though Jay was only doing Russ a favor by watching his bike, as a *shomer chinam* he is still liable for negligence.

[**Note:** Russ could theoretically claim the money for his bike in court – if Jay was not willing to pay. Jay’s status as a shomer chinam makes him more liable than a standard damager. The victim of indirect damages **cannot** claim them in court, whereas the victim of a shomer chinam’s negligence **can**.]

#### **To summarize our findings:**

Someone watching another person’s property, not for pay, is referred to as a shomer chinam. He is obligated to compensate for damages if he was negligent, but not if the object was stolen, and certainly if something happened beyond his control. (The truck driver is liable – but if Jay was not negligent, Russ, not Jay, will have to deal with the truck driver!)

[**Note:** Here are a few more essential halachot that apply to a *shomer chinam* (We include this necessary background without providing source material).

a. If a shomer chinam used the object without permission, referred to as *shlichut yad* (based on Shemot 22:7), he subsequently becomes obligated for any loss – even one that was beyond his control.

b. If a watchman claims that he is absolved of responsibility, he must prove his case. He can either provide witnesses, or, as the Torah says (Shemot 22:10), he can take an oath, *shvu'at hashomrim*, and thereby be released from accountability. He swears: a. that his report (that the incident occurred despite his proper surveillance) is valid, b. it is not in his possession, and c. he did not illegally use it (Shulchan Aruch Choshen Mishpat 295:2).

c. We go out of our way nowadays to avoid having anyone take an oath. When one of the parties would have been obligated to take an oath, the court strongly encourages making a *pesharah* (Shulchan Aruch Choshen Mishpat 12:2 – *pesharah* is defined as a legal decision where the judges come to a legal conclusion not based on the letter of the law, but based on going **beyond** the letter of the law, taking into account the needs of the situation, and striving to attain a peaceful solution).]

**What gives someone the status of shomer chinam, the unpaid guardian?** Consider the case of Jeanne and Wendy:

**Case 2. Monique's four Acrylic Paintings Trampled on a French Sidewalk**

*Wendy met her friend, Monique, on a busy city street outside the Artists' Colony in downtown Marseilles. Monique propped four of her large acrylic paintings against a city light pole. Standing just outside of an art supplies store, Monique asked Wendy, "Can you please watch these for me while I pick up some brushes?" Wendy answered, "You can leave them."*

*Wendy then got into a conversation with two French women asking her for directions to a certain restaurant. Totally absorbed in helping the women, Wendy walked them down the block and pointed out the restaurant. During these four minutes, a group of fourteen energetic pre-teens raced through the sidewalk, hopelessly trampling the paintings!*

**Is Wendy obligated to compensate?**

**Give a rationale for your answer.**

To rephrase our question in halachic language: **Is Wendy considered a shomer** (precise grammar is "shomeret", but the halachic category uses the masculine shomer) **chinam? And if she is, is she liable for negligence in this case?**

What gives someone the status of a shomer chinam, an unpaid guardian – to the degree that they have responsibility over an object and would have to take an oath over it?

To search for the answer to this question, let us look at a Talmudic passage that examines three possible responses a **potential** guardian can give when requested to watch an object.

**Source 5. Mishnah, Bava Metzia 80b – "Place it before me."**

If one says to another, "Watch this for me," and the other responds, "Place it down **in front of me**," he becomes an unpaid watchman.

שומר לי, ואמר לו הנח לפני, שומר חנם:

**Source 6. Bava Metzia 81b – "Place it before yourself," and "Place it."**

Rav Huna said: One who [when requested to watch an object] responded, "Place them down before yourself," becomes neither an unpaid nor a paid watchman. The following question was asked by the rabbis: What if he simply responded, "Put it down" (not "Place them down before me," nor "Place them down before yourself")?

אמר רב הונא: אומר לו "הנח לפניך" אינו לא שומר חנם ולא שומר שכר. איבעיא להו: הנח סתמא מאי?

Why should there be a difference between responding, “Place it before me,” “Place it before yourself,” and “Place it”?

Answer: One becomes a shomer chinam by **accepting responsibility**. A person does not become a shomer chinam merely because someone else’s possessions are in his or her property. “Place it **before me**” means I am willing to **accept responsibility** over it; “Place it **before yourself**” is said by someone **carefully avoiding taking responsibility**. The Gemara does not come to a conclusion about someone who just says “Place it.” [There are two ways of viewing this case: A. On the one hand, if he really does not want to take responsibility why did he say anything? When an object is placed with him he needs to explicitly avoid taking responsibility to get out of any obligations. B. On the other hand, perhaps our default assumption is that someone does not take on responsibility. Only by explicitly taking on responsibility does he take on any obligations.]

How do halachic authorities deal with a question that is left unresolved by the Gemara? The Rif and Rosh rule that because the Gemara left the case unresolved, if the object is destroyed through negligence while in the property of the one who said “Place it,” we cannot force payment. We cannot force someone to pay out of doubt. The Shulchan Aruch Choshen Mishpat 291:2 also rules that one who merely says “Place it” does not get the status of a shomer chinam.

In your eyes, to which of the three formulations is Wendy’s “You can leave them” equivalent to?

Wendy’s “Leave them” sounds like the equivalent of the Gemara’s “Place them,” so she does **not** have the status of a shomer chinam.

*Now imagine that Case 2 ended slightly differently. Imagine if Wendy had responded to Monique’s request to watch her acrylic paintings by answering, “**Yes, of course I will.**”*

***In that case would she be obligated to compensate?***

Based on what we have learned until now, we would answer “Yes, of course.” Wendy assumed the status of shomer chinam by explicitly answering in the affirmative when Monique asked, “Can you please watch these for me?”

However, some commentators, based on a passage in the Gemara, maintain that the picture is not so simple. Is it possible to gain the status of shomer chinam and the legal responsibilities that go along with it through a mere **verbal** agreement?

## **Background**

*Kinyanim* are acts of acquisition – actions that effect a legal transfer of property. One form of kinyan is referred to as *meshichah*, pulling. Ownership of movable property is transferred by pulling it (the Gemara outlines the rules of where and how this is done). Even though money changed hands, there is a rabbinic decree that ownership only transfers when the object is moved into the purchaser’s domain (see Bava Metzia 46b for a discussion of the decree).

### Source 7. Bava Metzia 99a – They decreed *meshichah* for watchmen.

Rabbi Elazar said: Just as they decreed pulling for purchasers [to attain ownership], so too they decreed it for watchmen. This was also stated in the following Beraita: Just as they decreed pulling for purchasers [to attain ownership], so too they decreed it for watchmen.

אמר רבי אלעזר: כדרך שתקנו משיכה בלקוחות כך תקנו משיכה בשומרים. תניא נמי הכי: כלשם שתקנו משיכה בלקוחות כך תקנו משיכה בשומרים:

Rashi, in his commentary to Bava Kamma (where this is also quoted), explains the practical relevance of this halachah.

### Source 8. Rashi Bava Kamma 79a – They decreed *meshichah* for watchmen.

The Sages decreed that pulling is required for watchmen – The watchman does not assume responsibility to safeguard the object until he pulls it.

תיקנו משיכה בשומרים - שלא יתחייב שומר בשמירה עד שישמשו:

Some Rishonim (Rambam, Ra'avad, Rashba, and others) agree with Rashi and hold that the status of being the guardian of an object, along with the responsibilities that entails, does not take effect until the prospective watchman performs an act of *meshichah* (or some equivalent *kinyan*) on whatever he is watching. He would have to pull the bicycle or artwork, in order to be considered a *shomer*. This could be done by pulling the object into his property or into an area on the periphery of a public thoroughfare (referred to as *tzidei reshut harabim*), but not in the marketplace, town square, or on a busy street (*reshut harabim*).

Another group (Tosafot and the Rosh) holds that a mere verbal agreement is sufficient to become either a *shomer chinam* (unpaid guardian) or *shomer sachar*, (paid guardian).

### Source 9. Tosafot Bava Metzia 99a, “*Kach Tiknu Meshichah Beshomrim*” – Some watchmen can become liable through a mere verbal agreement.

For an unpaid watchman becomes liable for negligence without pulling the object (*meshichah*), as we say in Chapter Six of Bava Metzia (80b – Source 5 above), that [merely saying] “Place it before me” gives one the status of *shomer chinam*. The same is true of a paid watchman becoming liable for theft or loss.

דהא שומר חנם בלא משיכה חייב בפשיעה כדאמרין פוק האומנין (לעיל דף פ:): דהנח לפני שומר חנם והוא הדין שומר שכר בגניבה ואבידה:

How do proponents of this approach explain Source 7 above – Bava Metzia 99a requiring the watchman to pull the object? That, Tosafot continues, teaches that a **renter** or **borrower** cannot back out of a rental or borrowing relationship after he has already pulled the object.

**Wendy's responsibility over these paintings** hinges on how the Shulchan Aruch rules about the status of someone who agreed to watch someone's property, but did not do any act of acquisition (Monique had left the paintings leaning against a light post and Wendy just left them there).

**Source 10. Shulchan Aruch Choshen Mishpat 291:5 – How does the Shulchan Aruch rule about whether a verbal agreement is sufficient to become a shomer chinam?**

There is an opinion that says that as soon as this watchman (the unpaid guardian) agrees to watch the object or has said, "Place it before me" – thereby causing the owner to stop watching it himself – he is liable for it if he was negligent, **even though he did not pull it** (do a physical act of acquisition). There is also an opinion that says that he is not liable **until he pulls the object**, providing that he pulls it in a place where pulling effects a transaction.

יש מי שאומר שהשומר הזה מיד  
בשקבל עליו לשמור או שאמר הנח  
לפני ונסתלקו הבטלים משמירה,  
חייב עליו אם פשע אף על פי שלא  
משך, ויש מי שאומר שאינו חייב עד  
שמשוך, ובמקום שמשכה קונה:

The Shulchan Aruch quotes both opinions! The Aruch Hashulchan (Choshen Mishpat 291:14) writes that later authorities (the Shach and the Gra) decided in favor of the opinion that the status of shomer chinam does not begin until *meshichah* was done. The Yerushalmi, he says, also supports this approach.

Based on these later commentators, Wendy would not be held legally liable in our case (though she might feel a moral obligation to help Monique compensate for her loss, especially because they were original artwork).

**KEY  
THEMES  
OF  
SECTION I**

- Even someone doing a favor for a friend, by watching his or her object for free, is still responsible to take care of it.
- The Torah speaks of four different categories of "watchmen," shomrim, and the one with the lowest level of responsibility is the unpaid guardian, the shomer chinam.
- An unpaid guardian whose negligence leads to the loss, destruction, or theft of the object must compensate the owner.
- However, one only becomes liable through actually taking on responsibility.
- All halachic authorities agree that **verbal** agreement – "I will watch it for you," or, even, "Place it here before me" – is essential to gain the status of an unpaid guardian.

- Some authorities also require making a physical act of acquisition on the object, a “kinyan,” (usually meshichah, pulling) in order to gain the status of a shomer chinam. Though the Shulchan Aruch brings both approaches, later authorities rule (leniently) that a mere verbal agreement is not sufficient to become a shomer chinam, but a physical kinyan is also necessary.

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## SECTION II Shomer Sachar – The Paid Watchman

We know that a shomer chinam, who does a favor for a friend and watches an object for free, only has to compensate for loss if he was negligent. Now we will ask: How does a watchman’s responsibility change if he gets paid to watch? Consider the following two cases:

### Case 3. Designer Coat Stolen from Synagogue Coatroom

*Sullivan and Bridgett Levy checked their coats into the coatroom of Chicago’s Anshei Tzedek Synagogue. They were attending a reception celebrating Bridgett’s brother Maxwell’s appointment as president of the World Jewish Communities Foundation. When the reception was over, they pulled out their coat stubs and stopped by the coatroom. The attendants did not find the Levys’ designer winter coats (worth \$3,299).*

*It did not take long to realize that a theft had taken place in the synagogue. The thieves had absconded with the two coats from the coat room, some Judaica from the gift shop, and a car that they had apparently hotwired and sped out of the parking lot with. The police were very skeptical about the likelihood of successfully retrieving the items.*

*The coatroom attendants were college students who each received \$40 for the evening.*

### Do they have to compensate the Levys for the coats?

### Case 4. Dog Injured in Freak Accident

*Kathy’s latest scheme for paying her way through grad school is “We-Watch-Your-Dog,” a dog daycare service that she initiated. She also enlisted a few friends, all downtown apartment dwellers, to join her enterprise. One day something strange happened when she and her assistants were walking that day’s dogs in the park. Out of nowhere, a stray dog, ownerless and dangerous, appeared, bounded through the park and attacked one of the dogs, a petite Norfolk Terrier.*

*When the episode ended they called the owner, and rushed to the veterinarian, who treated the wounds – one even needed stitches.*

*The total vet bill came out to \$240.*

*Kathy was just starting out in the business; she did not yet have insurance, and neither did the owner.*

### Is Kathy responsible for the veterinarian bill because the dogs were in her care at the time?

Both Kathy and the coatroom attendants were paid to watch someone else's property. People pay Kathy to watch their dogs, and the coatroom attendants take a salary (and, hopefully, generous tips) for watching people's coats.

They both have the status of a *shomer sachar*, a paid watchman.

The Torah devotes a passage to the paid watchman's responsibility:

#### Source 11. Shemot 22:9-12 – The Torah addresses the paid watchman.

<p>9. If a man gives his neighbor a donkey, a bull, a lamb, or any animal for safekeeping, and it dies, breaks a limb, or is captured, and no one sees [it],</p>	<p>(ט) כִּי יִתֵּן אִישׁ אֶל רֵעֵהוּ חֲמוֹר אוֹ שׂוֹר אוֹ שֶׂה וְכָל בְּהֵמָה לְשֹׂמֵר וּמָת אוֹ נִשְׁבֵּר אוֹ נִשְׁבָּה אִין רֵאָה:</p>
<p>10. the oath of the Lord shall be between the two of them, provided that he did not lay his hand upon his neighbor's property, and its owner shall accept [the oath], and he shall not pay.</p>	<p>(י) שְׂבַעַת ה' תִּהְיֶה בֵּין שְׁנֵיהֶם אִם לֹא שָׁלַח יָדוֹ בְּמִלְאֲכַת רֵעֵהוּ וְלָקַח בְּעֵלְיוֹ וְלֹא יִשְׁלַם:</p>
<p>11. But if it is stolen from him, he shall pay its owner.</p>	<p>(יא) וְאִם גָּנַב יִגְנַב מֵעֲמוֹ יִשְׁלַם לְבַעְלָיו:</p>
<p>12. If it is torn apart, he shall bring witness for it; [for] the torn one he shall not pay.</p>	<p>(יב) אִם טָרַף יִטְרַף יְבֹאֵהוּ עַד הַטְּרֵפָה לֹא יִשְׁלַם:</p>

This passage immediately follows the passage we quoted above (Source 1 – Shemot 22:6). That verse began, “If a man gives his friend money or articles for safekeeping...” whereas this one begins, “If a man gives his neighbor a donkey, a bull, a lamb, or any animal for safekeeping...” Both cases involve one person watching something for another, and deal with their responsibility for loss. However, even though it seems like the only difference between the Torah's two cases is **what** they are watching – money or a vessel in the first passage, and an animal in the second – their **liability** rules are also different. In the first passage he **is not** responsible for theft, in the second he **is**. The Gemara reasons from here that they are referring to different types of watchmen.

#### Source 12. Bava Metzia 94b – Which type of watchmen does the Torah refer to?

<p>For the Rabbis learned (in a Beraita): The first passage (Shemot 22:6-8) refers to an unpaid guardian, and the second (Shemot 22:9-12) to</p>	<p>דְּתַנּוּ כַּבְּנֵי פְרִיָּשָׁה רֵאשׁוֹנָה נְאֻמְרָה בְּשׂוֹמֵר חָנָם שְׁנֵיהֶם בְּשׂוֹמֵר שְׂכָר. אִיפוּךְ אֲנֵא! מִסְתַּבְּרָא שְׁנֵיהֶם</p>
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a paid watchman. Maybe I should reverse it (that the verses 6-8 refer to the paid watchman and 9-12 to an unpaid guardian)?! Answer: It makes sense to say that the second refers to a paid watchman because he is liable to compensate [the owner] if it is stolen or lost.

בְּשׂוֹמֵר שְׂכָר שֶׁכֵּן חַיִּיב בְּגִנְיָה וְאֲבִידָה.

(Source 12 was only the first stage of the Gemara's discussion, but it does conclude that verses 9-12 refer to the paid watchman.)

Why was it so obvious to the Gemara that the section with more liability (theft and loss) refers to the paid watchman?

**A.** The Tur states that a watchman is paid for his greater vigilance in protecting the object, and a more comprehensive liability goes along with his job (even if he and his employer did not spell this out).

**Source 13. Tur, Choshen Mishpat 303 – A paid watchman should watch more diligently than an unpaid one because he gets paid.**

Since he is getting paid for watching he should watch more diligently and is [therefore] liable for theft or loss.

וְכִיּוֹן שֶׁנֹּשֵׂא שְׂכָר עַל שְׂמִירָתוֹ צָרִיךְ לְשׂוֹמֵר שְׂמִירָה מְעוּלָה וְחַיִּיב בְּגִנְיָה וְאֲבִידָה.

**B.** There is a direct correlation between how much liability a watchman has and how much benefit he gets. This emerges from the Yerushalmi's explanation for the different liability levels of the different watchmen.

**Source 14. Yerushalmi, Shevuot 8:1 (40a) – A paid watchman is more liable than an unpaid one because he benefits more.**

Because a **borrower** gets all the benefit of the interaction (he uses the object without having to pay anything), he pays in all situations (even when the loss is totally beyond his control). Regarding a **paid watchman and a renter**, because they gain some benefit (the watchman gains his salary and the renter gains his usage) and give some benefit (guarding the object or paying rent), they take an oath (thereby getting absolved from payment) in some cases (when the loss was beyond their control) and pay in others (even theft or loss). **An unpaid watchman**, because he gets no benefit (he is doing a favor), takes an oath and is absolved of payment (in all cases – except negligence).

שׂוֹאֵל לְפִי שְׂנֵהֲנָה אֶת הַכֹּל מִשְׁלָם אֶת הַכֹּל נוֹשֵׂא שְׂכָר וְהַשׂוֹכֵר לְפִי שְׂנֵהֲנָה מְקַצֵּת וּמְהַנֵּה מְקַצֵּת וְשֹׁבֵעַ מְקַצֵּת וּמְשַׁלֵּם מְקַצֵּת שׂוֹמֵר חָנָם שְׂאִין לוֹ הַנִּזְיָה נִשְׁבַּע וְיֹצֵא.

The unpaid guardian gets no benefit and therefore has low liability (he is absolved for theft and loss); the paid watchman gets more benefit (his salary) and therefore has more responsibility (he must compensate for theft and loss); and the borrower gets a high level of benefit (he can use the object for free) and therefore has an extremely high level of responsibility.

The Seforno suggests that the difference in the objects referred to in the two passages (money and vessels vs. animals) itself indicates that they are referring to two different types of watchmen.

### Source 15. Seforno's Commentary on Shemot 22:6 and 9 – What types of guardians does the Torah refer to?

6. Money or vessels: In general a wealthy man will watch these [possessions for someone] for free.

(ו) נְסִיף אוֹ כֵּלִים: שְׁסִתָּם אֵלֶּה יִשְׁמְרֵם אִישׁ עֲשִׂיר בְּחֻנָּם.

9. A donkey or ox or sheep: In general the poor of the nation will watch these for payment.

(ט) חֲמוֹר אוֹ שׂוֹר אוֹ שֵׂה: סִתָּם אֵלֶּה יִשְׁמְרוּ אוֹתָם עֲנִי עִם בְּשֹׁכֵר.

Looking after animals involves more effort than watching money or vessels, and poor people do it for a fee. That is, therefore, the example the Torah gives for the shomer sachar.

The above-mentioned Mishnah summarizes the laws of the shomer sachar:

### Source 16. Mishnah, Bava Metzia 93a – A summary of the laws of the paid watchman.

There are four types of watchmen: the unpaid watchman, the borrower, the paid watchman, and the renter. [If the watchman does not have the object or animal when the owner comes to retrieve it,] the unpaid watchman takes an oath (and thereby is absolved of responsibility) over everything (whatever he claims happened to the object or animal); the borrower pays for any type of loss; **the paid watchman and the renter take oaths if [the animal or object they were watching or renting] was broken, taken captive, or died, but they must pay for a loss or theft.**

אַרְבָּעָה שׁוֹמְרִים הֵן. שׁוֹמֵר חֻנָּם, וְהַשׂוֹאֵל, נוֹשֵׂא שֹׁכֵר, וְהַשׂוֹכֵר. שׁוֹמֵר חֻנָּם נִשְׁבַּע עַל הַכֹּל, וְהַשׂוֹאֵל מְשַׁלֵּם אֶת הַכֹּל, וְנוֹשֵׂא שֹׁכֵר וְהַשׂוֹכֵר נִשְׁבָּעִים עַל הַשְּׂבוּרָה וְעַל הַשְּׂבוּיָה וְעַל הַמֵּתָה, וּמְשַׁלְּמִין אֶת הָאֲבֵדָה וְאֶת הַגְּנֵבָה:

The Shulchan Aruch rules accordingly:

**Source 17. Shulchan Aruch, Choshen Mishpat 303:2,3 – What do we conclude about the responsibilities of the shomer sachar?**

- |   |  |
|---|--|
| 2. A paid watchman is liable for theft or loss.   | (ב) שׁוֹמֵר שָׂכָר תְּיָיֵב בְּגִנְיָהּ וְאֶבְדָּהּ. |
| 3. A paid watchman is absolved from responsibility [if the object was destroyed by something] beyond his control. | (ג) שׁוֹמֵר שָׂכָר פְּטוּר מֵאוֹנְסִים.              |

Let us now re-read our verses from Source 11 and find what they say about the outcome of our two cases:

**Shemot 22:11. But if it is stolen from him** – as in the Levys' coats – **he shall pay the owners** – so they should be compensated.

**Shemot 22:12. If it is torn apart** – A stray dog attacking a Norfolk Terrier seems just as beyond Kathy's control as a wolf attacking the shepherd's sheep – **he shall bring witness for it; [for] the torn one he shall not pay** – and Kathy would not have to compensate for the accident.

**[Note:** All of the above presents the Torah's default rules for watchmen and guardians. **But the halachah allows for every particular watchman and employer to agree on alternate terms (see Shulchan Aruch Choshen Mishpat 296:8, based on Bava Metzia 94a).** A night-watchman at a warehouse might only be willing to take the job without the theft or loss liability clause. Even desperate job-seekers might not be willing to take a low-paying job as a watchman if he or she risks being liable for expensive stolen items; is it worth earning \$10 an hour if he might end up owing \$2000? Nowadays, fortunately, most institutions and businesses are insured for theft and loss, removing the responsibility from the security personnel. However, small start-ups or informal business relationships (occasionally formed in a sloppy or reckless manner) are not always covered, and when a loss takes place while under the care of a guardian, they may end up at a din Torah, a halachic court case, to determine who is responsible.

Also keep in mind: A shomer sachar – a night watchman, shepherd, or other paid guard – is not liable if armed robbers stole the object or animal they were watching. Armed robbery is classified as אונס, beyond the watchman's control (Shulchan Aruch, Choshen Mishpat 303:3).]

**KEY  
THEMES  
OF  
SECTION II**

- One who is paid to watch an object or animal is referred to as a shomer sachar.
- His level of responsibility is higher than that of a shomer chinam, an unpaid guardian. Whereas a shomer chinam is only liable if he was negligent, a shomer sachar is also obligated if the object was stolen or lost.
- Like the shomer chinam, the shomer sachar is also absolved from responsibility if the object or animal was lost, destroyed, or died in a way that was beyond his control - אונס.

### SECTION III Socher – The Renter

What are the responsibilities of a renter if the object gets destroyed, stolen, or lost? Consider the following case:

#### Case 5. Rented Tuxedo Gets Lost at Wedding Weekend

Marcos rented a \$1,200 tuxedo from his cousin for \$50 (they did it all very informally, but Marcos insisted on renting it) for his best friend Leon's wedding weekend at a hotel outside of Santiago. Marcos wore the tuxedo for the Thursday afternoon wedding and dinner and on Motzaei Shabbat at the Melaveh Malkah Sheva Berachot. On Sunday morning, the hotel asked Marcos to change rooms because two new groups arrived who needed his large suite. On Sunday evening, when Marcos was ready to check out, he realized the tuxedo had somehow disappeared. Friends helped him search, but with no success.

#### Is Marcos responsible to compensate for a lost, rented tuxedo?

What does the Torah say about a renter? What does the Talmud say? And how do the halachic authorities rule?

The Torah's comment about the renter is extremely cryptic:

#### Source 18. Shemot 22:13-14 – The Torah discusses someone who guards another person's property.

<p>13. And if a person borrows [an animal] from his neighbor and it breaks a limb or dies, if its owner is not with him, he shall surely pay.</p>	<p>(יג) וְכִי יִשְׁאַל אִישׁ מֵעַם רֵעֵהוּ וְנִשְׁבַּר אוֹ מֵת בְּעֵלָיו אִין עֲמוֹ שְׁלָם יִשְׁלָם:</p>
<p>14. If its owner is with him, he shall not pay; if he is a renter, it (the animal) comes with a rental fee.</p>	<p>(יד) אִם בְּעֵלָיו עֲמוֹ לֹא יִשְׁלָם אִם שֹׂכֵר הוּא בָּא בְּשִׂכְרוֹ:</p>

**[Note:** The translation above follows Rashbam's commentary on this verse, that *sachir* refers to the person renting the object, and that *ba bischaro* means because there is a rental fee, its law is different than that of a borrower. There is quite a range of approaches to this part of the verse: see especially Rashi, Ibn Ezra, Chizkuni, Haktav Vehakabalah, and the Ha'emek Davar.]

The Torah tacks on a short line about the renter to the passages about responsibility over another's object, but does not seem to tell us in which situations the renter is responsible.

**Before you study the next source, think about this yourself – what level of responsibility should a renter have? Think about whether he should be responsible in the following situations:**

- negligence
- theft

- **loss (in the sense of “I lost my keys. Where could they be?”)**
- **death of an animal**
- **fire**
- **freak accidents**

Indeed, Tannaim differ over the extent of the renter's obligation.

One side of the dispute appears in our Mishnah:

**Source 19. Mishnah, Bava Metzia 93a – The renter is discussed in the key Mishnah addressing the four types of watchmen.**

There are four types of watchmen: the unpaid watchman, the borrower, the paid watchman, and the renter. [If the watchman does not have the object or animal when the owner comes to retrieve it,] the unpaid watchman takes an oath (and thereby is absolved of responsibility) over everything (whatever he claims happened to the object or animal); the borrower pays for any type of loss; the paid watchman **and the renter take oaths if [the animal or object they were watching or renting] was broken, taken captive, or died, but they must pay for a loss or theft.**

אַרְבָּעָה שׁוֹמְרִים הֵן.  
שׁוֹמֵר חֲנָם, וְהַשׂוֹאֵל,  
וְנוֹשֵׂא שְׂכָר, וְהַשׂוֹכֵר.  
שׁוֹמֵר חֲנָם נֹשֵׂעַ עַל  
הַכֹּל, וְהַשׂוֹאֵל מְשַׁלֵּם אֶת  
הַכֹּל, וְנוֹשֵׂא שְׂכָר וְהַשׂוֹכֵר  
נֹשֵׂעִים עַל הַשְּׂבוּרָה  
וְעַל הַשְּׂבוּיָה וְעַל הַמָּתָה,  
וּמְשַׁלְּמִין אֶת הָאֲבֵדָה  
וְאֶת הַגְּנֵבָה:

But there is a dissenting opinion, which appears in the Gemara:

**Source 20. Bava Metzia 93a – The Gemara presents two approaches to the renter's responsibility.**

Who is the author of the Mishnah about the four watchmen? Rav Nachman quoted Rabbah son of Avuha: It is Rabbi Meir. Said Rava to Rav Nachman, “Who does not agree that there are four watchmen?” He responded, “This is what I am saying to you: Who is the Tanna that holds that the law of the renter is identical to that of the paid watchmen? (And then there are three laws resulting from the responsibilities of the four watchmen.) It is Rabbi Meir.”

But has not Rabbi Meir been quoted as saying the opposite?! For we learn in a Beraita: What are the payment rules of a renter? Rabbi Meir says he is treated like an unpaid guardian. Rabbi Yehudah says he is treated like a paid watchman. Rabbah son of Avuha held that their opinions were reversed.

מֵאֵן תִּנָּא אַרְבָּעָה שׁוֹמְרִים?  
אָמַר רַב נַחֲמָן אָמַר רַבָּה בְּרַ  
אָבוּהִי: רַבִּי מֵאִיר הִיא. אָמַר לִיה  
רַבָּא לְרַב נַחֲמָן, “מִי אֵיכָא דְלִית  
לִיה אַרְבָּעָה שׁוֹמְרִין?” אָמַר לִיה,  
“הֵבִי קְאָמִינָא לְךָ מֵאֵן תִּנָּא שׂוֹכֵר  
כְּנוֹשֵׂא שְׂכָר? רַבִּי מֵאִיר הִיא.”

וְהָא רַבִּי מֵאִיר אֵיפְכָא שְׂמַעִינָן  
לִיה, דְּתַנָּיָא, “שׂוֹכֵר כִּי צַד מְשַׁלֵּם  
רַבִּי מֵאִיר אָמַר כְּשׁוֹמֵר חֲנָם רַבִּי  
יְהוּדָה אָמַר כְּשׁוֹמֵר שְׂכָר”!  
רַבָּה בְּרַבִּי אָבוּהִי אֵיפְכָא קְתַנִּי.

If that is the case (that everyone holds that the renter is treated like one of the other watchmen), [why did we speak of] “four” – they are really three?! Said Rav Nachman son of Yitzchak: There are four watchmen but they have (among them) three sets of rules.

אי הכי ארבעה, שלשה נינהו?!  
אמר רב נחמן בר יצחק: ארבעה  
שומרין ודיניהם שלשה.

Let us distill the Rav Nachman – Rav Avuha approach to the dispute:

**Rabbi Meir:** A renter’s law is identical to that of a paid watchman, a shomer sachar. He is obligated to compensate for the object if it was stolen or he lost it, and certainly if he was negligent, but is absolved from payment for accidents beyond his control.

**Rabbi Yehudah:** A renter’s law is identical to that of an unpaid guardian, a shomer chinam. He is only obligated to compensate for the object if he was negligent, but is absolved from payment in any other situation: theft, loss, or accidents beyond his control.

**Now, try to take sides: Try to defend Rabbi Meir’s position. Then try to defend Rabbi Yehudah’s position. What, in your eyes, is the conceptual basis of their debate?**

Rashi explains:

**Source 21. Rashi’s Commentary on Bava Metzia 80b – In what way is a renter similar to a shomer sachar, and in what way is he similar to a shomer chinam?**

**He is like a paid watchman** – since the object is with him for his benefit. Even though he pays for its use, he is considered like a paid watchman, for if he did not pay (for the use of his friend’s object or animal) he would be considered a borrower and be obligated to compensate even if an accident beyond his control happened. But now that he is paying a rental fee, he is not a borrower but similar to a paid watchman.

... כְּשׂוֹמֵר שָׂכָר – הוֹאֵיל  
וְלִהְיֵנָתוֹ הוּא אֶעְלֹ, אִף עַל  
פִּי שְׁנוֹתָן שָׂכָר פְּעֻלָּתוֹ שׂוֹמֵר  
שָׂכָר הוּא, דְּאִי לֹא יְהִיב שָׂכָר  
הוּי שׂוֹאֵל וְחִיב בְּאוֹנְסִין, הַשְׁתָּא  
דְּיְהִיב לִיה אֶגְרָא לֹא הוּי שׂוֹאֵל,  
וְהוּי שׂוֹמֵר שָׂכָר:

**He is like an unpaid guardian** – for he pays a rental fee and does not take a salary for watching the object.

... כְּשׂוֹמֵר חִנָּם – דְּקָא יְהִיב  
אֶגְרָא מְלֻאכְתּוֹ, וְאֵינוֹ נוֹטֵל שָׂכָר  
עַל שְׂמִירָתוֹ...

A closer look at these comments of Rashi suggests that Rabbi Meir and Rabbi Yehudah’s dispute about a renter is really about how to define a shomer sachar.

**Rabbi Yehudah – A renter is like an unpaid guardian**

The simplest approach to defining a shomer sachar is “a person who is paid a salary to watch” – literally, a paid watchman. A renter is not paid to watch. He pays money

to use the object or animal, so the use of the animal cannot be viewed as his salary. It comes out that he is watching the object for free.

**Rabbi Meir – A renter is like a paid watchman.**

A renter is definitely not employed as a watchman, but he is referred to as a shomer sachar because his degree of accountability is parallel to that of a shomer sachar. Why is that so?

Rabbi Meir's approach makes sense according to the system presented in the passage from the Talmud Yerushalmi we quoted above (Source 14). A watchman's level of liability is determined by the relationship between how much he benefits from the object and how much he gives to the object's owner.

The **unpaid guardian** watches the object without deriving benefit at all and therefore has low liability (he is absolved for theft and loss). The **borrower** benefits greatly, using the object for free, and therefore has an extremely high level of responsibility. But a **renter** is similar to a **paid watchman**. Both of them benefit – the paid watchman takes a salary and the renter uses the object – but that benefit is offset by what they give to the owner – the renter pays and the paid watchman guards the object. They, therefore, both have more responsibility than an unpaid guardian but less than a borrower, and must compensate for theft and loss.

The Shulchan Aruch's ruling follows that of our Mishnah (Source 16):

**Source 22. Shulchan Aruch, Choshen Mishpat 307:1 – What level of responsibility does a renter have?**

When someone rents an animal or vessels, his legal status is like that of a paid watchman, and he is obligated to compensate for theft or loss, but is absolved [of accountability] for mishaps beyond his control.

השוכר מַחְכִּירו בְּהֵמָה אוּ בְּלִים, דִּינוֹ  
כְּשׂוֹמֵר שָׂכָר לְהִתְחַיֵּב בְּגִנְיָה וְאֲבֵדָה  
וְלִפְטוֹר מֵאוֹנְסִין.

Back to Marcos: **Is he obligated to compensate for the lost tuxedo?**

Based on the Shulchan Aruch's ruling, the simple answer is: yes, unless he had made some special arrangements with his cousin, the lessor.

**KEY  
THEMES  
OF  
SECTION  
III**

- The level of responsibility of a renter, referred to as a socher, is the subject of a Talmudic dispute between Rabbi Meir and Rabbi Yehudah (and there is an additional Amoraic dispute over who maintained each approach!).
- One approach is that a renter has the same level of responsibility as a **shomer chinam**; the other position is that the renter has the same level of responsibility as a shomer sachar.
- Rashi explains that a renter could be classified as a shomer chinam, because he is not compensated for watching the object. He pays the owner for using the

object, so his use cannot be viewed as a salary. On the other hand, the other approach holds that because he gains from the use of the object (like a borrower does), he really should have a high level of responsibility. However, because he pays, his responsibility level is lowered to that of a **shomer sachar**.

## SECTION IV Uman – The Craftsman

After learning about the unpaid guardian, the paid watchman, and the renter, we are now equipped to deal with the following case:

### Case 6. Client's Computer Stolen from Computer Repairperson's Home

*Marcy, who did organizational work for a London non-profit, had a knack for fixing the office computers. Friends started asking her to help with their computer problems, and this looked like it could bloom into a real small-scale, freelance computer repair business.*

*After an evening session transplanting a working screen onto her co-worker Suzie's Dell laptop, Marcy went to sleep exhausted but satisfied, imagining how happy Suzie would be when her screen would light up. But in the morning she awoke to a nightmare – her apartment had been burglarized, and her purse, her best jewelry, and...Suzie's laptop were all missing!*

*Like every responsible London resident, Marcy had locked her door before she went to sleep, and her windows were barred. But the thieves obviously specialized in breaking into locked apartments and removing valuable contents.*

*Marcy, who had only been doing this work for several months, did not have any insurance coverage for her clients' computers.*

### Is Marcy responsible for the laptop?

The Torah does not speak explicitly about a repair person's accountability for an object he or she is repairing. In which of our four categories would you place her?

A Mishnah does deal with our case directly:

### Source 23 . Mishnah, Bava Metzia 80b – What is the guardian status of craftsmen?

All craftsmen are considered **paid watchmen** (vis à vis the owner's object they are fixing). כָּל הַאֲמָנִין שׁוֹמְרֵי שְׂכָר הֵן.

Why does the Mishnah categorize a craftsman as a paid watchman? This is puzzling, because a craftsman does not get paid to watch an object but to fix it. Why would a craftsman, who is watching an object without getting paid, be categorized as anything but a shomer chinam, an unpaid watchman?

### A. Rationale Behind the Mishnah

We can understand the rationale behind our Mishnah by taking another look at a segment of the passage from the Talmud Yerushalmi we quoted above (Source 14):

#### Source 24. Shach, Choshen Mishpat 72:8 – The principle is limited to mitzvah items.

Regarding a **paid watchman and a renter**, because they gain some benefit (the watchman gains his salary and the renter gains his usage) and give some benefit (guarding the object or paying rent), they take an oath (thereby becoming absolved from payment) in some cases (when the loss was beyond their control) and pay in others (even theft or loss). **An unpaid watchman**, because he gets no benefit (he is doing a favor), takes an oath and is absolved of payment (in all cases – except negligence).

נושא שָׂכָר וְהַשׂוֹכֵר לְפִי שְׁנֵהֶנָּה  
מְקַצֵּת וּמְהַנֵּה מְקַצֵּת וְשֹׁבֵעַ  
מְקַצֵּת וּמְשַׁלֵּם מְקַצֵּת שׂוֹמֵר  
חֲנָם שְׂאִין לוֹ הַנְּיִיה נִשְׁבַּע וְיִוצֵא.

The Yerushalmi defines a paid watchman as one who both watches the object and derives benefit from it. This is as true for the craftsman as it is for the paid watchman and renter. The renter benefits from use of the object; the craftsman benefits by earning his livelihood through fixing it; and, of course, the paid watchman benefits through earning a salary for watching it. All of them give benefit to the owner as well, because his object is in their care – each of them is watching the owner's object. This balance of giving and getting benefit set their responsibility level lower than the borrower who gains benefit without benefiting the owner; and higher than the unpaid watchman who gives much benefit without getting anything.

The Talmud Bavli also equates the liability level of the craftsman with that of the renter. The Gemara begins its discussion of this Mishnah about the craftsman quoting Tannaitic sources about a renter!

### B. The Gemara's Discussion About Our Mishnah (Source 23 above)

We will now follow the Gemara's discussion about the liability level of a craftsman over the object he was fixing.

#### Step #1 – There is a dissenting opinion to that of our Mishnah.

#### Source 25. Bava Metzia 80b – Can Rabbi Meir agree that a craftsman has the status of a paid watchman?

Could we possibly say that this Mishnah is not in line with Rabbi Meir's approach (that follows)? For we learn in a Beraita: In which situations does a renter compensate for the loss of the

לִימָא מִתְּנִיתִין דְּלֵא כְּרַבִּי מְאִיר,  
דְּתַנְיָא: שׂוֹכֵר כִּי צַד מְשַׁלֵּם? רַבִּי  
מְאִיר אָמַר כְּשׂוֹמֵר חֲנָם, רַבִּי  
יְהוּדָה אָמַר כְּשׂוֹמֵר שְׂכָר.

object? Rabbi Meir says he has the status of **an unpaid watchman** (and only pays if he was negligent). Rabbi Yehudah says he has the status of a paid watchman (and must also pay if the object was stolen or lost).

The Gemara, as we pointed out, assumes here that a craftsman should have the same status as a renter. The Gemara postulates that our Mishnah, which is discussing a craftsman, is not in accordance with Rabbi Meir's position about the liability level of a renter. It follows that the author of our Mishnah – ruling that a craftsman has the status of a **paid** watchman – must argue with Rabbi Meir, who holds that a renter has the status of an **unpaid** watchman.

Rashi explains this dissenting approach, that both a renter and a craftsman have the status of an **unpaid** watchman. (We quoted portions of this Rashi earlier in Source 18, but we will now add the portions about a craftsman.)

### **Source 26. Rashi's Commentary on Bava Metzia 80b – Why are both the craftsman and renter considered unpaid watchmen?**

And a craftsman is similar to a renter, because the craftsman has the object with him in order to benefit by getting paid for his work. But he is not taking a salary for watching the object. He is, rather, taking payment for his service.

... ואומן דמי לשוכר, של הנאת  
שכר אמנותו היה אצלו, אבל  
לא שכר שמירה הוא נוטל, אלא  
שכר פעולה:

A craftsman is not getting paid for watching the item while he is fixing it, just as the renter is not being paid to watch the object he is renting. If a renter is like an **unpaid guardian**, the craftsman is as well; for both are not taking a salary for watching the object. This approach defines a shomer sachar as someone who is paid to watch – such as a shepherd, parking lot attendant, or coatroom worker.

### **Step #2 – Perhaps a Renter and a Craftsman Have Different Liability Levels**

This suggestion, that our Mishnah (Source 23) argues with Rabbi Meir's opinion, is very difficult to maintain. A Mishnah like ours, presented anonymously, is usually assumed to be based on Rabbi Meir's approach (Sanhedrin 86a) – “*Stam* [an unattributed] Mishnah [is of] Rabbi Meir.”

Therefore, the Gemara now takes on the challenge of resolving our Mishnah with what we know to be Rabbi Meir's approach. Our first attempt is to assume that Rabbi Meir holds both:

- a.** that a craftsman has the legal status of a shomer sachar, as our Mishnah (Source 23) reports; but also that
- b.** a renter has the status of a shomer chinam, as the Beraita (in Source 25) reports.

Here is the Gemara's first attempt:

**Source 27. Bava Metzia 80b – It is logical for Rabbi Meir to hold that a craftsman has the status of a paid watchman while a renter has the status of an unpaid guardian.**

...Our Mishnah can also be in line with Rabbi Meir's approach. The craftsman's payment for watching the object is the benefit he receives from holding onto the repaired vessel as security for his payment, so he does not have to run to others to borrow money. Therefore, he is considered a paid watchman.

...אפילו תימא רבי מאיר בכהיא  
הנאה דתפיש ליה אאגריה דלא  
בעי למיעל ולמיפק אזורי הוי  
עליה שומר שקר.

The Gemara's first approach retains the definition of a shomer sachar as "one who receives a salary for the object being under his care." A renter is considered a shomer chinam because he is not paid for the object being under his care. But the craftsman **does** get a salary, suggests the Gemara, although his salary is not a conventional one, like the shepherd's or the parking lot attendant's. His "salary," suggests the Gemara, is having the right to seize the object to exact payment (for his craftsmanship) from the owner.

The Gemara now presents a second attempt at resolving the Beraita (in Source 25) with our Mishnah (Source 23). It is extremely simple: That Beraita has another version, which states that Rabbi Meir actually holds that a renter also has the status of a paid watchman!

**Source 28. Bava Metzia 80b – Rabbi Meir holds that both a renter and a craftsman have the status of paid watchmen.**

An alternate approach is to follow Rabbah son of Avuha's version of the Beraita where the names are reversed: What responsibility for payment does a renter have? Rabbi Meir says he is like a *shomer sachar* and Rabbi Yehudah says he is like a *shomer chinam*.

איבעית אימא: כדמחליה רבה  
בר אבוה ותני שומר כיצד משלם  
רבי מאיר אומר פשוט שקר רבי  
יהודה אומר פשוט חנם:

Rabbi Meir holds, according to this second approach in the Gemara, that even though both a renter and a craftsman do **not** receive a salary, they have the status of paid watchmen. This can be easily explained in light of Source 24 – that the status of a paid watchman is given to those who both benefit from the object and give benefit to its owners. The shepherd and parking lot attendant give benefit (surveillance and protection) and receive benefit (a salary). Similarly, the renter and craftsman both get benefit (the renter – use of the object, and the craftsman – a livelihood) and give benefit (the renter – his rental fee, and the craftsman – his work).

Let us return to Marcy's unfortunate situation. How does the Shulchan Aruch rule about a craftsman? It quotes the Mishnah almost verbatim.

**Source 29. Shulchan Aruch Choshen Mishpat 306:1 – What level of responsibility does a craftsman have?**

All craftsmen are considered paid watchmen. But any craftsman who says to the owner, "Take your object and pay me the money you owe me," or the craftsman told him, "I have finished it," and the owner did not take it, the craftsman is considered an unpaid watchman.

כָּל הָאוּמָנִים שׁוֹמְרֵי שְׂכָר הֵם,  
וְכֹלֵם שְׁאָמְרוּ טַל אֶת שְׂלָךְ  
וְהִבֵּא מַעוֹת אוֹ שְׁאָמַר לוֹ הָאוּמָן  
גְּמַרְתִּיו וְלֹא לָקַחוּ הַבְּעָלִים הַכֶּלִי,  
הֲרֵי הָאוּמָן שׁוֹמֵר חֲנָם.

If we plug in the data of our case to the halachic ruling, it looks like Marcy will have to pay. She was at the stage of having already fixed the computer, but had not yet told Suzie, "Take your object, and pay me the money you owe me," at which time, according to the Mishnah, a craftsman's responsibility drops. At first glance it seems an open and shut case: Marcy should be held accountable. She is a craftswoman, tantamount to a shomer sachar; the object was stolen; and a shomer sachar is liable if the object is stolen. However, in discussing a similar case, a burglary in a silversmith's workshop, Rabbi Tzvi Shpitz quotes an important approach that is maintained by two of our great Acharonim.

**Source 30. "A Silversmith's Liability For Theft," Hilchos Choshen Mishpat, Volume II : Number 5, Rabbi Aaron Tendler's English version of an article by Rabbi Tzvi Shpitz, available online at [torah.org/advanced/business-halacha/5757/vol2no5.html](http://torah.org/advanced/business-halacha/5757/vol2no5.html) - What precautions absolve a craftsman from liability over theft?**

However, the Ketzos HaChoshen (75:5) and the Teshuvos Chassam Sofer (16) state that there are two different types of paid watchmen. On the one hand there is a watchman who has an obligation to constantly watch the item deposited in his care. This is the case where he is being paid specifically to watch the object, such as in the case of a guard being paid to guard something. If it is stolen while in his care, he will be held liable for this theft. On the other hand, we have someone who is being paid to fix an item, as in our case, but because of a side benefit that he derives in doing so, it is considered as if he is getting paid for watching it also. In this case he has no obligation to constantly watch the item, and it is sufficient to take all customary precautions to prevent loss or theft. If, despite these precautions, it is stolen or lost, it is included in the category of *obhness*, and he has no liability.

Both a security guard and a craftsman have the status of shomer sachar, and both are liable in the event of theft or loss. But each is classified as shomer sachar for a different reason. The security guard is a shomer sachar because he is being paid to watch; but the craftsman is a shomer sachar because he has the right balance of getting benefit to giving benefit. Although both are classified as paid watchmen,

there is a practical difference between the two: The guard is being paid to watch more diligently than the normal homeowner, and taking the standard precautions against theft and loss is not sufficient for him to get off the hook. However, the craftsman – though responsible for theft and loss – need only take standard precautions. His responsibility goes beyond an unpaid watchman who only needs to avoid negligence, but is not as high as the security guard's, who is paid for an intense level of protection.

Consequently, when our Mishnah (Source 23) rules according to Rabi Meir that the craftsman is a shomer sachar, that ruling reflects his responsibility to take **standard** precautions to watch the items in his shop. In contrast, when the Beraita brought by the Gemara (Source 25) says that Rabbi Meir labels the craftsman a shomer chinam, that ruling reflects that he would not be responsible to take **unusually high** precautions to watch the items in his shop.

Based on this, Marcy would not be responsible to compensate for Suzie's computer.

**KEY  
THEMES  
OF  
SECTION  
IV**

- The Mishnah teaches us that while an owner's object is on the premises of a craftsman – an uman – who is fixing it, his level of responsibility is that of a shomer sachar. He is therefore absolved from accidents beyond his control, but is liable if it is stolen or lost, and certainly if the loss took place as a result of his negligence.
- At first glance, says the Gemara, it seems that a craftsman should be treated like a renter. Because both are not paid to watch they could both be viewed as having the status of a shomer chinam. However, since both the craftsman and the renter watch the object and derive benefit from it, they could be viewed as having the status of a shomer sachar. The same Tannaitic dispute about a renter should apply to a craftsman.
- On the other hand, the Gemara opens us up to the possibility that even though a renter is treated like a shomer chinam, a craftsman might still be treated like a shomer sachar. Even though the craftsman does not receive wages to watch, he does have the benefit of holding on to the owner's object as collateral to exact payment. That benefit makes it worthwhile to watch and gives him that status of shomer sachar.
- Two key Acharonim (later authorities), the Ketzot Hachoshen and the Chatam Sofer, hold that there is still a slight difference between the craftsman and a classical paid watchman, such as a shepherd or parking lot attendant. A paid watchman is liable for the theft of the object unless he takes extremely high level precautions (*shemirah me'ulah*). However, a craftsman, who gets some benefit for watching but is not taking a salary for guarding, can take normal precautions against theft and therefore be absolved from responsibility.

**CLASS  
SUMMARY****What is the Torah's framework for determining who is responsible when a loss takes place?**

The Torah presents four different categories of shomrim, watchmen. The lowest level of responsibility is that of the shomer chinam, the unpaid guardian, who cannot use the object and does not get paid to watch it. He is only held responsible for negligence.

A paid watchman, a shomer sachar, cannot use the object either, but is paid to watch, and takes on a higher level of responsibility for theft, loss and negligence.

A renter and borrower both use the object. The renter, a socher, we rule, has the responsibility level of a shomer sachar, and the borrower, with a few rare exceptions (death while working or when the owner was hired along with the borrowing agreement), is liable for any damages. Use and benefit bring with them a higher level of responsibility.

**Can I be held accountable for the loss of someone else's property just because he left it in my possession?**

A person can only be held responsible if has the status of a shomer, a watchman. To take on the status of a shomer chinam, a person must agree to take on responsibility. Just having the property in front of him or on his property is not sufficient to give him that status, with the responsibilities that go with it. Even if a person explicitly agrees to watch an object, or he responded affirmatively to such a request (by saying the equivalent of "Place it before me"), some authorities hold that he is still not responsible unless he makes a kinyan, a physical act of acquisition on the object – such as pulling it (meshichah) or lifting it (hagba'hah).

**Is a friend who does me a favor by guarding my object just as responsible as a paid watchman or guard?**

No. A paid watchman is liable for theft and loss, whereas an unpaid guardian is not. Both are held liable if they are negligent. Both are not held responsible for accidents beyond their control (unless they had used the object without permission).

**What responsibility does someone have if he rents an object and it gets lost, stolen, or ruined?**

We rule that a renter has the status of a shomer sachar, a paid watchman. If the object was stolen or lost, he is held responsible. However, if something happened to the object that was beyond his control, אונס, he is not held responsible.

**How does the halachah view the accountability of someone who repairs other peoples' objects in his or her own shop or home?**

The Mishnah rules that a craftsman has the status of a paid watchman, a shomer sachar. There are two possible reasons for this. If the definition of a shomer sachar is rigidly limited to one who gets paid to watch, his ability to seize the object to force payment can be considered a salary for watching (thus suggests the Gemara). On

the other hand, the status of shomer sachar might be a broad category that includes all those who both watch the object and get benefit through it. According to this view, since the craftsman does earn money through his work on the object, he is held responsible for it.

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**FURTHER STUDY:**

This shiur only touches on a handful of topics relating to the shomrim. Here are a few other areas that you or your students might be inspired to pursue after this shiur:

The core foundation of the shomer's liability: damages, self-obligation, or a special new biblical law (*gezeirat hakatuv*) – This is an extremely broad topic that touches on many areas. A few of the sources that deal with this are the Avnei Nezer Orach Chaim 326, Machaneh Efraim Shomrim 8, Ketzot Hachoshen 291:4.

*Shomer shemasar leshomer* – when one watchman passes the object on to another (Bava Metzia 36).

The borrower's ownership – Does he own the object itself or does he just have usage rights? (See the Pri Moshe Geneivah Ugezeilah 34:2 for a presentation of the *machloket Rishonim*.)

*Meitah machmat melachah* – Shomrim (even a sho'el) are absolved from payment in a situation where the animal dies while doing work (Machaneh Efraim Shomrim Sheeilah Ufikadon 4). They are also absolved if the owner is hired simultaneously with his *pikadon*, ***shmirah bevaalim*** (Bava Metzia 95a).

(See *Kobetz Yesodot Vachakirov – Shomrim*)

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**RECOMMENDED ADDITIONAL READING**

“Get Rid of the Stuff! The Vanishing Importer and Other Tales,” by Rabbi Yirmiyohu Kaganoff, available online at: <http://rabbikaganoff.com/archives/1886>

Comprehensive Chart (with sources and explanations) of The Forms of Liability of the Four Types of Shomrim, available online at: <http://www.shemayisrael.co.il/dafyomi2/bmetzia/bm-ch-18.htm>

“The Four Shomrim - An Overview,” by Rav Yair Kahn, available online at: <http://vbm-torah.org/archive/bmetzia/01bm.doc>

“The Lost Gift,” by Rabbi Yirmiyahu Kaganoff, available online at: <http://www.yeshiva.co/midrash/shiur.asp?cat=21&id=9302&q=the+lost+gift>

**Hebrew**

Mishpetei HaTorah – Shomrim, Vol. 1, by Dayan Tzvi Shpitz, shlita

Pitchei Choshen – Pikadon, She'eilah, Shlichut, by Harav Yakov Yishaya Blau, zt"l