

YESHIVAT HAR ETZION
ISRAEL KOSCHITZKY VIRTUAL BEIT MIDRASH (VBM)

TALMUDIC METHODOLOGY
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"TECHILATO B'PESHIYA VE-SOFO B'ONNES"

This week our discussion takes us to the world of shomrim. The Torah establishes four different categories of shomrim, each with varying degrees of responsibility depending upon the circumstances. They are all, however, responsible to pay for 'peshiya' - or gross negligence. For example, if instead of protecting the animal the shomer allowed it to stray into the woods where the animal was killed there is no questioning that the negligence of the shomer led directly to the ultimate loss of the mafkid (owner / one who deposited) and the shomer must compensate that loss. What is not absolutely clear is a case in which the shomer has acted negligently but eventually the pikadon (deposited item) is destroyed through some accident (for which most shomrim are actually patur). Does the shomer have the right to escape payment by pointing to the accidental nature of the loss. Or does the mafkid have the right to collect since that the shomer was indeed negligent. Interesting case? The gemara thinks so as well and refers to this 'dilemma' as Techilato b'peshiya ve-sofo be-oness - initial negligence but ultimate accident. (For the sake of brevity the remainder of the article will refer to this case as 'techilato bi-peshiya'.

The 'reference case 'of techilato bi-peshiya' is cited by the gemara Bava Metzia (42a). A shomer was given money to guard. Ideally (in the Pre-VBank era) the money should be buried in the ground - kesafim ein lahem shemira ela be-karka. This would ensure absolute safety (as long as you drew a map!!). This fellow, however, instead of burying the money decided to store them in a box, exposing them to the danger of fire. This constitutes a peshiya - a gross negligence and had they been burnt the shomer would have been chayav. However, in this instance a complete accident occurred - a thief entered and stole the money. Generally, thieves do not look in boxes so therefore the ultimate damage is considered an oness - an accident. In this instance we have a machloket between Amoraim whether the shomer is chayav or patur. Intuitively, we would probably assert that the shomer should

be patur, since an oness occurred. How are we to explain the position that a shomer is chayav despite the oness which occurred?

Understanding the chiyuv of a shomer in this instance requires a broader understanding of the basis for a shomer's chiyuv in standard cases of peshiya - where the negligence directly prompted the damage. What generates the obligation to reimburse the mafkid. Here we encounter two distinct possibilities. Initially, we might reason that the shomer pays simply because he was negligent and betrayed his obligation vis-a-vis the mafkid. Indeed, if no damage results from his negligence he doesn't pay - there is no one to compensate. Only if some damage results from his negligence is payment conceivable. However, what generates the chov is not the loss of the victim but the shomer's own irresponsibility; this negligence only results in actual payment if there is someone to reimburse. There is, however, an alternative understanding. Possibly, the loss of the mafkid generates an impetus to compensate that loss. In order to reimburse we search for a party who is associated with this loss. The principal impetus (mechayev) for the chov is the loss; we merely locate an individual associated with this loss and require him to render payment. Since the shomer was negligent and directly caused the loss we can ascribe this payment or compensation of the victim to him. To summarize: In order for a shomer to be chayav TWO events must occur - a peshiya and a damage. Which of these is the primary 'generator' of the chov? Do we view the peshiya as creating a chov (assuming there is a victim to compensate) or do we view reconstituting the loss as the moving force behind the chov so long as we can discover a negligent party associated with this loss. This question is central to our understanding of the chiyuv of a shomer. Possibly, in a standard case of negligence two independent reasons exist. We can obligate him because of his peshiya and we can also ascribe the loss of the mafkid to him. Of course, in the standard case of 'real' peshiya we have this luxury - there are two independent sources (mechayev) for the shomer. In the case of Techilato b'peshiya we might not be so fortunate.

Quite possibly, the very machloket regarding Techilato b'peshiya might revolve around this very issue - the mechayev of a shomer in a standard case of peshiya. Were we to view the peshiya as the dominant element behind a regular posheya (negligent shomer) Techilato b'peshiya would be chayav just as well, since the shomer has been negligent and there is a victim to compensate. If, however, the damage - the hefsed is the primary impetus

behind the chiyuv and we endeavor to 'pin' this damage upon the guilty party who caused this loss, in our case we cannot obligate the shomer for his actions did not cause this loss - rather an accident occurred. At first glance, the dispute regarding this case of Techilato b'peshiya might reflect the broader question of what underlies a shomer's chiyuv.

The gemara in Bava Metzia however depicts a case which might demand an alternate understanding. The gemara (36b) portrays a case where the shomer allowed the animal to stray into a swampy marsh exposing the animal to toxic fumes. The animal, however, did not collapse because of these fumes but happened to die naturally. Assuredly, this reflects a classic case of Techilato b'peshiya and should be subject to the aforementioned machloket. Rava, however, claims that in this case, there is a consensus of opinion that the shomer is patur since as he says "mal'ach ha-mavet ma li hacha ma li hatam" - basically the animal would have met its fate regardless of its location. The negligence of the shomer in no way enabled or facilitated the damage. Had the shomer closed the animal within the house the accident would still have occurred. In order for Techilato b'peshiya to be chayav there must be some RELATIONSHIP between the peshiya and the ultimate oness. The shomer must, if not directly cause or produce the damage, at least contribute in some way. In the aforementioned case where he placed the money in a box, this initial peshiya, although not directly CAUSING the oness certainly enabled and contributed to the oness. There is a difference between directly causing something and contributing to the circumstances of its event. Had he not been negligent - had he truly buried the money, the oness would never have happened. In this case of techilato bi-peshiya, where the shomer enabled the accident, it's feasible to obligate the shomer to pay. In the case of the swamp, however, where his actions in no way contributed to the oness everyone admits he is patur. If the shomer's chiyuv were based solely upon his negligence we might not require this relationship between his peshiya and the ensuing damage. Apparently Rava understood the chiyuv of Techilato b'peshiya in a slightly different manner.

Returning to our analysis of the general chiyuv of a shomer - the peshiya or the loss to the victim attributed to the shomer - we might be able to justify a chiyuv in techilato bi-peshiya, even if the chiyuv emanates from the loss itself. We would have to question how exactly we associate damages and losses with a shomer. After all he didn't cause it but he contributed to it. Though he isn't the direct parent of the loss he is its author - one who didn't

cause but contributed to it. In order to associate the loss with the shomer as its author we might not require actual negligence; mere enabling, and precipitation might be sufficient. The chiyuv of techilato bi-peshiya might not stem from the peshiya but from the hefsed which we can 'pin' upon the shomer because in some way he contributed to it. Were he to have buried the money in the ground the thieves would never have uncovered them. If, however, the peshiya in no way contributes - the animal's time had come and it would have died regardless of location - we cannot obligate the shomer since his actions in no way contributed to the damage.

SUMMARY:

In general, the responsibility of a shomer might stem from one of two events - his negligence or the loss of the victim with which he is associated. Presumably, the obligation of Techilato b'peshiya stems from the first mechayev. We might, however, maintain that even though a complete accident occurred this loss is still mechayev the shomer to remit damages. He didn't cause but he enabled the loss.

In terms of solving our question: whether the peshiya is the mechayev or the hefsed we would first want to examine what forms of peshiya are necessary to obligate a Techilato b'peshiya. If we were to discover that a particularly intense and exaggerated form of peshiya is necessary - more so than in the regular case of a negligent shomer - we might conclude as follows: In the case of a regular shomer the hefsed CAN be the independent mechayev; since the shomer directly caused the hefsed - it can be traced back to him. For this reason any negligence even moderate is sufficient to associate the damage with the shomer and obligate him. In techilato bi-peshiya, however, the only possible mechayev is the negligence; the hefsed cannot be associated with the shomer since he didn't directly cause it. In order for peshiya to serve as the mechayev - the PRINCIPAL generator of the chiyuv - we require a high standard of negligence (gross negligence). Our first glance is over at peshiya - what type do we require to be mechayev techilato bi-peshiya?

In this regard we can investigate the peshiya along two lines: degree and type. What level of peshiya is required to obligate Techilato b'peshiya and what type? We will begin with the first issue. There exist different degrees

of negligence and various shomrim are responsible for varying degrees - depending upon how much they are paid for their service and if they receive some hana'a (sh'el). What degree of peshiya is necessary for techilato bi-peshiya? Gross negligence or even moderate negligence? Tosafot (Bava Metzia 93b) maintains that 'techilato be-ch'ein geneiva ve-aveida ve-sofo be-oness - a case where the initial negligence was moderate and ultimately an oness - occurred is not chayav even though Techilato b'peshiya (with an intense peshiya) would be. Ostensibly, Tosafot felt that the peshiya was the mechayev in Techilato b'peshiya and hence we require an intense one.

A similar issue arises regarding the form of shemira. What happens if the shomer isn't negligent but at the same time doesn't watch it in the precise manner which the mafkid instructed him. Two such examples emerge from the gemara. What happens if a shomer transfers the item to another shomer for safekeeping. According to one opinion in the gemara (36a) the mafkid can claim "ein retzoni she-yehi pikdoni be-yad acher" I wanted YOU to watch and not another - even if that other is capable of performing an objectively superior watching. The mafkid has the right to determine not only THAT you will watch it but HOW you will as well. One who transfers to another hasn't been negligent but on the same token hasn't fulfilled the exact request of the mafkid; he hasn't performed a shemira. What would the halakha, asks the Rosh, be in a such case where the shomer transferred to another but ultimately an oness occurred: techilato, not with peshiya but with LACK OF SHEMIRA and sofo be-oness. The Rosh himself maintains that no proposition would obligate the shomer in this case. Again, in order for the peshiya to act as the primary mechayev it must be an intense form of peshiya. (See afterword for an additional example of this variety).

Conversely, we might inspect the type of oness required for Techilato b'peshiya to be mechayev. If the peshiya is the generator of the chov, as long as there is a victim, we would not pay too much attention to the exact conditions of the oness. Any and every oness would provide a victim to whom we would transfer the money of this negligent shomer. If, however, we seek to associate the loss with the shomer who contributed to it we might distinguish between different types of oness some which can be easily associated and others which cannot be. The Ba'al Ha-ittur wrote a sefer entitled Me'a She'arim (found in the back of several Shas gemarot). In his comments to Bava Metzia he says something which on first glance is somewhat astounding. He discriminates between oness shachiyach - 'frequent'

accidents and oness de-lo shachiyach - infrequent, once in a lifetime events. Only the former qualify as cases where Techilato b'peshiya ve-sofo be-oness would be chayav not the latter. Presumably, he viewed the hefsed/oness - the event of damage as that which obligates payment. The peshiya of the shomer although not a direct cause of the accident allows us to trace the payment back to him; after all his negligence contributed. In this light we might be able to associate frequent reasonable accidents with the shomer who contributed to them. We cannot, however, associate absurd, ridiculous disasters with this shomer. Hence, according to the Ittur, the peshiya does not generate the chov, rather the loss of money impels us to locate an author. The peshiya generally serves as the link between author and event; in these extreme cases of oness the link is unreasonable.

SUMMARY:

Two approaches toward understanding the mechayev of Techilato b'peshiya were addressed. Intuitively, we view the peshiya as the mechayev. Alternatively we might assert that the loss of money generates a chov, which is ascribed to the contributing shomer by assessing the types of peshiya and the types of oness we might uncover our answer.

AFTERWARD

1) The mishna in Bava Metzia (78) discusses an additional form of non-shemira but not peshiya. What happens if the shomer is entrusted with transporting the animal. Each of the two possible routes offers a danger. If he travels on the mountain the animal might die of heat exhaustion. If the shomer takes the valley route the animal might slid on the water. In general the mafkid has the right to choose his poison. If he requests the animal be taken thru the valley to protect against heat overheating and the animal indeed overheats then of course the shomer is responsible. His betrayal led directly to the cause of death. What happens if he didn't listen to the mafkid and travelled upon an alternate route. This isn't the precise shemira requested but it cannot be considered a peshiya - each route represents a certain danger. What would be the halakha if after this deviation an oness occurred? Would this be an additional example of techilato without shemira but also without peshiya? See the Rambam Bava Metzia (78) who addresses

this very issue.

2. What would happen to Techilato b'peshiya ve-sofo be-oness in other areas of halakha? Most prominently what about the world of nezek - of direct damages. See Tosafot Bava Kama (23a) Dibbur Hamatchil

METHODOLOGICAL POINTS:

1. Whenever (and I do mean whenever as the capitals indicate) two events/dimensions are necessary to produce one halakhic result (chalut, chiyuv etc.) it is always incumbent to ask first and foremost which of the two is the central component that which generates the halakha and which is secondary. In our case in order for a shomer to be chayav we require two conditions:

a) negligence

b) damage

In the absence of either no chiyuv occurs. Our question becomes which is the primary generator of the chiyuv: The peshiya (assuming there is damage and someone to reimburse) or the damage (assuming there is a negligent party with whom we may associate this loss). Remember secondary does not mean you don't require it. It just means it isn't the central dimension. The nafka mina generally is

2. What standard do we require for each element. The more central an element is, by and large the higher standard of the element we may require to generate the halakha. If the peshiya is the mechayev of Techilato b'peshiya we might only impose the chiyuv in severe cases of negligence.

Shabbat Shalom, Moshe Taragin

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