

HALOCHOSCOPE

This week's question:

Is it appropriate to ask a gentile to act as a *shomer hamais*, watch a dead body before burial? Is there a difference in a case where he will be paid? May he be used in relief of a Jewish *shomer*, to allow the Jew to *daven* or attend to other *mitzvos*?

The issues:

A) *Shomer Hamais*

B) A gentile doing this job

C) *Osaik bemitzvah patur min hamitzvah*, one occupied in a *mitzvah* performance is exempt from other *mitzvah* obligations

A) *Shomer Hamais*

This obligation is part of the general *mitzvah* to bury the dead. The Talmud discusses the basis of this *mitzvah*. If one is executed by stoning, the Torah requires the corpse to be hung. If it is left out, onlookers see the perpetrator of a crime against Hashem, which is an insult to Him. Therefore, the body must be taken down as soon as possible. The Talmud says that the body is only hung for a short time at the end of the day.

From here we derive the *mitzvah* to bury all dead. Two elements are present in the *mitzvah*. It is a *kapara*, atonement for soul of the the deceased to have his body laid in the ground. And it is *bizayon*, undignified for the body to remain unburied. This is partly due to the honor and dignity of the survivors and partly due to honor of the deceased. The deceased might leave instructions not to be buried. He has a right not to desire *kapara*. He has no right to subject his survivors to indignity.

The poskim seem to conclude that the primary reason is *bizayon*. If not the entire *mitzvah*, it is a major element, and at the very least, must be taken into account. Accordingly, any protection of the corpse from *bizayon* is part of the *mitzvah* of burial, or of preventing indignity to the survivors. Thus, the *mais* may not be left alone, especially in a place where it is open and easily accessible. In addition, there is always a risk that vermin could ravage the body. This is learned from the terminology used by the Torah in the aftermath of the great flood. Noach was told that fear of the humans would be upon all other living creatures. If a person is not sinful, he need never fear wild animals. It is the animal who is afraid of the human. The Torah is careful to describe this fear as being inspired by living humans. The Talmud observes that the smallest child alive inspires fear in a lion. The greatest giant, when dead, is prey for small mice. This is an additional reason to attend the body. It is most undignified for a corpse to be attacked and mutilated by animals. [It is, in fact, a curse found in *Tanach* on a number of occasions.] The presence of the *shomer*, without his looking at the corpse, is enough to protect it. Nonetheless, he may not distract himself unduly or walk in and out of the presence of the *mais*.

As will be discussed in section C, this is one of the *mitzvos* that exempt the per-

former from fulfilling other *mitzvos* at the same time, including *Shema* and *Tefilah*. These other *mitzvos* require concentration. They could distract the performer from his *mitzvah* to watch over the body. Since he can not fulfill both at the same time, the *mitzvah* he is already preoccupied with takes precedence. In addition, performance of *mitzvos* in the presence of a corpse is forbidden, unless they are done to directly benefit the soul of the deceased. *Mitzvos* can only be performed in this world, and by the living. In the next world it is not possible. The soul of the deceased is present near his body. He feels the inability to perform the *mitzvos*. If one performs them in his presence, he feels the pain more so. This is likened to scoffing at the poor by flaunting one's wealth. The *shomer* may not indulge in idle chatter or other meaningless activity. He should pray for the soul of the deceased and recite *Tehilim*.

An *onain*, bereaved person waiting for the burial, is exempt from *mitzvos* [for the same reason discussed in section C]. On Shabbos this does not apply, since burial is not preoccupying him then. *Shemiras hamais*, however, applies on Shabbos as well. A *kohain* may not ritually contaminate himself by contact with a corpse. However, for close relatives he may and should do so. Some maintain that this applies only to the needs of the burial. Others maintain that it applies to all needs, especially prevention of *bizayon*. Thus, even on Shabbos, when burial is not an issue, a *kohain* may watch the body. [See Noach 9:2, Emor 21:1-9, Ki-Saitzai 21:22-23. Brochos 18a, Sanhedrin 45b-47b, Poskim. Tur Sh. Ar. OC 71:3, YD 341:6 373:5 403:9, commentaries.]

B) A gentile doing this job

In general, one does not delegate a *mitzvah* to a gentile. Even *mitzvos* that one usually pays for, are done by the delegate as a *shliach*, agent. The *shliach* should be able to perform the *mitzvah* in his own right, in order to qualify as an agent for another person. However, some *mitzvos* are not considered as personally incumbent, but rather as generally required. Those who undertake them are in fulfillment, but there is no single person obligated. Care for a corpse falls somewhere in between. On the one hand the relatives are obliged to care for the burial, so much so that a *kohain* may defile himself for it. If there are no relatives the first person on the scene is obliged to fulfill this *mitzvah*, and to set aside any other *mitzvah* he was occupied in at the time. This is because if no-one does it now, who will come forward? On the other hand, the custom is for the relatives to delegate much of the arrangements to a team of regular *katafim*, pallbearers or a *chevra kadisha*. Thus, while there is indeed some personal obligation, it is acceptable to delegate it to others.

If it becomes necessary, gentiles may be engaged to bury on a day when Jews are forbidden to do the *melachos* involved. The main novelty of this rule is the permissibility to have gentiles work for Jews on *Yomtov*, which is usually forbidden. It is permitted to save the *mais* from *bizayon*. We may also derive from here that gentiles may be engaged in the activities of burial and its sub-categories. However, it is considered less dignified for a gentile, whose soul is not bound up in the Torah and *mitzvos* like a Jew's, to be caring for the body of a Jew.

In addition, there arises the issue of providing merit to a gentile that could be earned by a Jew. The Talmud discusses accepting charity from gentiles. The Prophet says that when the merits of the gentiles are used up they will no longer have the merit to rule over

us. Their rule will be broken and *Moshiach* will come. If the gentile does it for personal gain, rather than as a *mitzvah*, it is debatable whether his activity counts as a merit. For a Jew the *mitzvah* of burial is considered an unmotivated kindness. In general, kindness between man and his fellow keeps society and the world going. However, often one person performs acts of kindness with this very thought in mind. Accordingly, the motivation is not pure kindness, but motivated by the prospect of 'payment' in the form of a return of the favor, if not by the recipient by a third person and so on. Kindness for the deceased cannot be motivated in this way. Hoping for the same to be done to oneself by others at his demise is not the same as hoping for reward from the one being helped. This is *chesed shel emess*, true kindness, from the language used by Yaakov Avinu when he instructed Yosef about his burial.

The Talmud says that while Yaakov could not repay Yosef, Moshe Rabainu cared for Yosef's bones, who in turn was 'compensated' when Hashem Himself attended to his own burial. This is not payment, but shows that it is appropriate to be payed for activities tending to the dead, if the custom is such. This includes the *chevra kadisha* in some communities, the manufacturer of the shrouds and coffin, the eulogizers and the musicians. [There was a widespread practice in Talmudic times to play mournful music at funerals.] A *shomer* may also be compensated for his time.

However, while he is compensated, it is not really payment for a *mitzvah*. The *mitzvah* is really the obligation of the family members. The hired *shomer* is acting in their stead, and giving up his livelihood for it. The payment is for his time. The 'kindness toward the deceased' aspect of the act is not being repaid. As for the gentile's act, he is probably not doing with the intent to fulfill a *mitzvah* of any kind, and is probably not even thinking of 'kindness to the deceased'. In fact, the Talmud suggests that whenever a gentile does a favor he should be tipped. This will ensure that the merit for the favor will not be eternalized. Thus, we see that payment actually removes the problem, in part, of delegating the *mitzvah* to the gentile. This does not automatically mean that the person paying gets the *mitzvah*. He fulfills his obligation, because though agency might not apply, he has ensured that the body is not left alone. However, he cannot be considered having done kindness, at least not personally. However, since a Jewish *shomer* would indeed be doing it as a *mitzvah*, one has prevented other Jews from fulfilling a *mitzvah*. Therefore, unless it is absolutely necessary, one should avoid hiring a gentile *shomer*. [See Vayechi 47:29. Demai 4:6, Baba Basra 10b, Bechoros 29a-b, Kesubos 105a-b, Pesachim 50b, Poskim. Tur Sh. Ar. OC 526:5, 585:5, YD 246:21, etc., commentaries. Sdei Chemed Shin 23. Sefer Chasidim 357.]



C) Osek Bemitzvah Patur Min Hamitzvah

This Scripturally mandated principle is derived from two sources in the passage of *shema*. One source teaches us simply that one must interrupt personal activity for *shema*, but not 'Heavenly' activity. The other says that if the *mitzvah* preoccupies his mind even before he does it, he is exempt even in advance of his 'first *mitzvah*'. For other *mitzvos* the exemption only works once one has already begun performance of the first *mitzvah*. There is a debate whether one should anyhow exert himself to try to fulfill both *mitzvos*. The debate seems to focus on the reason that the Torah exempts one from the second *mitzvah*. If it is because one can not physically do both, and he has already begun one,

then if he is able to do the second as well, he should. If it is because once one is occupied in a *mitzvah*, he is 'employed in Hashem's work' and is not available for anything else, he should not exert himself to try to fulfill the second as well. It appears that the poskim follow the latter view. If it is no bother to fulfill the second *mitzvah*, all agree that he may do both at the same time.

Those watching the corpse may not step out to do the other *mitzvah*, even if they want to do so. In the presence of the corpse they may not perform *mitzvos* anyhow. However, the Talmud says that if there are two *shomrim*, they should cover for each other, allowing each time to leave and say *shema* and *tefilah*. Some suggest that this practice should be followed. However, it is noteworthy that the Talmud does not obligate following this practice. This implies that there is no true obligation to involve another party in this. Our question is, should a gentile be engaged to perform this function? It would allow the Jew to fulfill his other *mitzvos*, but would somewhat lower the level of respect for the corpse. Since the Jew is legitimately exempt from *mitzvos*, he need not exert himself to find a way to perform them. Therefore, if he did not arrange for a second proper *shomer* to begin with, he need not find a way to get one now. Arranging it with a gentile is not suggested by the poskim, though it might not have occurred to them. However, there is a big difference between sharing the *mitzvah* with another Jew, who gains the merit, and having a gentile cover. It is also possible that the reason one may leave the other is only due to their having both been present all along. Thus, each is already involved in the *mitzvah*. This way, neither has the exemption, but if both leave, there will be no *shomer*, so both could claim exemption. The Talmud's ruling is based on the ease with which each could fulfill both of his obligations. Our questioner never suggested that a gentile should be hired together with the Jewish *shomer*. Therefore, it appears that there is no requirement to find a way for the Jew to say *shema*, and hiring a gentile to cover is not necessary. Since it is not necessary, it is not correct for the *shomer* to lessen the dignity he is trying to give to the *mais*. He may rest assured that the *mitzvah* he is occupied with takes precedence over *shema*, for him. [See Brochos 11a 16a 18a, Sukah 25a-26a, Poskim. Sh. Ar. OC 28:7-8 71:3-7, commentaries.]

On the Parsha ... *And Aharon died there on top of the mountain, and Moshe and Elazar descended the mountain. And the whole congregation saw that Aharon had died ... [20:28-29]* How did they 'see'? *Chazal* say that the people did not believe that Aharon, who had been their great atoner was gone. Hashem had to open his *me'ara*, grave-cave, and show where he was buried. Why does the Torah omit mentioning that Aharon was buried? Earlier, Miriam's burial is mentioned. In *Parshas Eikev* [10:6] Aharon's burial is mentioned. Why is it not mentioned here? [See *Meshech Chochma*] As we mentioned there are two aspects to burial, the *kapara* and the *bizayon*. Perhaps the context of this *parsha* highlights Aharon's role as the *mechaper* who atoned for Israel. In this context, it might be less appropriate to point out the personal *kapara* of Aharon in his grave. In *Eikev* the Torah is discussing the travels of Israel and where Aharon died and was buried. There, the focus is preventing *bizayon* to the body.

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