

DISTANCING FROM DAMAGE

הרחקת הנזיקים

[בבא בתרא פרק ב']

(The following introduction is adapted from "Money in Halacha" by Rabbi Yitchok Silver)

“A close neighbour is better than a distant brother.”¹ Good neighbours are an invaluable asset, and bad neighbours can be a constant thorn in ones side.

The ideal scenario is when neighbours are united in love, brotherhood, peace, and friendship, with the Divine Presence resting upon them.² A good neighbour lends a hand in times of hardship and shares our joys and sorrows. While unity among neighbours is a wonderful thing, good relations require that we maintain a certain distance and respect each other’s privacy.

Unfortunately, many people neglect to keep the above principles in mind, either because they do not see beyond their own personal benefit, or because they are driven by bad character traits, inborn or acquired. The result is that a significant percentage of the disputes that come to a *beis din* (court of Jewish law) concern relations with neighbours.

It behooves us to study the halachos pertaining to the “Laws of Neighbours”, as found in the classic sources of the Gemara, Shulchan Aruch, and latter-day authorities, for the laws of the Torah are the “ways of pleasantness, and all of its paths are peace.”³

In this learning session we’ll explore the following issues:

- **Is one allowed to place objects next to another’s property which could cause damage?**
- **What are ones rights concerning using his own property in a normal manner?**
 - o **Among neighbours, whose responsibility is it to prevent damages?**
- **Is one allowed to set up a business in his home which will result in increased traffic?**
- **What about throwing a party in ones backyard?**

¹ Mishlei 27:10

² Eirubin 68a

³ Mishlei 3:17

1 – THE TREE & THE PIT

Source 1. Bava Basra 25b

<p>MISHNA: One must distance a tree twenty-five cubits [1 cubit is approximately 2-feet] from a cistern...</p> <p>If the digging of the cistern preceded the tree, the owner of the tree cuts down the tree and the owner of the cistern pays him money [i.e. the value of the tree]. And if the tree preceded the cistern the owner of the tree need not cut down the tree. If it is uncertain whether this came first or that came first, the owner of the tree need not cut down the tree.</p> <p>Rabbi Yossi says: Even if the cistern preceded the tree, the owner of the tree need not cut down the tree. This is due to the fact that this one digs in his own property, and that one plants in his own property.</p>	<p>מתני' מרחיקין את האילן מן הבור עשרים וחמש אמה... אם הבור קדמה קוצץ ונותן דמים ואם אילן קדם לא יקוצץ ספק זה קדם וספק זה קדם לא יקוצץ</p> <p>ר' יוסי אומר אע"פ שהבור קודמת לאילן לא יקוצץ שזה חופר בתוך שלו וזה נוטע בתוך שלו</p>
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What exactly is the point of contention between the Rabbi's (the first opinion) & R' Yossi?

The Gemara [18b] explains that their argument revolves around a general question: upon whom does the responsibility of preventing damages fall?? In the language of Chazal:

על המזיק להרחיק את עצמו
(It's the *damager's* responsibility to distance himself)
OR
על הניזק להרחיק את עצמו
(It's the *damagee's* responsibility to distance himself)

The Rabbi's hold it's the *damager's* responsibility, and R' Yossi holds that it's the *damagee's* responsibility.

This disagreement has far-reaching consequences in other cases as well. For example:

- Planting vegetables (such as leeks) in one's garden which will extend to his neighbours bed of onions thereby threatening their taste. ^[25a]
- Cultivating mustard plants which will reduce the honey production from his neighbour's beehive.⁴

In all of these cases, as well, the Rabbi's maintain that it's the *damager's* responsibility to move, and R' Yossi holds that it's the *damagee's*.⁵ To review:

?? "על המזיק להרחיק את עצמו, או על הניזק להרחיק את עצמו"??

Let's Clarify!!

We shouldn't take this opinion of R' Yossi too far, though: to be sure, R' Yossi certainly agrees that one is not allowed to go over to another and slap him in the face or throw a rock at him, on the grounds of "it's the damagee's responsibility to move!"

Rather, specifically in these scenario's – where the damager is operating from his own property in a non-malicious manner, and the object with which he's damaging is coming from his own property and causing inevitable damage in his neighbours – does R' Yossi maintain his position that it's the *damagee's* responsibility to move.

But even this is not so simple...

⁴ The bee's will go and eat the mustard, which is very spicy, which makes them thirsty, and then they'll go and eat their honey. [רש"י יח. [ד"ה ואת, בהתחלת האי סוגיא נפלא של חרדל

⁵ לפי מסקנת הגמ' יח.

2 – UNDERSTANDING R' YOSHI

The opinion of R' Yossi seems awkward, and perhaps even absurd: just because one is operating from his own property, why should this give him the right to damage his neighbour?? Since when are you allowed to damage another's property?!? Why does R' Yossi maintain that "it's the damagee's responsibility to distance himself"???

What do you think??

One of the classic commentaries on the Shulchan Aruch, the Nesivos HaMishpat [Yaakov Lorberbaum of Lissa, 1760-1832, affectionately referred to as the "Nesivos"] addressed this issue some 200+ years ago:

Source 3. Nesivos [סי' קנ"ה ס"ק י"ה]

It's difficult to understand all of those obligations to distance oneself which are listed in Bava Basra...it's similar to having a bull [in one's property]...why should the Sages [R' Yossi] say that he needn't distance it...how is this different from the 4-primary forms of damage [which one is obligated to guard from causing damage to others]??

...We must answer that regarding the '4 primary forms of damage' one is only responsible to guard them in so far as they can be contained within his property, then, the Torah obligates us to guard them and ensure that they do not damage...However, these damages which are enumerated in Bava Basra are of the nature that if one were obligated to contain them in his property then he would not be able to use them altogether, and not being able to use one's own property altogether is not something that the Torah obligates us to do.

...It is for this reason that R' Yossi holds that it is the damagee's responsibility to move, for what is the logic that the damager should lose his ability to use his property more than the damagee should lose his ability???

לכאורה קשה על כל ההרחקות שמונה שם בפ' לא יחפור בב"ב...הא כשהדבורים אוכלין החרדל או היונים בשדות שורו ממש הוא...ואמאי אמרי רבנן [ר' יוסי] דא"צ להרחיק, ומשמע דאפילו בדיעבד פטורים...אמאי הא הוי כד' אבות נזיקין?!

...וע"כ צ"ל דהד' אבות נזיקין אינו חייב עליהן רק כשאפשר להחזיק ברושתו ובשמירה שלא יזיקו, דאז רחמנא חייביה בשמירה וכשלא שמרו חייבין בתשלומין, אבל הני דחשיב בפ' לא יחפור הוא באופן דכשיחייב לשלם ההיזק אין אפשרות לא לעשות תשמיש זה ברשותו כלל, ויתבטל תשמיש זה מרשותו כיון דא"א כלל בעשיה ובשמירה, ובביטול רשות לא חייביה רחמנא... ומשום הכי סובר ר' יוסי בב"ב דעל הנזיק להרחיק, דמה"ת יבטל רשות המזיק יבטל רשות הנזיק...⁶

The Nesivos makes a phenomenal distinction: in all of these cases of R' Yossi, if the *damager* were to refrain from placing his objects by the others property, this would prevent him from being able to use his own property in a normal manner.

⁶ בקושטא דמלתא דברי הנתיבות צ"ב קצת דו"ל בשלמותן: "...דמה"ת יבטל רשות המזיק יבטל רשות הנזיק, דהא כשהנזיק ישמור עצמו לא יזיק. משא"כ בד' אבות נזיקין א"א להניק לשמור דאין הנזיק יודע מתי יבא המזיק, ולמזיק אפשר בשמירה. ובהנך דב"ב הוא להיפך, שהמזיק א"א לשמור הנזיק כ"א בביטול התשמיש מרשותו, מש"ה לא חייביה רחמנא להמזיק" ע"כ. משמע מסוף דבריו דהענין תלוי קצת על יכולת הנזיק לשמור את עצמו, וממילא יש ב' ענינים דהיינו בטול רשות דהאי או האי, וגם יכולת השמירה, וצ"ב כוונתו בזה.

In other words, the damager can claim: “Listen, I’m not doing anything crazy here, I’m planting a tree. You’re going to get damaged?? OK, so therefore what, I shouldn’t be able to plant my tree?! Why do you have more of a right to use your property normally than I do?!!”

If we were talking about allowing ones dangerous animals to roam around in the backyard, so then keep them behind a fence! But in these cases, if we’ll prevent this person from doing his own stuff in his property, it’ll be entirely abnormal living- conditions!! This, says the Nesivos, is not expected from a person.

One Last Point

Good explanation, no?

So what about the Rabbi’s – R’ Yossi’s arch-nemesis in this debate – what do they hold?? Why *shouldn’t* one be allowed to use his property in a normal manner? A potential answer to this question can be found in the footnote below⁷.

⁷ What exactly the Rabbi’s hold – or, more specifically, what the point of contention between them and R’ Yossi is – is somewhat of a sticky issue. R’ Ahron Kotler zt”l explains that although the typical halachos of “damages” do not apply here, but there is a *new halacha* which pertains specifically to **neighbours**:

...יש דין מחודש של נזקי שכנים, דכיון דתשמיש שניהם כל אחד בתוך שלו הוא מן הנמנע, ע"כ תקנו חכמים דעל המזיק להרחיק את עצמו כדי שיוכל כ"א להשתמש בתוך שלו מבלי שיופסד משכנו, והיינו, דתקנו חכמים דמצד זכות השכנים אין לכ"א זכות בתוך שלו להעמיד שם דברים המזיקין, וכיון דחסר לו רשות על כך מצד זכות הניזק, ע"כ עליו להרחיק. [משנת ר' אהרן ב"ב סי' י"ב ס"ה]

3 – WHEN R' YOSSI AGREES

Until now we've seen that there's a fundamental dispute between the Rabbi's & R' Yosi in a scenario where one is operating from his own property, whether or not we say that it's incumbent on the damager to move, or on the damagee.

The Gemara, however, qualifies this disagreement by illustrating that there are some scenario's in which even R' Yossi agrees that "it's the *damager's* responsibility to move":

Source 4. Mishna 22b, and Gemara

<p>MISHNA: One must distance his ladder four cubits from a neighbor's bird-coup so that a marten⁸ will not be able to jump from the ladder to the bird-coup and devour the birds.</p> <p>GEMARA: Let us say that the Mishna is not in accordance with the opinion of Rabbi Yossi, for if it were in accordance with the opinion of Rabbi Yossi, doesn't he say [with regard to planting a tree next to a neighbor's cistern]: This one digs within his property and that one plants within his property, [and neither individual need consider what is happening in the property of the other]?</p> <p>(The Gemara answers): You may even say that the Mishna follows the opinion of Rabbi Yossi, as didn't Rav Ashi say: When we were studying in the study hall of Rav Kahana, he would say to us that Rabbi Yossi concedes with regard to his arrows, [i.e., he concedes that one must distance himself if his actions will cause immediate damage to his neighbor]. Here too, sometimes when he places the ladder, the marten might be sitting in a hole and will immediately jump up and climb the ladder to the bird-coup.</p>	<p>מתני' מרחיקין את הסולם מן השובך ארבע אמות כדי שלא תקפוץ הנמייה</p> <p>גמ' לימא מתניתין דלא כר' יוסי דאי ר"י הא אמר זה חופר בתוך שלו וזה נוטע בתוך שלו</p> <p>אפילו תימא ר' יוסי הא אמר רב אשי כי הוינן בי רב כהנא הוה אמר מודי רבי יוסי בגירי דידיה ה"נ זמנין דבהדי דמנח ליה יתבא בחור וקפצה</p>
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In situations of "גירי דליה" (lit. "Ones arrows," see footnote⁹) there is *no disagreement*: everyone holds that it is the *damager's* obligation to move. In contrast to all of the previous scenarios in which R' Yossi hold's that it's the damagee's responsibility, when the damage is immediate¹⁰, such as in this case, R' Yossi agrees to the Rabbi's.

Other examples of this, where there's no disagreement, would include:

- Operating a carpentry-shop, downstairs or next-door, which generates a great deal of smoke and odor [שרי"ע חר"מ סי' שנ"ה סל"ד]
- Storing sacks of produce which produce moisture and mold [כנ"ל ס"ד]
- Using heavy machinery which vibrates the neighbours wall [כנ"ל]

⁸ A flesh-eating, tree-dwelling animal, similar to a mongoose [תרגום הלע"ז]

⁹ Chazal use this as an analogy: if one is shooting arrows (or missiles!) from his own property, R' Yossi certainly agrees that this is not allowed!

¹⁰ כן פ' תוס' כב. ד"ה לימא (ודלא כרש"י בב"מ קיז. דס"ל דיסוד של גירי הוא אדם המזיק לאפוקי גרמא ע"ש)

4 – NOISY NEIGHBOURS

Another common application of the *halachos* we studied thus far, in which *everyone* agrees that it's the *damager's* obligation to distance himself, is the following Mishna:

Source 5. Bava Basra 20b

MISHNA: If there is a store in a courtyard, his neighbor can protest to prevent him and say to him: I am unable to sleep due to the sound of people entering and exiting.
However, one may fashion utensils in his house and go out and sell them in the market, and the neighbor cannot protest against him doing so and say to him: I am unable to sleep due to the sound of the hammer you use to fashion utensils, nor can he say: I cannot sleep due to the sound of the mill that you use to grind, nor can he say: I cannot sleep due to the sound of the children.

GEMARA: (The Gemara asks): What is different in the first clause of the Mishna, [which states that one can prevent his neighbor from opening a store in the courtyard because the noise of the human-traffic which keeps him awake], and what is different in the latter clause, [regarding the children, which we *assume now* is speaking about having children come in to the courtyard to purchase things from the store]?
...**Rava** said: In the latter clause is dealing with schoolchildren who come to learn Torah in his house, and this ruling applies from the time of the ordinance of Yehoshua ben Gamla and onward [who made a special rule that obligates institutionalized Torah-education for the children, as the Gemara goes on to elaborate].

מתני' חנות שבחצר יכול למחות
בידו ולומר לו איני יכול לישן מקול
הנכנסין ומקול היוצאין
אבל עושה כלים יוצא ומוכר בתוך
השוק ואינו יכול למחות בידו ולומר
לו איני יכול לישן לא מקול הפטיש
ולא מקול הריחים ולא מקול
התינוקות

גמ' מ"ש רישא ומ"ש סיפא

...אמר רבא סיפא אתאן לתינוקות
של בית רבן ומתקנת יהושע בן
גמלא ואילך

One is entitled to prevent another from operating a business in their neighbourhood¹¹ due to the noise which will inevitably exist as a result of the increased human traffic. (Teachers, though, as the Gemara says, are an exception to this rule.)

However, if only the work itself is noisy, such as in the latter cases of the Mishna, he may not object. Why? What is the difference??

What do you think??

In order to answer this question, let's have a careful look at how the great Rambam brings down these halachos, in his magnum-opus, the Mishna Torah:

¹¹ The literal term here is "courtyard": in Mishnaic times it was common for multiple families to live in close proximity to each other with one shared courtyard in the middle. The exact application – or parameters – of this to current-day neighbourhood living is subject to discussion.

Source 6. Rambam [פ"ו שכנים הי"ב]

<p>If there is a shop in a courtyard, the residents may object to the owner and say to him: "We cannot sleep on account of the noise of those who come and go. He should therefore do his work in his shop and sell the product in the market. But they cannot protest and tell him: "We cannot sleep on account of the noise of the hammer or the mill," <u>since he has already established the right to do this</u>. So too, he has the right to teach Torah to Jewish children in his house, and the partners cannot protest and claim: "We cannot sleep because of the noise of the school children."</p>	<p>חנות שבחצר יכולין השכנים למחות בידו ולומר לו אין אנו יכולין לישן מקול הנכנסים והיוצאין אלא עושה מלאכתו בחנותו ומוכר בשוק, אבל אינן יכולין למחות בידו ולומר לו אין אנו יכולין לישן מקול הפטיש או מקול הרחיים <u>שהרי החזיק¹² לעשות כן</u>. וכן יש לו ללמד תינוקות של ישראל תורה בתוך ביתו ואין השותפין יכולין למחות בידו ולומר לו אין אנו יכולין לישן מקול התינוקות של בית רבן</p>
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The Rambam explains that this whole Mishna is speaking about where the other party (the ‘damager’) is “מוחזק” – he’s been there already for a lengthy period of time without any objections [See footnote 12]. Why the qualification?

The Magid Mishna (Rabbi Vidal of Tolosa, mid 14th-century, one of the classic, early commentators on the Rambam) explains what, exactly, the Rambam is coming to say with this:

Source 7. Magid Mishna [שם]

<p>From that which the Rambam writes “since he’s already established the right to do this,” it appears to me that he holds that this rule [i.e. that one is not allowed to object] only applies in this case. Initially, however, the neighbour <i>would</i> have every right to object and prevent the other from setting up all of these forms of disturbance.</p> <p>The reason the Rambam maintains this position is because it was difficult for him to understand why the complaint of “I can’t sleep ‘cause of your hammer!!” should not be justified just as much as the complaint of increased traffic. Also, the language of the Mishna: “If there is a store in a courtyard” implies that <u>it was already there</u>, for if not, it should’ve said “One who wants to open a store”!!</p> <p>Rather, by force, the Mishna is speaking about a situation where the disturbances have existed in that courtyard for some time already, and it’s coming to teach us the following: regarding the store, even though he has not objected until</p>	<p>ומתוך מ"ש המחבר שהרי החזיק לעשות כן נ"ל שהוא סובר דדוקא החזיק אבל אם בהתחלה בא לעכב עליו יכול לעכב וסובר זה המחבר לפי שהוקשה לו מה טעם אין טענתו טענה בקול הפטיש והלא יותר מונע השינה מקול הנכנסין והיוצאין ועוד למה אמרו חנות שבחצר שנראה שכבר היא בחצר יאמרו מי שביקש לעשות חנוני או לא יעשה אדם חנות בחצר השותפין אלא כוונת המשנה בשהחזיק לעשות כן במלאכתו ובחנותו והודיענו שאפילו החזיק אין חזקתו חזקה אצל הנכנסים</p>
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¹² לענין אם בעינין חזקת ג' שנים וכו' או מיד כששתק, שמעתי שסתימת הפוסקים הוא שחזקה זו נעשית מיד וגם אינו צריך לטעון שמכר לו זכות, ע"ע בספר שערי משפט מאת הרה"ג ר' יצחק סילבר שליט"א שער השכנים פ"א ס"ק י"ז. עוד יש להאיר דחזקה זו דוקא כשהדבר ברור, כגון שסייע עמו או שאמר לו לעשות או שראה שעשה על צדו ושתק ולא הקפיד

now, this does not translate in to 'consent' to have the traffic throughout the courtyard given that they are foreigners (i.e. they don't reside there)... This is not the case, however, regarding the other disturbances such as the mill and hammer, where his non-objection implies consent. Initially, though, he's certainly entitled to object in *all* of these cases.

והיוצאין שהן אחרים וכן כתב פרק י"א
בשם הגאונים ז"ל¹³ אבל חזקתו חזקה
במלאכתו עצמו אבל אם לא החזיק יכולין
לעכב זה נ"ל מדבריו

The Magid Mishna explains that, according to the Rambam, the understanding of this Mishna is almost the opposite of what it first appeared: in **all** cases, one is entitled to prevent his neighbour from setting up a business (and the likes) which will disturb his sleep & comfort!

Only, if the other has already been there for a long time without any objections, *then* you can't ask him to move...except in the case of the store which generates increased human-traffic, where you can **always** tell him to move.

¹³ הלח"מ הקשה על האי טעמא דהמ"מ דהמעייין בדברי הרמב"ם האלו יראה טעם אחר לגמרי דהתם הרמב"ם מפ' מדינא דהזיק קבוע, ע"ש מה שמיישב. אבל הקהלות יעקב ב"ב ס' י"ד והאבהא"ז פ' דברי המ"מ דלגבי אחרים אינו שייך חזקה דהם לאו בעלים להחזיק משא"כ השכן עצמו.

EXAMPLES:

1. Is one allowed to smoke in the lobby of his apartment building, or outside an open window of his house or office, if it may disturb his neighbours??

2. “Ohh, what is that odor? It hits you the moment you come through the door,” comments Mrs. Miller, who was blessed with an excessive sense of tact. “You really must get cleaning assistance to help keep this place clean.”
Shoshana blushed at her mother-in-law’s words, but remained silent. When the local boy’s school opened a kindergarten in the empty apartment next door, she had no objection to the noise or even the occasional candy wrapper, but she never anticipated the “fragrance” that would reach her home through the window from the restrooms. *Does Shoshana have a right, now, to object?*

3. Is one allowed to operate a noisy air-conditioner or washing machine in his home, even if the noise annoys his neighbour(s)??
 - a. What about hosting a party?

4. “Yankel, do me a favor and come give me a hand,” called Shimon to his downstairs neighbour. Always willing to be of assistance, Yankel stepped in to the house and followed Shimon out to the porch. Shimon, who was very handy around the house, was installing an air conditioner on his porch and needed his friends help to put the heavy machine in place and set up the drainpipe. Yankel noticed that the drainpipe would lead water right on to their terrace, but he was hesitant to speak up. “I won’t say anything. Why cause hard feelings? He’ll figure out on his own that it’s not a good idea.”
Once the air conditioner was in, the dripping water proved to be quite a nuisance, and Shimon did not “figure it out on his own.” *Is Yankel entitled to object??*

(These examples were taken from the book “Money in Halacha” by Rabbi Yitzchok Silver, with permission)