



Please Move Your Trees

Environmental allergies are common and affect up to one-third of the world's population. A wide variety of allergens can cause the symptoms that characterize allergic reactions, including tree, grass, and weed pollen, different types of wood, dust mites, mold, insects, and pet urine, saliva, or dander (dead skin cells). Exposure to these substances can trigger adverse symptoms in people with allergies. Some substances cause allergic reactions even in small doses and at a distance from the source, while others generally only affect people only in larger doses and in close proximity to their origin.

When the body is exposed to allergens that it recognizes as foreign, it responds with a cascade of reactions. Mast cells release histamine, which in turn leads to inflammation and tearing, congestion and itching, along with constriction of smooth muscle in the respiratory tract that leads to shortness of breath. In severe cases, fatal anaphylactic shock can occur. The allergic reaction is fundamentally an immune response to harmless substances instead of pathologic infectious organisms like bacteria or viruses. In addition, a person with allergies is at increased risk of developing additional allergies or asthma.

Primary care physicians can generally diagnose and treat allergies, but evaluation by an allergist may be warranted. Allergy testing will determine the substances to which a person is allergic and can be performed by either skin prick or blood tests. Although medications can relieve symptoms and immunotherapy ("allergy shots") can lead to lasting remission of symptoms, there is no known cure for allergies. The best way to avoid allergic reactions is to avoid coming in contact with the allergen(s) altogether.

This essay will discuss several Halachos pertaining to a theoretical scenario in which two neighbors get into a dispute over one possessing substances to which the other is allergic:¹

Reuven occupies the ground floor apartment of a large apartment building and plants several fruit trees in his garden. Some years later, the tenants living upstairs vacate their apartment and Shimon moves in. When spring arrives, Shimon finds that he is suffering terribly from allergies. Upon surveying the area, he discovers the source

¹ This essay is based on the excellent work of Rav Shalom Segal on this topic which that appears in the Tzohar Journal, 5759.

of his problem: Reuven's fruit trees! He promptly asks Reuven to remove the trees from his property as they are causing his severe allergic reaction. Does Shimon have a valid claim against Reuven?

The Gemara in *Bava Basra* (26a) records the following incident: *Rava bar Rav Chanan* had palm trees growing on the edge of his property attracting birds to the area that caused damage to *R' Yosef's* neighboring property. When *R' Yosef* requested that *Rava* cut down his trees to prevent further damage to his property, *Rava* replied that since it is forbidden to cut down a fruit-bearing tree, he could not comply. He told *R' Yosef* that if he wanted the trees cut down, he would have to do it himself.

The Gemara implies that *Rava* would have been obligated to cut down the trees to prevent further damage to *Rav Yosef's* field if not for the prohibition to cut down a fruit bearing tree (due to "*Bal Tashchis*"). *Tosfos* (s.v. "*Ana*") derives an important principle from this: It is incumbent upon the *Mazik* (the one causing the damage) to distance his property from his neighbor so as not to cause him damage.

However, *Tosfos'* view is disputed by the *Ramban*. The *Ramban* argues that if it were true that a *Mazik* must distance his property from his neighbor, *Rava* would have been required to so – the prohibition of "*Bal Tashchis*" notwithstanding. Accordingly, the Gemara is a proof to the opposite conclusion: a *Mazik* is not required to distance his property from his neighbor. Many *Rishonim* concur with the *Ramban* and this is the accepted *Halacha*.

At first glance, the Gemara's case seems identical to our case. However, we must consider whether Reuven is considered a *Mazik* at all.

In the Laws of *Hilchos Sh'cheinim* (Laws of Neighbors), distinctions are drawn between different types of activities that could cause damage to the neighboring residents. As a general rule, one cannot object to a neighbor's work or business just on account of it being noisy – disturbing the peace and quiet in the area is not considered bona fide damage. (This is true regarding an already established business. This claim could, however, be used to prevent a neighbor from opening a business.) A noteworthy exception to this rule is where the affected neighbor is unusually sensitive to loud noises. In this case, the noise is considered as damaging as "*Kutra*" (heavy smoke) and "*Beis haKisei*" (an outhouse) and he has a valid claim against his neighbor.

The *Rivash* (196) discusses a case of a person operating a weaving business in his home and the resulting noise was damaging an unwell neighbor. The *Rivash* rules that the unwell neighbor had the right to demand that the weaving be discontinued. Although a person cannot be prevented from performing noisy work on his property, if

his neighbor is unwell and the noise causes actual damage, the neighbor has the right to demand that the work be stopped.

The *Chiddush* in the *Rivash's* ruling – as noted by the *Chazon Ish* (*Bava Basra*, 13:11) – is that even if a particular activity is generally not damaging, it can be considered damaging to select individuals to whom it affects. Applying this to the case at hand, although the fruit trees on Reuven's property are not damaging to anyone except for the neighbor with allergies, he nevertheless has the right to demand the removal of the trees from the premises.

The *Chazon Ish* (*ibid*, 14) opines that the ruling of the *Rivash* only applies to something like that which is at least bothersome to most people, although only damaging to a few. However, an activity that is not bothersome *at all* to most people, but does harm a certain individual, cannot be contested since this activity cannot objectively be classified as "damaging." Hence, one might reason that Shimon cannot contest the presence of the trees since the trees are not bothersome at all to most people. However, this is not the case. As Rav Segal points out, this argument is invalid because allergies clearly are considered "damage" since they are so common, as noted in the introduction to this essay.

On the other hand, it should be noted that for Shimon to have a claim against Reuven we must ascertain that his symptoms are severe. If his allergic reaction is minor, Reuven would not be considered to be damaging him, and no claim could be made. A doctor should be consulted to assess the severity of the allergies; Shimon himself may not demand that his personal assessment or report be accepted in Beis Din (for a similar ruling, see *Shulchan Aruch*, 154:33).

There is a well-known dispute between *R' Yosi* and the *Chachamim* regarding the basic laws that govern *Nizkei Sh'cheinim*. According to *R' Yosi* it is incumbent upon the *Nizak* (the damaged party) to distance himself from the *Mazik* (the damaging party). However, the *Chachamim* hold that it is the *Mazik's* responsibility to ensure that his property not damage his neighbors. The Halacha follows *R' Yosi*. *R' Yosi* concedes that in a case of "*Giri Dilei*" ("His arrows" - where the damage may be compared to arrows shot from one property to the other²) it is up to the *Mazik* to distance himself and avoid damaging his neighbor.

² [Editor's note: *Rashi* (s.v. "*b'Giri Dilei*") explains "where the damage occurs from the hands of the *Mazik*" and quotes the example of the *Gemara* in *Bava Metzia* 117a where the floor of a second-floor dwelling had eroded such that every time he washed his hands, the water would fall directly from his hands into his downstairs neighbor's apartment.]

In our case, although the damage would not be considered *Giri Dilei*, it would be considered *Gramma D'Giri* (indirect *Giri*). This is because the travel of the allergens via the wind is attributed to the owner of the trees as a *Gramma*. The source for this rule is the Gemara (*ibid.* 26a) that discusses chaff ("*Rakta*") produced when beating flax³ that was blown by the wind and caused damage. The Gemara cites a disagreement in this regard but the Halacha follows the opinion that requires the *Mazik* to prevent the chaff from leaving his property and damaging others as codified by the *Shulchan Aruch* (C.M., 154:34, see also *ibid.* 36) who rules that a neighbor whose work produces dust (and the like) must distance himself from his neighbors, ensuring that the dust not be carried via the wind to other properties in the vicinity.

The *Rishonim* ask why the aforementioned Gemara only considers the possibility of obligating the *Mazik* under the Laws of *Nizkei Sh'cheinim* and *Giri Dilei*. Why does it not consider the owner of the chaff to be responsible as a *Mazik* of "*Aish*" (fire)? This ought to be similar to a case where a person leaves an object on his property and the object is carried by the wind and causes damages to others – the owner of the object is responsible to pay for damages under the category of "*Aish*."

The Ramban answers that in the case of beating flax, the chaff is being beaten to the ground, which should prevent it from flying off his property since the wind would be unable to spread it once it hits the ground. The fact that the wind managed to blow it off of his property before it hit the ground is not a reason to obligate the owner since the wind blowing the chaff is not considered his action. By contrast, the case in which a person is obligated due to "*Aish*," is when he places an object in a location where the wind is likely to carry it away.

Following this line of reasoning, a person who places flowers in his property where the wind is likely to carry the pollen to neighboring properties should be considered to have damaged his neighbors under the category of "*Aish*."

Rabbenu Yonah and the *Rashba* offer a different distinction between the cases of the chaff and the *Aish*. In the case of *Aish*, the wind merely carried the item from place to place, but the item itself caused the damage. However, in the case of chaff, it was the *impact* of the chaff⁴ that caused the damage, accordingly the wind plays a part in causing the damage, somewhat lessening the responsibility of the one who freed the chaff by beating the flax.

³ [Editor's note: When preparing flax for linen, one of the stages is "scutching" or "swingling", which involves vigorously whacking the fibers with a wooden blade to remove extraneous woody material (chaff or *Rakta*).]

⁴ Upon collision with other items

According to this reasoning as well, the damage caused by the pollen would be classified as *Aish* since the damage is being caused directly by the pollen itself and is not due to the force with which it collides with the neighbor.

However, in spite of all of the above, it is possible that our case would still not be classified as *Aish* based on the *Chazon Ish's* comments on the above Gemara. The Gemara elsewhere in the *Sugya* compares the damage wrought by chaff to damage done by a spark produced by a hammer blow. The *Chazon Ish* asks that according to the *Rashba* there should be no comparison between the two cases. Damage wrought by the chaff is at most *Giri Dilei*, but damage done by a spark is *Aish* since it is the spark itself that ignites the fire and not the force of the wind that propelled the spark! The *Chazon Ish* answers that if not for the wind the spark would have extinguished itself immediately and not caused damage; as such, the wind has an essential role in causing the damage and, therefore, the damage is not considered as *Aish*.

Accordingly, in our case, since the pollen does not cause damage unless it comes into contact with the allergic person, the damage caused should not be considered *Aish*. Nevertheless, in the final analysis, the *Mazik* will nevertheless need to remove his pollen-producing flowers because they are considered at least a *Grama* of *Giri Dilei*.

This is true of a person who plants allergenic flowers in his garden. If he plants a tree in his garden that will only blossom in the distant future, the Halacha may be different. In that case, the *Mazik* only damages by means of a *Grama* (indirectly), as made clear by *Tosfos (Bava Basra, 26a, s.v. "Aval b'Gefanim")* and the *Ramban (ibid. 22b)*.

Even though the blossoming trees are the property of the owner, the Halacha in this case is a matter of dispute among the *Rishonim*. In *Kuntrus Dina D'Garmi*, the *Ramban* rules that the *Mazik* is not obligated to distance the trees from the neighbors because (as the *Nesivos haMishpat 154:18* explains) one is not obligated to ensure that his property does not cause damage if doing so would involve forfeiting the usage of his property.

However, the *Rosh (Shu"t 108)* (quoting the *Baal Ha'Itur*) holds that the *Mazik* is required to distance his trees so that they do not cause damage to the neighbors. This also seems to be the opinion of the *Rashba* (beginning of *Bava Basra*). Even according to this opinion, it would seem that *Bedi'eved*, once the damage has been done, the *Mazik* need not pay for the damage since the damage was merely caused by a *Grama*.

One factor that could change this ruling is whether the tree was planted before the neighbor moved into the adjacent property (as in our example). According to many *Rishonim*, the damage caused by the tree is not called *Girei* at all (see the *Beis Yosef*,

Choshen Mishpat, 55:47 who concurs with this view). At the very least, the *Mazik* can say “*Kim Li’* (I hold) like this opinion” and thereby exempt himself from having to remove the trees (this concept is discussed by *Rabbi Akiva Eiger* in his *Kuntrus* on *Harchakas Nezikin*). Rav Segal also considers other *Halachic* factors that may have a bearing on this case, but they are beyond the scope of this essay.

In conclusion, Rav Segal writes:

If a person places flowerpots or plants a tree that has already blossomed in his garden, his neighbor has the right to demand that they be placed elsewhere.

*If he plants a seed or a tree that has not yet blossomed, the neighbor cannot force him to move them. Still, it would be praiseworthy (*Midas Chasidus*) to go beyond the letter of the law, and to allow the neighbor to cut down the tree himself if he wishes.*