

# HALOCHOSCOPE

After a very heavy snowfall, a mass of snow dropped off a roof onto a neighboring driveway, destroying his car. The neighbor claims that had the roof not been insulated, so much snow would never have accumulated and, therefore, would not have dropped off in such a large mass. Is there any validity to such a claim?

The issues:

- (A) *Nezikin*, damages; *Hilchos Shechainim*, being a good neighbor.
- (B) *Giri Dilei*, restrictions on activities on one's property that affect a neighbor
- (C) *Grama* and *Garmi*, liability for indirect damages.
- (D) *Chezkas Tashmishin*, earning the rights to (limited) use of others' property

(A) *Nezikin*; *Hilchos Shechainim*

Moral societies establish a legal code to decide liability for damages. This is usually based on the factors, and is influenced by personal opinions of the judge and litigants (each will view it in their favor). In Judaism these laws are set by the Torah, interpreted by the Talmud, and expanded by the Rabbis. Generally, one is liable for both intent to damage and negligence in its prevention. The Torah lists major categories, called *Avos Nezikin*, the details of which lead to different laws on liability and payment. Thus, whereas one is usually liable for the damage, the guidelines on when, for what part, and how much, one pays, vary according to its type. The assumption is that, clearly, damaging is forbidden. Apart from the Mitzvah not to waste, it is considered a legal restriction. Some include it in spirit of the laws of stealing, though no item is taken. Others group it in the Mitzvah to love one's fellow, or in the restrictions against placing an obstacle before the blind, which may be translated literally. Yet others maintain that it is implied by the liability for damages due to negligence.

The laws of neighbors may be grouped in a few areas. Some are based on Scriptural references, while others were instituted Rabbinically to protect the interests of the neighbors. Some, one is obligated to follow out of common decency but, when violated, might not be pursued in a court. Others relate to when one may legally prevent his neighbor from an activity on his own property because of its affects on the neighboring property, but not necessarily collect compensation. Some grievances may be brought before *Bais Din*. They could result

from one party violating the rights of his neighbor, or the rights themselves might be the matter of dispute. A neighbor may be compelled to prevent damage, desist from some activity, or participate in a communal effort to improve the property or environment. Sometimes a resident may claim that he has been doing an activity for some time with the implied consent of his neighbors, since they did not protest until now. This is known as *Chazaka* and will be discussed later.

Sometimes one may not be sued in a Bais Din but is liable to pay on his own conscience, *Chayav Bedinei Shamayim*. One might not be liable at all but still forbidden to do the activity. There are also cases where the activity is not forbidden, but refraining is commended, *Midas Chasidus*, extra piety, or *Lifnim Mishuras Hadin*, above the letter of the law. [See Parshas Mishpatim 21:18-22:5 etc. Baba Kama esp. 2-5 (Birkas Shmuel 2 etc.) Baba Basra Perek 1, 2, end 3. (Yad Remah 2:107) Avos 1:1 (Rabeinu Yona) Rambam Shechainim 7-11.]

### **(B) Giri Dilei**

An additional factor in neighbor damage is that one might cause it by doing something on his own property which he feels he has a right to do. To define which activities one has a right to do and which one is liable for, the Talmud uses the term *Giri Dilei*, literally, his own arrows. One may not shoot arrows in his own property which will inevitably go out of his boundaries, and disregard the damage caused outside, by saying: "I'm allowed to do what I want in my house." I.e., the damage may be traced to a real action that directly affects the neighboring property.

Examples of *Giri Dilei* include: If the floor of an upstairs apartment is broken and the upstairs resident washes his hands over the hole, and setting up a press that requires thumping. Every time the resident thumps he causes vibrations in the neighbors residence, maybe causing vessels to fall down and break. In these instances, according to most, the liability is not to pay for resulting damages, but to remove the potential for damage. Thus, a neighbor may insist that the resident must either not do the activity or do it at a safe distance. Some Poskim distinguish between *Giri Dilei* that directly cause the damage, where one is also liable, and where it is less direct, requiring only that one should not do it close by.

The provision giving a neighbor the right to insist on distancing the potentially damaging activity is considered a Rabbinical institution. It is to further and protect the interests of the community. The basis for this kind of institution is in the Pesukim that describe how Jewish homes are positioned — to ensure privacy. [See Parshas Balak 24:2-5 Baba Basra 2b (Ramban) 18a-b, Poskim etc.]

### **(C) Grama, Garmi**

Aside from liability and the rights of the neighbor, the resident's activity is forbidden. There must be an underlying, recognized category of damages to forbid it. This is known as *Grama*. There are three ways to cause damage. One could directly break or damage something. This is called *Mazik Beyadayim*. One might cause the damage directly, without actively doing it. This is called *Garmi*. The Talmud debates the liability in this case, and the Poskim conclude that one is liable. According to some Poskim this is Scripturally considered his action, and according to others a Rabbinical liability to prevent people from being *Mazik Beyadayim*. If the activity is not sure to lead to the damage, or it involves the participation of another force indirectly having a hand in the damage, it does not make one liable in Bais Din. This is called *Grama*. For example, one might open a gate, releasing the livestock of another person, which will later cause damage. *Grama* is forbidden, but there is no financial liability. In our case, the insulation was done to protect the property of its owner. Under normal circumstances, there would be less snow build-up. It should be able to melt slowly into the gutters. He certainly did not produce the snow. In terms of liability, it is at best *Grama*. [See Baba Basra 22b-23a 25b-26a 60a Baba Kama 55b 98b 100a 116b etc. Poskim. Kiryas Sefer, Shechainim 9. Ramban Dina Degarmi. Tur Sh. Ar. Choshen Mishpat 153:1 154 155:1 7 15 31 36-39 etc. 384 386.]

### **(D) Chezkas Tashmishin**

We touched on *Chazaka*, earning the rights to damage. The prohibition against damaging is not suspended, but the institution to protect neighbor's property may be viewed as a monetary personal obligation which may be forgone by the potential injured party. [Actually, waiving an obligation that has not yet materialized is a matter of debate.] Thus, while a neighbor may insist that potential damage be removed, if he declines to insist on it, he has waived this right. In an instance where the victim can show that the damage is too much to waive, such as causing smoke or a truly intrusive odor, he may demand its removal later.

A second type of *Chazaka* is where the neighbor has been using the neighboring property, sometimes indirectly, without the owner's protesting it. He does not claim rights of ownership, but that he has been ceded the right to make such use. Some maintain that he need not claim to have been ceded this right, but that it was waived. An example the Talmud cites is where a sloping roof concentrates rainfall on the neighboring property. The *Chazaka* permits the present roof to remain.

However, if the owner of the roof decides to change it, the Chazaka might not apply to the changes. One situation debated is switching to a roofing material made of willow thatch. The owner of the roof has established a Chazaka to permit his roof to drip onto his neighbor's property. Restricting his neighbor's use is considered either waived damages or a ceded right to use.

The Poskim discuss the possible increased use due to the thatch material. Some say it soaks the water up and only allows it to drip more slowly. Thus, while previously the neighbor could use his yard right after the rain stopped, now the drips continue a long time afterwards. The Poskim follow the ruling that permits one to change to such a roofing material. The basis for this is that once one has made a Chazaka to allow his roof to drip onto the neighboring property, he now "owns" this right, no matter how the water comes down. Nonetheless, the Poskim maintain that it must be shown that in the opinion of experts, there is no increase of the hazard or damage due to the changes.

Our situation resembles this case in a number of ways. The original roof had no insulation. Rain and snow did fall off into the neighboring driveway. The alterations to the roof by insulating it have an effect on how the snow will build up and fall off. If there is no existing agreement limiting the damage or drainage from this roof, it would appear that the newly insulated roof has inherited the Chazaka from the old roof. If it can be shown that the old roof would never cause a mass of snow to fall off, due to the way it would melt, one could argue that there is no Chazaka for snow. However, if the house was left empty and unheated, even the old roof would not have prevented this. Unless there is an express agreement to the contrary, one must assume that the existence of this roof for this time period included instances where some snow fell off the roof with no protest from the neighbor. It could be argued that in the case cited by the Talmud the issue is restricted use, whereas here the issue is damage or a hazard. However, heavy flow of water can also cause damage, and the main problem arises with restricted use in the case of snow, too. The damage that actually occurred was not solely the fault of the insulation. [See Baba Basra 6a, Poskim. Tur Sh. Ar. C.M. 153:10, commentaries.]

In conclusion, it appears that the claim that the neighbor had no right to insulate his roof is not supported by the conclusion of the Poskim.