Loss Splitting in Jewish Law: A Covid-19 Example

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Rabbi Itamar Rosensweig October 24, 2021

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Introduction

Economic losses are an inescapable part of commercial life. Suppose a train cancellation leaves you stranded at Penn Station and you have to splurge on an Uber to get home. Or a babysitter cancels at the last minute causing you to stay home and lose a day of work. Or a vehicle crashes into yours, leaving your vehicle in need of repair. In cases such as these, you suffer a loss. One of the primary tasks of a legal system is to determine how to distribute these losses between the relevant parties.

Consider the following true set of facts.[2] Mrs. Stein drives a group of preschoolers to the local yeshiva day school. In September 2019, Mr. Grossman hired Mrs. Stein to transport his son to and from school each day. From September through December, Mr. Grossman paid Mrs. Stein at the end of each month. Beginning in January, however, Mr. Grossman decided that it was too burdensome to remember to write a check each month, so he paid Mrs. Stein in advance for the remainder of the year.

The arrangement went smoothly until March 2020, when the school shut down because of the Covid-19 pandemic, under the governor's statewide orders. Is Mr. Grossman entitled to recover the amount he prepaid for March through June? Or is Mrs. Stein allowed to keep the payment, even though she will not be providing transportation services? Or does justice require a different resolution? In our previous posts, we discussed several principles of

Jewish law that might bear on contracts canceled by the Covid-19 pandemic, some of which may be relevant to deciding the present case.[3] In this post, I focus on the halakhic principle of loss sharing.

Loss Splitting when *Force Majeure* Affects both Parties to a Contract Equally

The halakhic precedent for splitting a loss when a contract is frustrated by circumstances beyond the parties' control is articulated in a responsum of Ra'avan (R. Eliezer b. Natan of Bonn, 1090-1170), who was asked to rule on the following case. A landlord had leased a property to a tenant for two years. The tenant paid the entire rent upfront at the beginning of the lease. But violence against the Jewish community during the lease term caused the Jewish citizens of the city to flee for their lives. The tenant fled with them, abandoning the leased property for several months until it was safe to return.

The parties disagree over whether the tenant was obligated to pay rent for the months that he had to abandon the property. The tenant argued that he is entitled to be refunded for the months of rent during which he could not use the property when he fled the city. The landlord counters that he is entitled to keep the rent that was paid for those months because the house was structurally sound and available, and it was the tenant's decision to abandon it.[4]

Ra'avan rules that the parties are to split the loss, with each party bearing half of it. Accordingly, Ra'avan ordered the landlord to return *half* of the rent for the months that the property sat unoccupied.[5] Ra'avan explains that neither party was more, or less, responsible than the other for the contract having been frustrated. The contract was frustrated by the violence that affected the *entire* Jewish community (*makat medinah)*, and thus the *force majeure* (אונס) that undermined the contract affected both parties equally.[6] Therefore, Ra'avan reasons, justice requires that the parties bear the loss equally by splitting it between themselves.[7]

It is important to emphasize that the loss splitting principle articulated by Ra'avan is not conceptualized as a compromise or court-imposed settlement (*peshara)*. Rather it is conceptualized as a principle of *din*. It is a halakhic principle of justice that when *force majeure* affects both parties equally, the parties are to share the loss, with each party bearing half of it.

Grossman v. Stein

Let's return to the case of Mrs. Stein and Mr. Grossman. The facts of their case are similar to the case decided by Ra'avan. Neither Mrs. Stein nor Mr. Grossman was at fault for non-performance. A third party (the governor) had shut down the school in the face of a nation-wide health pandemic (*makat medinah*), making performance unreasonable or purposeless to the parties. There was no school for Mrs. Stein to drive to, and there was no reason for Mr. Grossman to send his child to a locked school building. If the cases are analogous, as they

appear to be, then based on the ruling of Ra'avan, the proper halakhic resolution is for the parties to split the loss, with Mrs. Stein returning *half* of the amount Mr. Grossman advanced for March through June.

In fact, that is exactly how the parties amicably resolved their dispute, without having to litigate their case in beit din. The parties elected to resolve their dispute in accordance with the principle articulated by Ra'avan. Had the case proceeded to litigation, it is likely that the dayanim would have arrived at a similar conclusion.[8]

Jewish Law and the Common Law: Two Different Approaches

Note how halakha's approach of loss splitting in the above type of case differs from the common law's approach. Under the common law doctrines of frustration of purpose and impossibility, a court would determine whether the contract remains enforceable under the circumstances or whether to excuse the parties from performance. The common law approaches the case from the perspective of "winner takes all," assigning the loss on an all-or-nothing basis.[9]

For example, in the above case of Grossman v. Stein, a court might find that the governor's closure of schools frustrated the purpose of the contract between Mr. Grossman and Mrs. Stein, as the purpose of the contract–transportation to school–had been extinguished. On that theory, Mr. Grossman would be excused from having to pay Mrs. Stein, and he would be entitled to recover the entire amount that he advanced. Alternatively, a court might find that the contract remains enforceable, such as when the risk of school closure was foreseeable to the parties when they entered into the agreement. On that theory, Mrs. Stein would be entitled to keep the entire amount that she received.

Jewish law's approach of loss splitting avoids either of these extremes. Rather than picking a winner who takes all, Jewish law maintains that where parties are equally affected by the loss, and where the parties are in moral equipoise regarding their responsibility or non-responsibility for it, they are to share the loss between themselves, with each party bearing half of the cost.

Thus, the different systems of law advance different conceptions of justice in their approaches to contracts frustrated by *force majeure* where the parties are in moral equipoise. The common law picks a winner and a loser, such that one party must bear the entire loss. Jewish law endorses *loss sharing* by assigning half of the loss to each party.[10]

NOTES

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[2] I discuss this case with the permission of the parties. The names of the parties have been changed at their request.

[3] See Rabbi Michoel Zylberman, "Covid-19 and Canceled Rental Contracts," *Jewishprudence* (June 2020).

[4] Responsa Ra'avan no. 98

לאיש כלבי קרובי אהובי ר' אליעזר בר' שמשון, אני אליעזר משיב על עסק ראובן ששכר בית משמעון לשתי שנים והקדים ונתן לו השכר של ב' שנים, ובתוך אותן ב' שנים ברחו היהודים מן העיר מפני פחד נפשם וברח גם הוא והניח הבית ריקם, ואח"כ חזרו היהודים וגם הוא ורוצה שישלם לו שמעון מה שהיה חוץ מביתו, ושמעון משיב ביתי היה לפניך ואתה חוכרתו ואיני משלם לך.

[5] ibid:

שמעון ישלים לראובן מחצית הימים שהיה חוץ מביתו וראובן יפסיד המותר.

[6] In one striking formulation, Ra'avan writes that the violence rendered the homes uninhabitable *and* caused the residents to flee. On this formulation, the violence undercut *both* parties' performance under the contract. The landlord could no longer supply a habitable home (given the violent social conditions), and the tenant could no longer live there. Ra'avan writes:

הכא איכא למימר גזירת המכה על שניהם היתה על הבתים להיות בדודים ועל האנשים להיות גולים הלכך לתא דשניהם הוא יחלוקו ההפסד.

Ra'avan bases his ruling on his interpretation of Bava Metzia 105b. The Mishnah there discusses a tenant-sharecropper who pays a fixed rate for his right to use and work the field. If the crop was destroyed by a natural disaster, such as a flood or a plague of locusts, the Mishnah rules that the tenant-sharecropper is not obligated to pay the entire rent (מנכה לו מן חכורו). Ra'avan interprets this to mean that the tenant-sharecropper pays half of the rent, effectively splitting the loss with the landlord:

ומיהו מנכה מן חכורו קתני ולא כל חכורו, דכיון דמכת מדינה היא על שניהם הוי ההפסד וזה יפסיד מחצה וזה יפסיד מחצה.

[7] Ibid:

דכיון דמכת מדינה היא על שניהם הוי ההפסד וזה יפסיד מחצה וזה יפסיד מחצה... דמכת מדינה להאי דשניהם הוא לפיכך ההפסד על שניהם.

Sema (Choshen Mishpat 321:6) applies this loss splitting principle to a case that is even more analogous to the facts of Grossman v. Stein. Sema discusses a case where a parent hired a rebbe to educate his child, but the government later outlawed Torah study. Sema notes that in such a case the contract is frustrated by an outside force (*makat medinah*) that affects both parties equally, with neither party more responsible than the other for not performing under the contract. Sema therefore rules that the parties should split the loss, with the father paying the rebbe for *half* of the value of the contract:

מסתברא לומר כיון דמכת מדינה היא המשכיר והשוכר שוין בהדבר, ואין לומר דמזלו דשום אחד גרם, … יהיה ההפסד על שניהן… גם במלמד זה שגזר המושל שלא ללמד יחלוקו.

Sema bases his ruling on the Talmud's discussion of the wine-shipping case (Bava Metzia 79b), where one permutation of that case provides for the parties to split the loss. Sema writes:

דאמרינן בגמרא [ב"מ ע"ט ע"ב]… בשכר ספינה סתם ליין סתם ונטבעה שחולקין, אם לא שאחד מהן רוצה לקיים התנאי… גם במלמד זה שגזר המושל שלא ללמד יחלוקו, שהרי אם זה יאמר שרוצה לקיים התנאי גם השני מוכן לקיים התנאי אלא שאי אפשר מצד המושל,

Note that Ra'avan based his decision on the Talmud's *makat medinah* rule (Bava Metzia 105b), above n. 6. Depending on how we interpret the legal principle at work in the wine-shipping case, it is quite possible that Ra'avan's ruling and Sema's ruling are based on different legal principles, even though they arrive at the same legal conclusion.

For a discussion of this Sema, see Rabbi Michoel Zylberman, "Employment Contracts and Covid-19", *Jewishprudence* (January 2021).

[8] Though the dayanim might consider some of the principles discussed in our earlier post to be relevant as well. For those principles, see Rabbi Michoel Zylberman, Covid-19 and Canceled Rental Contracts *Jewishprudence*, (June 2020).

[9] In an earlier post, we discussed the common law's approach and when it might be incorporated into halakha under a theory of minhag ha-sochrim, see Tzirel Klein, "Commercial Custom, Common Law, and Contracts Impacted by Covid-19," *Jewishprudence*, (July 2020).

[10] Jewish law provides for loss sharing in other areas as well. See Bava Metzia 79b (one permutation of the wine-shipping case), Bava Metzia 2a (two parties struggling over a garment), Bava Kamma 15a (liability for damages caused by a mild-mannered ox), and Bava Kamma 46a (Sumchus's opinion for how courts should resolve disputes where there is insufficient evidence to support either party's claim; see also Yevamot 37b). Here, however, we must be careful. For although all of these cases involve splitting a claim fifty-fifty between the parties, the underlying legal principle appears to differ between these cases. Further, some of these cases are better characterized as involving claim-splitting rather than loss-splitting.