



## Questions

- (1) My child was enrolled in a summer overnight camp, for which I pre-paid in order to lock in a discount. A fire destroyed the camp in March, and the camp will not function this summer. Am I entitled to a full refund?
- (2) My child was enrolled in a summer overnight camp, for which I pre-paid in order to lock in a discount. COVID cancelled the camp season, by order of the provincial government. Am I entitled to a full refund?
- (3) Refunding all of the camp tuition may bankrupt the camp; at the least, they will need to release some employees. Do I have an obligation to forgive some or all of my right to a refund?

### 1. Rabbi Asher Weiss, **הביאני הדריי** pg. 398

בדיני ממונות עסקינות, והמיוחד בדיני ממונות שלעולם אין תשובות מפורשות ומוגדרות לשאלות המתעוררות בהיי המעשה, לעולם יש מקום לתהות ולפקפק שמא אין הנידון דומה לגמרי לראיה... ובכל השאלות כעין זה לעולם לא יתכן הכרעה ברורה ומוחלטת, ועל הפוסק לשקול את הדברים בפלס כאשר שני ערכים נר לרגליו, השכל הישר ומדת היושר והחמלה.

We are dealing with financial law, and what is unique in financial law is that the answers are never explicit and defined in relation to real-life questions. There is always room to question and challenge that perhaps the case does not fully resemble the evidence [for a particular ruling]... And in all such questions, it is never possible to make a clear and decisive ruling, and the authority must weigh matters on a scale, with two values as a light for his path: Straight intellect and the traits of justice and compassion.

## Civil Law

### 2. Aubry, Tannerya and Walter, Can a force majeure clause be relied upon in light of the COVID-19 pandemic? [https://www.dickinson-wright.com/-/media/files/news/2020/09/covid-resource-guide\\_\\_binder1.pdf](https://www.dickinson-wright.com/-/media/files/news/2020/09/covid-resource-guide__binder1.pdf)

Force majeure clauses authorize contracting parties to extend or suspend the time of performance, or to be excused from performance, in whole or in part, as a result of specifically negotiated and enumerated conditions or events.

Obligations under the contract may resume once the condition or event has been remedied – a determination of the exact circumstances will depend on the clause, and its place contextually within the contract as a whole...

If a party wants to rely on a force majeure clause, they must first establish that the event or condition falls within the definition of force majeure; this is evaluated in the context of each specific contract.

The Supreme Court of Canada, in the leading decision, *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, defined a force majeure clause as “generally [operating] to discharge a contracting party when a supervening, sometimes supernatural event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.”

It is not sufficient that the event makes performance more expensive or time-consuming than expected. The event must make performance substantially more difficult, substantially more expensive, or imprudent.

### 3. Frustrated Contracts Act, R.S.O. 1990, c. F.34 <https://www.ontario.ca/laws/statute/90f34>

2 (1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged.

### 4. Bal v. Infinite Entertainment Sound and Lighting Inc., 2020 BCCRT 865 (CanLII)

<https://www.canlii.org/en/bc/bccrt/doc/2020/2020bccrt865/2020bccrt865.html>

19: I say this because although the government restrictions on gatherings of more than 50 people limited [the wife]’s intended reception attendance, this does not render the parties’ contract impossible. Rather, [the company] was willing and able to perform the contract, either with a smaller group in attendance on the original March 29, 2020 date, or some future date within 18 months. For a contract to be frustrated, it must be truly impossible to continue to perform the terms of the contract, not just inconvenient, undesirable, or uncomfortable...

### 5. Frustrated Contracts Act, R.S.O. 1990, c. F.34 s.3(1)(2)(3) <https://www.ontario.ca/laws/statute/90f34> *Adjustment of rights and liabilities*

3 (1) The sums paid or payable to a party in pursuance of a contract before the parties were discharged,

(a) in the case of sums paid, are recoverable from the party as money received for the use of the party by whom the sums were paid; and

(b) in the case of sums payable, cease to be payable. R.S.O. 1990, c. F.34, s. 3 (1).

### *Expenses*

(2) If, before the parties were discharged, the party to whom the sums were paid or payable incurred expenses in connection with the performance of the contract, the court, if it considers it just to do so having regard to all the circumstances, may allow the party to retain or to recover, as the case may be, the whole or any part of the sums paid or payable not exceeding the amount of the expenses, and, without restricting the generality of the foregoing, the court, in estimating the amount of the expenses, may include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the party incurring the expenses. R.S.O. 1990, c. F.34, s. 3 (2).

### *Benefits*

(3) If, before the parties were discharged, any of them has, by reason of anything done by any other party in connection with the performance of the contract, obtained a valuable benefit other than a payment of money, the court, if it considers it just to do so having regard to all the circumstances, may allow the other party to recover from the party benefitted the whole or any part of the value of the benefit. R.S.O. 1990, c. F.34, s. 3 (3).

### Jewish law: Finding Fault

6. Rabbi Asher Weiss, **הביאני חדריו**, pg. 393

והנה אף אם הותנה מפורשות בשטר השכירות שבשום אופן וענין אין השוכר רשאי לחזור בו מן השכירות אף במקרה של אונס, מכת מדינה שאני, דכל כהאי גוונא לא הו"ל לאסוקי אדעתיה, ועוד דשורת הדין והשכל הישר מחייבים דשאני **אונס של השוכר** כגון חולי או מות ח"ו ושאר מקרי ופגעי הזמן, ממכת מדינה שאינה קשורה לשוכר. ובהרבה חוזים נכתב להדיא **דבכה עליון** (מכת מדינה) השוכר רשאי לחזור בו, ואף אם לא נכתב במפורש, כך הלכה פשוטה.

Even though it was explicitly declared in the rental agreement that under no circumstances could the tenant back out of the rental, and even in a situation of *oness*, a *makkat medinah* is different. In all such cases, he could not have anticipated it. Further, the law and straight intellect require us to recognize that a tenant's *oness*, like illness or death Gd forbid, or other events and harms that occur, are different from a *makkat medinah* which has no tie to the tenant. And many contracts include an explicit clause stating that in a case of Force Majeure (*makkat medinah*), the tenant may back out. And even if it is not written explicitly, such is the straight law.

7. Talmud, Bava Metzia 76b

"הלכו אבל הלכו חמרים ולא מצאו תבואה, פועלין ומצאו שדה כשהיא לחה, נותן להן שכרן משלם, אבל אינו דומה הבא טעון לבא ריקן, עושה מלאכה ליושב ובטל..."

תני תנא קמיה דרב "נותן להם שכרן משלם", אמר ליה... חביבי אמר: אי הואי אנא, לא הוה יהיבנא ליה כלל, ואת אמרת כפועל בטל!?

אלא קשיא הך? לא קשיא - הא דסיירא לארעיה מדאורתא, הא דלא סיירא לארעיה מאורתא...

"If the wagon-drivers want and did not find grain, the field workers and they found the field was wet, he must pay them fully. But one who comes loaded down is not like one who comes empty-handed, and one who is working is not like someone who is doing nothing..."

This was taught before Rav, "pay them fully", and he replied... My beloved uncle said: If I had been there, I would have given them nothing – and you say to pay as to an idle worker?!

Then how do we explain this? It is not a problem – one is where he inspected his land on the previous night, one is where he did not inspect his land on the previous night.

8. Talmud, Bava Metzia 79a-b

"השוכר את הספינה וטבעה לה בחצי הדרך: רבי נתן אומר אם נתן לא יטול, ואם לא נתן לא יתן." היכי דמי? אילימא בספינה זו ויין סתם, אם נתן אמאי לא יטול? נימא ליה "הב לי ספינתא דאנא מייתינא חמרא!" אלא בספינה סתם ויין זה, אם לא נתן אמאי לא יתן? נימא ליה "הב לי ההוא חמרא ואנא מייתינא ספינתא!"...

"One who hires a boat [to carry wine], and it sinks partway through the journey: Rabbi Natan said: If he has paid, he cannot take it back. If he has not paid, he should not pay." What is the case?

- If the arrangement was for this boat and any wine, then even if he paid, why does he not receive a refund? Let [the wine owner] say, "Bring me that boat; I will bring wine!"
- If the arrangement was for any boat and this wine, then if he has not paid, why shouldn't he pay? Let [the boat owner] say, "Bring me that wine, and I will bring a boat!"...

9. Rashi (11<sup>th</sup> century France) to Bava Metzia 76b

לא הוה יהבינא כלל - דמזלייהו גרם...

"I would have given them nothing" – for their *mazal* caused it...

10. Talmud, Bava Metzia 105b

משנה: המקבל שדה מחבירו ואכלה חגב או נשדפה, אם מכת מדינה היא מנכה לו מן חכורו, אם אינה מכת מדינה אין מנכה לו מן חכורו...  
גמרא: היכי דמי "מכת מדינה"? אמר רב יהודה כגון דאישדוף רובא דבאגא. עולא אמר כגון שנשתדפו ארבע שדות מארבע רוחותיה...

Mishnah: If one rents a field, and it is eaten by locusts or damaged by plague, if it is a *makkat medinah* then he may reduce his rental payment. If it is not a *makkat medinah*, he may not reduce his rental payment...

Gemara: What is a *makkat medinah*? Rav Yehudah said: For example, if most of the fields were damaged by blight. Ulla said: For example, if the four surrounding fields on four sides were damaged by blight...

11. Rashi (11<sup>th</sup> century France) to Bava Metzia 105b

אינו מנכה - דאמר לו: מזלך גרם.

"He may not reduce" – For he says to him: Your *mazal* caused it.

12. Jerusalem Talmud, Bava Kama 3:1

ראה אמת המים שוטפת ובאה לתוך שדהו עד שלא נכנסו המים לתוך שדהו רשאי לפנותו למקום אחר משנכנסו אין רשאי לפנותו למקום אחר.  
If one sees an irrigation ditch flooding toward his field, then before the water enters his field he may divert it elsewhere, but once it enters he may not divert it elsewhere.

13. Rabbi Yosef Fleishmann, **הביאני חדריו** pg. 433

לפי השקפת התורה בכל מקום, לא מתייחסים ל'אונס' כאל מקרה בעלמא, אלא כאל 'עונש' משמיים שבא על מי שהאונס מזיק לו. ולכן כאשר קורה אונס המפריע להתקשרות בין שני אנשים, בודקים מי נראה יותר שהעונש בא עליו, והוא הנקרא 'מזלו גרם', והוא סופג את ההפסד...

According to the Torah's perspective everywhere, we do not ascribe *oness* to mere coincidence, but to a Divine "punishment" upon the one who is harmed by the *oness*. Therefore: When *oness* disrupts a contract between parties, we examine who seems more likely to be suffering the punishment, and he is called "his *mazal* caused it", and he absorbs the loss.

For COVID?

14. Rabbi Moshe Isserless (16<sup>th</sup> century Poland), Rama Choshen Mishpat 321:1

וכן פסק מהר"ם על מלמד שגזר המושל שלא ילמוד, דהוי מכת מדינה וכל ההפסד על בעל הבית.

And so ruled Maharam regarding a teacher, when the government decreed that one may not learn. This is a *makkat medinah*, and all of the loss is upon the employer.

15. Rabbi Asher Weiss, **הביאני חדריו** pg. 386

א. במכת מדינה מזליה דבעל הבית גרם, דכאשר מדובר בגזירה על הכלל הכל חוזר אל השורש, ומשום כן מנכה החוכר מבעל הבית את שכר חכירתו כיון שהשדה של בעל הבית היא, והמלמד גובה שכרו מאבי הילד כיון שהילד של אביו הוא...

ב. לעולם יד הפועל על העליונה, ובהלכות רבות חזינן שהתורה והחכמים חסו על הפועל וזכויותיו, וכדחזינן ממצוות רבות כגון "ביומו תתן שכרו"...

1: In a *makkat medinah*, the employer's *mazal* caused it, for when we are talking about a decree against the community then all returns to the root. Therefore, the tenant reduces his rent for the landlord, since the field belongs to the landlord. And the teacher collects his wages from the child's father, since the child belongs to his father...

2: The worker's hand is always the higher. In many laws we see that the Torah and the Sages had compassion for the worker and his rights, as seen in many mitzvot, like "Pay him on his day"...

## The Ethical Duty

16. Talmud, Bava Metzia 30b

"והודעת להם" זה בית חייהם, "את הדרך" זו גמילות חסדים, "ילכו" זה ביקור חולים, "בה" זו קבורה, "ואת המעשה" זה הדין, "אשר יעשון" זו לפנים משורת הדין.

"And you shall inform them" is a livelihood. "Of the path" is acts of kindness. "They shall walk" is looking after the sick. "On which" is burial. "And the deed" – This is justice. "They will perform" – This is to transcend the line of the law.

17. Talmud, Bava Metzia 83a

רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא, שקל לגלימיהו. אתו אמרו לרב, אמר ליה הב להו גלימיהו. אמר ליה דינא הכי? אמר ליה אין, "למען תלך בדרך טובים." יהיב להו גלימיהו. אמרו ליה "עניי אנן, וטרחינן כולה יומא וכפינן ולית לן מידי!" אמר ליה זיל הב אגרייהו. אמר ליה, דינא הכי? אמר ליה, אין, "וארחות צדיקים תשמר."

Porters broke Rabbah bar bar Chanan's wine barrels, and he took their cloaks. They told Rav, who told him to give them their cloaks. He asked, "Is this the law?" Rav replied, "Yes, 'So that you will walk the path of the good.' (Proverbs 2:20)" The porters said, "We are poor, we worked all day, we are hungry and we have nothing!" Rav told him, "Pay them." He asked, "Is this the law?" Rav replied, "Yes, 'And you will guard the path of the righteous.' (ibid.)"

## Review Questions

- 1) In civil law, is there recourse for a parent if they pre-paid for summer camp and then a fire prevents the camp from opening, and there is no Force Majeure clause in the agreement?
- 2) Does Judaism recognize a Force Majeure clause?
- 3) Why does Jewish law care who "owns" the damage that took place?
- 4) If the harm affects an entire population, so that no one "owns" the damage, must the parent pay the camp for the frustrated summer camp?