Incomplete Pass: Who Is Liable When a Delivered Package Isn't Received?

Adapted from the writings of Dayan Yitzhak Grossman
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The increase in online purchases at this time of year brings a concomitant uptick in incidents of "porch piracy," in which a delivered package is stolen from the doorstep before the resident has a chance to collect it.

In this article and a follow-up, we consider the question of who bears the loss when merchandise shipped by a vendor to a customer is lost or stolen before the customer receives it. This scenario is sometimes explicitly addressed in an agreement between the parties, in which case the language of the agreement determines who bears the loss, although the question of whether this would apply to a disclaimer clause on a website that is not explicitly accepted by customers is beyond the scope of this article. Moreover, applicable law and prevailing custom will impact the halacha as well. Our articles explore the basic halacha governing such cases absent any controlling agreement, law, or custom.[1]

Arvus

The Mishnah states:

> If one was borrowing a cow, and the lender sent it to him with his son, his slave, or his proxy, or with the son, slave, or proxy of the borrower, and the cow died in transit, the borrower is not liable.
> If, however, the borrower said to the lender, "Send it to me with my son, my slave, or my proxy," or "with *your* son, slave, or proxy," and the borrower said "Send it," and the lender then sent the cow and it died in transit, the borrower is liable.[2]

The Gemara cites views that just as the borrower is liable when he authorizes the sending of the cow via a human agent, he is also liable when he instructs the lender to send him the cow on its own:

> "Lend your cow to me." And he said, "With whom shall I send it?" And he said, "Hit it with a stick and it will come to me." Rav Nachman said in the name of Rabbah bar Avuha in the name of Rav: Once the cow has exited the lender's domain, and it died, the borrower is liable.**[3]**

While some authorities rule in accordance with these views,[4] most do not.[5]

The *Rishonim* offer two different conceptual bases for the borrower's liability in these scenarios in which the cow was lost before the borrower actually received it: Some invoke mechanisms of agency (*shlichus* or *zchiyah*), and explain that the receipt of the cow by the designated agent is halachically equivalent to its receipt by the borrower himself.[6] Others invoke the halachic principle of guaranteeing (*arvus*), which says that whenever someone releases money or property from his possession in reliance upon another's promise to ensure that he eventually recovers it, that promise is automatically binding (even in the absence of a formal *kinyan*).[7]

The Nesivos Hamishpat points out a basic and important ramification of this dispute about the rationale for the borrower's liability: Various categories of

persons cannot serve as *shluchim* (proxies), including those not of sound mind, minors, and non-Jews; if the cow were sent via one of these, then according to the *shlichus* rationale, the borrower would not be liable, but according to the *arvus* rationale, he would be.[8]

A number of halachic authorities consider the application of the principles of *shlichus* and *arvus* to various situations involving someone who instructed someone else to send property somewhere and it was lost in transit,[9] including two prominent *poskim* of a century and a half ago, R' Shlomo Yehudah Tabak (author of Erech Shai and Shu"t Tshuras Shai) and R' Malkiel Tannenbaum (author of Shu"t Divrei Malkiel). They discuss cases very similar to ours, in which a customer ordered merchandise from a vendor and instructed him to ship it by train, and the merchandise was stolen en route. The doctrine *of shlichus* is not applicable to their cases, because the vendors were not Jewish, but Rav Tannenbaum and Rav Tabak both consider the applicability of the doctrine of *arvus*.

Rav Tannenbaum rules that the customer can indeed be liable under the doctrine of *arvus*, but only in the case of a cash-in-advance agreement, where the customer owes payment to the vendor immediately upon shipment of the merchandise; in the case of a cash-on-delivery (C.O.D.) agreement, where the customer does not owe payment until the merchandise reaches him, he is not liable if it is stolen en route.[10]

Rav Tabak, however, argues that *arvus* is inapplicable to such cases, because there is a dispute among the *Rishonim* whether *arvus* applies to someone who tells someone else "throw a *maneh* (one hundred *zuz*) into the sea, and I will owe you the money." Some rule that it does, but others rule that it does not, because the liability of *arvus* hinges upon the guarantor (or someone else) benefiting from the other party's release of the money, and here no one has benefited.[11] Rav Tabak understands that according to the latter view, *arvus* does not apply when an item is released to a courier and lost in transit, because no one received any benefit from the item before it was lost. (According to Rav Tabak, those *Rishonim* that explain the borrower's liability in the Mishnah based on *arvus* are following the view that *arvus* **does** apply in the case of throwing money into the sea.)

Rav Tabak further argues that as a matter of normative halacha, even according to the opinion that *arvus* applies in the case of throwing money into the sea, it does not apply where the the person who released the money from his possession retains the power to retrieve it.[12] (Rav Tabak seems to be assuming that even after the vendor had handed the merchandise over to the shipper, it was still possible for him to retrieve it.)

In the typical case of a customer who orders merchandise from a retailer, pays for it, and directs the retailer to ship it via a third-party courier, and the merchandise is stolen before he takes possession of it, according to Rav Tannenbaum the customer would certainly bear the loss, because payment was due (and paid) before the shipping. Even according to Rav Tabak, however, it is possible that the customer would bear the loss, because he concedes that the applicability of *arvus* to third-party delivery hinges upon an unresolved dispute regarding the applicability of *arvus* to the case of

throwing money into the sea. Therefore, where the seller has already been paid, he is the *muchzak* (in possession of the disputed funds), so he may be able to claim "*kim li* (I hold)" like the view that *arvus* does apply in this case. (Unless the vendor actually retains the ability to retrieve the merchandise from the courier, in which case Rav Tabak maintains that *arvus* definitely does not apply and the customer would be entitled to a refund.)

In the case of a vendor that handles its own shipping, however, it would seem that the customer certainly has no liability for the theft of the merchandise in transit, because *arvus* cannot apply if the vendor never released the merchandise from its possession.

In a follow-up article we will *iy*"H consider the question of whether the delivery of the merchandise to the customer's premises, such as his porch or yard, constitutes receipt by the customer.

[1]See also the related discussion by R' Chaim Weg: Packaged Pachyderm, Q&A from the Bais HaVaad Halacha Hotline, Dec. 3, 2020.

[2]Bava Metzia 98b.

[3]Ibid. 99a.

[4]Piskei HaRosh ibid. *perek* 8 *siman* 12.

[5]Rif as understood by Nimukei Yosef ibid.; Rabeinu Chananel, cited by Tosfos ibid. s.v. *Amar* Shmuel; Rambam Hilchos *She'eilah* 3:2; Shulchan Aruch C.M. 340:7 (Rama is silent); Shach ibid. *s.k.* 10.

[6]Ra'avad, cited in Shitah Mekubetzes ibid. 98b.

[7]Chidushei HaRan ibid.; Chidushei HaRitva ibid. (cited in Shitah Mekubetzes ibid.).

[8]Nesivos Hamishpat ibid. *biurim s.k.* 11. The Nesivos ibid. *s.k.* 14 asserts that *arvus* does not apply to minors and those not of sound mind, contradicting his assertion in *s.k.* 11 that it does, but even in *s.k.* 14 he does not reject its applicability to non-Jews.

[9]Teshuvos HaGeonim Sha'arei Tzedek *cheilek* 4 *sha'ar* 2 *siman* 24 (Rav Hai Gaon) (cited in Bais Yosef C.M. end of *siman* 176 *mechudash* 57 and in abridged form in Shach ibid. *s.k.* 43, and cf. Nesivos Hamishpat ibid. *biurim s.k.* 43; Shu"t Zekan Aharon *cheilek* 2/*mahadura tinyana siman* 138); Shu"t HaRashba *cheilek* 1 *siman* 1006 (cited in Bais Yosef C.M. *siman* 183 *mechudash* 4 and Rama to Shulchan Aruch C.M. 182:1 and 183:4); Shu"t Maharashdam C.M. *siman* 106 (noted by Shach C.M. *siman* 176 *s.k.* 43).

[10]Shu"t Divrei Malkiel *cheilek* 5 *siman* 221.

[11]See Chidushei HaRamban Kidushin 8b s.v. *Haisah hasela shelah*; Chidushei HaRashba ibid. from s.v. *Ve'i kasheh lecha*; Piskei HaRosh ibid. *perek* 1 *siman* 13; Ran ibid. 4b in Rif pagination s.v. *Vechasav* haRamban, and see Eimek Hamishpat (*Arvus*) *siman* 33 for an extensive discussion of the opinions of the *Rishonim* on the applicability of *arvus* to the case of *zroke maneh layam*.

The Rama in Shulchan Aruch C.M. 380:1 cites both opinions and does not explicitly decide between them. Cf. Yam Shel Shlomo Bava Kama *perek* 9 *siman* 16; Rama in Shulchan Aruch E.H. 30:11; Eirech Lechem ibid.; Chelkas Mechokeik ibid. *s.k.* 18; Bais Shmuel ibid. *s.k.* 18; Taz ibid. *s.k.* 12;

Biur HaGra ibid. *s.k.* 12; Sefer Hamiknah *kuntreis acharon* end of *siman* 30; Avnei Miluim ibid. *s.k.* 13; Pis'chei Azarah end of *siman* 30; Hagahos R' Ozer C.M. *siman* 207; Pa'amonei Zahav ibid. (end of *siman* 207); Sha'ar Mishpat *siman* 77 *s.k.* 1; Erech Shai C.M. beginning of *siman* 121; Imrei Bina *Gviyas Chov siman* 27 s.v. *Ve'ayein*.

[12]Shu"t Tshuras Shai *mahadura tinyana siman* 121.

A much lengthier and more intricate discussion of the issues and sources cited here (as well as others), upon which this article is based, was previously published by this author as *Din Arvus Be'omer Lechaveiro Zroke Maneh Layam O Shlach Li Eizeh Davar Al Yedei Ploni* in *Nehorai* 5767 pp. 775-811.