

# Skin Transplants For Burn Victims

Rav Shaul Yisraeli

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### The Problem

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Is it permissible for a hospital to establish a skin bank, made up of skin taken from bodies after death, for use in emergencies? Experience has shown that during emergencies, when there are multiple cases of burn victims whose treatment requires human skin tissue, it is impossible to obtain the necessary amount from bodies available at the time. The accepted solution is to maintain a reserve in a sort of bank, similar to a blood bank.

Although in most cases one is dealing with danger to life, which suspends all prohibitions, there nonetheless remains a problem. The *Noda B' Yehuda* (v.2, Y.D. 210) rules that mortal danger (*pikuach nefesh*) does not suspend a prohibition except in a case where the patient is "before us". Here we are speaking of maintaining a supply of tissue for *future* use in emergencies, when there would not be otherwise a sufficient supply. Furthermore, at times the purpose of the skin is to correct facial scars, and hence, being essentially cosmetic, it would not be considered a case of *pikuach nefesh* at all.

### 1. Skin Donation

The Tosafot maintain that there is no Torah prohibition in benefiting from the skin of a corpse (Nid. 55a). Their reasoning is that the prohibition of benefiting from a corpse is derived from that of the broken-necked heifer (*egla arufa*) (AZ 29b). The prohibition of *egla arufa* is derived from its status as a sacrifice. Skin of a sacrifice, however, is permitted after the completion of the

sacrificial ritual. Hence, it follows that the skin of both *egla arufa* and of a corpse is permitted.

The Rambam rules (*Hilchot Avoda Zara* 7;3) that the skin of an idolatrous sacrifice is not forbidden. Rav Shlomo Eiger (*Gilyon Maharsha* AZ 29b) explains the Rambam's ruling by pointing out that the prohibition of benefiting from an idolatrous sacrifice is derived from *egla arufa*, and hence the skin is permitted, following the reasoning of the Tosafot quoted above. From this it follows that the Rambam would agree that human skin is also permitted, by the same argument.

On the other hand, Rabbenu Tam (San. 48a) contends that human skin is prohibited by the Torah. He argues that the status of skin is clearly not inferior to the shrouds of the deceased, which the *Gemara* prohibits (AZ 29b) by derivation from idolatry. Similarly, the Ritva (Nid. 55a) argues that the status of skin is not inferior to that of human hair, which is prohibited in *Arachin* (ch. 1). The Rambam, it is true, permits the use of human hair, but that is for the reason mentioned in the *Gemara* (op.cit.), "Death is what prohibits", which is explained by Rashi to mean that hair does not die with the body. By that reasoning, skin, which presumably is considered to be an organic part of the body and shares in its death, is prohibited according to all opinions. Furthermore, were skin to be permitted, there would seem to be no reason to question the status of hair, which is ancillary to the skin. It remains to be seen how the Tosafot can deal with these arguments.

The Tosafot (San. 48a), which quotes the opinion of Rabbenu Tam, explains that even though the shrouds of the dead are prohibited by derivation from idolatry, the prohibition of the body itself is derived from *egla arufa*. Similarly, the Tosafot (AZ 29b) explains that the derivation from idolatry is sufficient only for shrouds, which are considered accessories to the body itself, similar to the case of idolatry, in which the verse "You shall utterly destroy ..." is taken to refer to "utensils which were used for idolatry", and not to idols. This implies that one cannot derive the prohibition of the body itself from that of its own accessories, despite the obvious logical dependence of the second on the first. Therefore a separate derivation from *egla arufa* was necessary for the body. But according to this line of reasoning, Rabbenu Tam's argument, which infers the prohibition of skin because "it is not worse than shrouds", is invalid. For just as one cannot derive the body from accessories, so one cannot derive skin from shrouds, as the skin may be regarded, relative to the shrouds, as part of the body proper.

The answer must be that Rabbenu Tam believes that it is indeed possible to derive the prohibition of the body directly from idolatry, in the same way that we derive the prohibition of the shrouds. It would be illogical were an accessory to the dead to be forbidden, while the body itself were not. The *Gemara* nonetheless offers an additional source for the prohibition of the body. The reason is that the prohibition of the accessories would appear to be based on the *honor* due the dead. It seems clear that a prohibition based on honoring the deceased can be waived by the deceased himself (while he is still alive, of course). The *Gemara* states that if the *mitzva* of eulogy is in order to honor the deceased (as opposed to honoring his family), then he can waive the honor and the obligation is suspended. Our case is similar. For this reason, the *Gemara* finds it necessary to derive the prohibition of the body from *egla arufa*, which is considered as being in the category of a sacrifice, thereby indicating that this prohibition is not one of honor but is essential to the object involved, and hence cannot be waived by the deceased. Hence, even though it is theoretically possible to derive the body from accessories of idolatry, it is necessary to utilize an independent source in order to remove the possibility of voluntary waiving on the part of the deceased. The conclusion is that the deceased can remove the prohibition from the shrouds, but not from the body, of which he is not the owner.

We now understand the opinion of the Tosafot. They maintain that one cannot derive the body proper from the accessories. The only source for the prohibition of the body, of which the skin is part, is *egla arufa*, and hence the skin, which is permitted in sacrifices and in *egla arufa*, is permitted in the dead as well. Similarly, the Tosafot can answer the Ritva's question based on the comparison to hair mentioned above. Hair, the Tosafot will claim, is not an integral part of the body and hence is to be considered an accessory, like the shrouds, which are indeed forbidden. Skin, precisely because it is a more integral part of the body, can only be prohibited by derivation from *egla arufa*, which fails in this case. One cannot, according to the Tosafot, derive an integral part of the body from an accessory, and it is precisely on this point that Rabbenu Tam disagrees.

The conclusion is that skin donations are permitted by the Torah, not only according to the Tosafot, but according to the opinion of Rabbenu Tam as well. We have seen that the basis of Rabbenu Tam's prohibition is the comparison to accessories, which are based on the honor due the deceased, and can therefore be waived by the deceased himself. Furthermore, this

permissibility is based not on *pikuach nefesh* but on the fact that when the deceased waives the honor due him, there is no Torah prohibition at all.

## 2. Benefiting From Skin in a Nonordinary Manner

There is a further matter which requires clarification. We need to determine if the prohibition of benefiting from a dead body includes benefit in a nonordinary manner (*shelo kederech hana'ata*), as medical treatment is considered halachically to be a nonordinary use.

According to the *Gemara* (Pes. 24b), any prohibition derived from a verse phrased in terms of eating, such as 'You shall not eat ...' etc., includes only the ordinary benefit from that object. The Tosafot in a number of places state that nonordinary use is not prohibited even by rabbinic decree (Kid. 56b; cf. *Mishne LeMelech, Yesodei HaTorah* 5,5 and *Sha'ar HaMelech, Hilchot Ishut* ch.5. The Tosafot A.Z. 12b however states that there "is some prohibition", although not from the Torah.) The Tosafot in *Pesachim* (26a) state that Temple property (*hekdesch*) is prohibited only in the ordinary manner, as *hekdesch* is derived from tithes, where the prohibition is phrased as one of 'eating'. Hence, as *egla arufa* is derived from sacrifices (*hekdesch*) and the dead from *egla arufa*, it follows that in both cases nonordinary uses are permitted. This explains why the Rambam, in his list of those prohibitions forbidden even for nonordinary uses, does not mention *egla arufa*.

The Tosafot (A.Z. 12b) raise the possibility that idolatrous sacrifices are forbidden in nonordinary uses, since the term 'eating' used in connection with them appears only in the Prophets and not in the Torah. R. Akiva Eiger asks why the Tosafot needed to raise such a possibility. They should simply have said that idolatrous sacrifices are derived from the dead (ibid.) and the *dead are forbidden even for nonordinary uses*. The answer would seem to be that the Tosafot contend that the dead are not forbidden in nonordinary uses, as we stated above.

The basis for the assertion of R. Akiva Eiger that the dead are forbidden even in nonordinary uses would appear to be the *Gemara* in *Pesachim* (25a). Abaye states that a milk-meat combination is prohibited for use even in a nonordinary manner despite the fact that all the suggested sources for the derivation of the prohibition of milk and meat, such as *chametz* or *orla*, are themselves forbidden only in the ordinary manner. The reason given is that "for this very reason (a term of) 'eating' is not written by it — to indicate that it

is prohibited even in the nonordinary manner". In other words, any prohibition derived from another will automatically include nonordinary uses irrespective of the nature of the source of the prohibition. By this logic, both *egla arufa* and the dead will be prohibited even in nonordinary uses. Similarly, the statement of the Tosafot mentioned earlier that *hekdesch* is not prohibited for nonordinary uses as the prohibition is derived from tithes is contradicted by this passage. (cf. *Sha'ar HaMelech, Hilchot Yesodei HaTorah* ch.5; *Sha'agat Aryeh*,76; *Ahiezer* III,83,4). Abaye's ruling concerning milk-meat combinations is quoted by the Rambam (*Hilchot Yesodei HaTorah*, 5,8). Why do the Tosafot appear to ignore it?

The Tosafot apparently find Abaye's logic impossible to accept at face value. How can an effect be greater than its cause? A derived prohibition cannot be more inclusive than its source. While it is true that the term "eating" does not appear in the formulation of the prohibition, that is because there is in fact no formulation whatsoever of the prohibition — it is completely derived from another source. It follows logically that the nature of the prohibition should be completely dependent on the source and cannot exceed it in scope. The Tosafot therefore conclude that Abaye was speaking only in the case in question. The reason is that milk-meat combinations could have been derived from the prohibition of mixed species in the vineyard (*klai hakerem*) which is forbidden in nonordinary uses (Tosafot Pes. 25a d.h. "*Klai Hakerem*"), but this derivation is not conclusive (Tos. ibid. d.h. "*Ma Liklai Hakerem*"). Only in such a case does Abaye claim that the lack of an explicit term of "eating" indicates that one should prefer the derivation from the source which includes nonordinary uses (*klai hakerem*) to the other possible derivations which do not. However, in a case where the derivation is solely from a source which includes only ordinary uses, Abaye's rule does not apply. Therefore, there is no problem concerning the opinion of the Tosafot about *hekdesch* or about the dead. In both cases, it is logical to conclude that nonordinary uses are permitted.

The *Ahiezer* (III,83,4) points out the contradiction between the Tosafot in *Pesachim* quoted above (which states that *hekdesch* is not forbidden in nonordinary uses), and the Tosafot in *Sanhedrin* (80a, d.h. "*Shor*") which forbids the use of the fat of a sacrifice for medicinal purposes, which is the classic nonordinary use. His solution is to distinguish between benefit which consumes the object, as is the case in *Sanhedrin*, and an external benefit, such as

sitting in the shade of a sacred object, which does not actually deplete the object, which is the case of the Tosafot in *Pesachim*.

The logic of the distinction would appear to be as follows. There are two different types of prohibitions involved in *hekdesh*. One, based on the divine ownership of *hekdesh*, is a monetary one, similar to stealing in the case of interhuman relations. The other, based on the sacred status of the *hekdesh* object, is a formal use-prohibition, similar to milk-meat, forbidden wine etc. That there is, aside from the usual sort of prohibition, a monetary aspect to *hekdesh* is explicitly mentioned by the Tosafot (Ket. 30b d.h. "Zar").

In the case of benefiting from the shade of *hekdesh*, where no consumption of the object is involved, there appears to be no monetary violation at all, just as in the corresponding case between two people, if one sat in the shade of the other's wall, it would not be a case of stealing. In such a case, the violation of *hekdesh* is only the formal one, which, as it is derived from tithes, shares the latter's characteristic of being limited to ordinary uses. However, in a case where the benefit is consumptuary, the Tosafot claim there is no distinction to be made as to the manner of the benefit, whether ordinary or not, just as in a case of stealing, there would be no difference as to the manner of the taking.

In the case of *egla arufa*, the derivation from sacrifices is from the formal aspect of the prohibition, since there is no relevance in *egla arufa* to the monetary aspect of *hekdesh*. This is indicated by the phrasing of the comparison to sacrifices mentioned by the *Gemara*, "Atonement is mentioned in (*egla arufa*) as in the sacrifices". It is the formal sacred status, rather than the monetary one, which is common to both of them. Hence, the prohibition in *egla arufa* and ultimately in the dead is limited to ordinary uses, just as the formal aspect of the *hekdesh* prohibition is so limited.

This applies in the case of the body proper. In the case of the skin, which according to Rabbenu Tam is forbidden by derivation from idolatry, which includes in its prohibition nonordinary uses (Rambam, *Hilchot Yesodei HaTorah*, 5,7), the case would seem to be different. However, we have already seen that the prohibition of skin according to Rabbenu Tam is based on the honor of the dead and can therefore be waived.

We may therefore draw the following conclusions.

1. If consent has not been obtained from the deceased prior to his death, the opinion of Rabbenu Tam is that there is a Torah prohibition in using the skin, even though the use is considered to be a nonordinary one. It would therefore only be permissible if there were a case of mortal danger present before us.

2. If consent has been obtained, then Rabbenu Tam agrees that the derivation from idolatry no longer applies. Even were one to argue that Rabbenu Tam would then apply a derivation from *egla arufa*, in contradistinction to our argument in the first section, it would still be permissible to benefit from the skin in a nonordinary manner, such as skin transplants. There would remain the question of whether a rabbinic prohibition exists in such a case, but for a medicinal use that question is irrelevant, as the rabbinic prohibition is definitely suspended for treatment of even a nonmortal medical condition. This is mentioned explicitly in the *Gemara* (Pes.25b), "Ravina applied a salve of *orla*" origin to his daughter". Hence, a skin transplant under such conditions would be permissible not only in a case of *pikuach nefesh* but for any patient, and it would be permissible to maintain a prior supply of skin for this purpose.

### 3. The Obligation to Bury Skin

We must still consider the question of the obligation to bury limbs of the body with regard to skin, as well as the prohibition of delaying burial, as the transplant prevents the fulfillment of these obligations.

From the discussion of the commentators (Nid. 55a), who raise the prohibition of benefiting from the dead as the only problem, it would appear that there is no other applicable Torah prohibition. The question is, why does the Torah obligation of burial not constitute a problem as well?

The answer seems to be based on the assertion of the *Mishne LeMelech* (*Hilchot Avel* ch. 14) that the obligation of burial applies only to an intact majority of a body (*roshe verubo* — "his head and the majority of him"). He quotes the opinion of the *Tosafot YomTov*, who explains that the volume equivalent of an olive is the the minimum amount necessary for liability in a case of transporting the dead on Shabbat because that amount of human body would have been put aside for the purpose of burial, implying that there exists a Torah obligation to bury even a part of a dead body. However the *Mishne LeMelech* quotes an explicit proof from the *Yerushalmi* to prove his point.

It would appear that the *Tosafot YomTov* agrees that the obligation of burial applies only to a majority of the body, as proven by the *Yerushalmi*. However, aside from the obligation of burial, there exists an obligation to prevent dishonor to the dead. For this it is sufficient that the body be put aside

honorably. This distinction derives from the *Gemara* (San. 46b) which states that burial is for the purpose of atonement, as the purpose of preventing dishonor would be served if the deceased were “lying on his bed in honor”. Undoubtedly, this refers to a private and sealed-away place. The *Tosafot YomTov* intends to include in *this* obligation even the amount of an “olive”, and this is the meaning of the term “put away” (*lehatzniyo*) that he mentions. The obligation of burial proper is not included.

The Ran (Hul. 122a) questions why the *Gemara* needs a rabbinic injunction in the case of human skin, to prevent a case where one might “use his father’s skin to make a blanket for his mule”, when there is a Torah prohibition of benefiting from the dead. In reply, he quotes the Ramban as explaining that the *Gemara* never considered the possibility that someone would deliberately utilize human skin in this manner. Rather, “because it is dear to him, a person would save his parent’s skin to mourn over it before him, and in so doing, he transgresses (the prohibition of) delaying burial, as well as dishonor (to the dead)”. It appears from this that the Ran’s opinion is that there is an obligation to bury skin.

But this conclusion is untenable. The Ran’s purpose was to avoid the Torah prohibition of benefit from the dead, but in so doing he has only managed to substitute another prohibition. The question still remains why the *Gemara* spoke only of a rabbinic injunction. It must be that his intention is not that a person might delay burial of the skin alone, but that in order to accomplish his purpose with regard to the skin, a person might inadvertently come to delay burial of the body itself. The rabbinic injunction is the prohibition of saving the skin in order to prevent an unintended delay in the burial of the body. This is borne out by the continuation of the quote from the Ramban. “...This is the meaning of the *Gemara*: We fear lest he strip the skin of relatives to mourn over them, and after a time come to make of them a blanket, either he or someone else who would not recognize that they were of human origin”. The possibility that he might forget the origin of the skin is surely a very farfetched one, while the problem of burial of the skin, if indeed there is such an obligation, is implicit in the very act of saving the skin. Why then should it be necessary for the *Gemara* to refer to such a rare possibility when there is always the problem of the burial of the skin? This proves that there is no problem in the nonburial of the skin itself, but only a fear that it might lead to nonburial of the body proper. Since this is a mere possibility, the *Gemara* adds another one — that the skin might be used for making a blanket.

It is clear that there is no obligation to bury the skin. In the case of a medical transplant, to save a life or to treat pain, the problem of dishonor to the dead does not obtain. Since the prohibition of benefit from the dead does not apply in the case of a donation made before death, at least for nonordinary uses, there is no impediment to utilizing the skin even in cases that do not involve danger to life. It will also be permissible to establish a bank to maintain a ready supply, as before the use there is no benefit and hence no prohibition, and, at the time of use, the benefit is permitted, as explained above.