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THE MILK CONTROVERSY

Generally, a detailed halakhic discussion of a serious communal kashrut issue should take place in a halakhic journal rather than a "journal of Jewish thought." The arguments are often technical and involve a competence in halakha usually limited to those who deal with these matters on a professional basis. However, this summer's public controversy on the kashrut of milk was played out in the press, leaving many people confused as to the issues involved. It therefore seems appropriate to outline the main issues for readers of *Tradition*.*

The controversy centered around some of the surgical procedures used to treat milk-cows for left displaced abomasum (LDA). There was a fear that one of the procedures, in which a needle is used to puncture the abomasum (*keva*) to allow built-up gas to escape, rendered the cow *treifah* and, hence, its milk not kosher.

A good part of the discussion involved a responsum by Rabbi Yehuda Assad (*Yehuda Ya'ale*, YD 60) which held that even if a needle is inserted at a slant (*be'alakhson*) with the resulting hole closing up immediately, the animal nevertheless is considered a *treifah* because of the single moment during which there was an actual hole. But the present surgical method of treating LDA involves puncturing the *keva* in a completely different way from that dealt with by Rabbi Assad, one that does not render the cow a *treifah*.

When a number of different skins surround an organ, the hole has to penetrate *directly* through all skins in order to render the animal *treifah* because of *nekuva* (YD 49:1, *Shakh* 1). If the holes in the different layers are not directly in line with each other (*ze shelo keneged ze*),

*This article is predicated on my discussions with my colleague, Rabbi Yisrael Belsky. He will present a fuller treatment of this subject, complete with references and footnotes, in a forthcoming issue of the UOJCA's Hebrew-language halakha journal *Mesorah*. But even the discussion here should demonstrate that the UOJCA's ruling that the milk was kosher was based not on leniencies, relaxation of the rules, *hefsed meruba*, or similar considerations but on firm halakhic ground.

there is no controversy that the animal remains kosher. Indeed, in the procedure under discussion here (omentopexy), in which an incision is made in the right flank of the animal, if the *keva* must be punctured, care is taken to push the needle through the first layer and then stretch the skin so that the needle penetrates the next layer at a point not directly behind the hole in the first layer. The same thing applies to the third layer.

Thus, in virtually all of our cases, three different holes are created which are then only artificially lined up for a moment or two so that the gas may be pumped out. This does not render the animal a *treifah*, as the anatomical wound is not a puncture directly through the *keva*, making the whole discussion about puncturing the *keva* irrelevant. So too is the claim that air entering the *keva* through a hole renders the animal non-kosher. The halakhot of *treifah* have nothing to do with the motion of air from outside to inside the *keva*, but only with the wound itself, which in this case is outside the parameters of *treifah* (Rambam, *Ma-akhalot Assurot* 11). (We have omitted a discussion about the puncturing of the *keres* because, with an incidence of less than one in 200, it is so uncommon today.)

On another issue, *poskim* (YD 36) quote Rashi (*Yevamot* 76a, s.v., *lim'utei*, and other places) and other Rishonim regarding a hole in an organ which has been rendered *treifah* by *nekuva* and then attains a *stima ma'alyuta*, i.e., it has healed to the point that the hole is perfectly closed and will never open again. In general, they hold that such an animal is not a *treifah* (*Taz* 36:6). While there is an opinion that holds that such a situation renders the animal a *treifah*, *Shakh* (57:48) and virtually all *poskim* hold that whenever there is a disagreement as to whether a particular condition renders an animal a *treifah*, we rely on the evidence of the survival of *yud bet hodesh* (twelve months) to prove that it is not a *treifah*. Since virtually all of the animals on whom the operation is done properly survive for more than twelve months, we follow Rashi and the others that these animals are not *treifah* because of *stima ma'alyuta*.

Furthermore, some (*Shakh* 36:6) of those who argue that a *stima ma'alyuta* does not negate the status of *treifah*, do so only when the closure was made by a growth that came after the hole was exposed. However, if the hole was sealed from the very beginning (i.e., there was never an exposure at all), they agree that the animal is not a *treifah*. They reason that as there is always something blocking off the hole, we consider the hole to have never penetrated the walls of the organ. When the surgical procedure calls for suturing, toggling, or blind stitching to attach the wall of the *keva* to the abdominal wall, there was never any

single moment when there was an open hole going through and through. It would follow, then, that all agree that these procedures do not render an animal a *treifah*.

We should also note the opinion of *Shoel uMeishiv* (vol. 3, 87) and others, who hold that a hole renders the animal a *treifah* only when it was made through accidental or intentional damage or by disease. However, a hole made during a healing procedure was excluded by Hazal and does not render the animal a *treifah*. Again, even taking into consideration those who rule differently, this question is considered a disagreement among the *poskim* and we follow the rule of evidence of twelve month's survival.

Another issue involved here is the general question of the effect of an incision which may temporarily render the animal a *treifah* and which is then healed by a procedure which wasn't practiced at the time of the Talmud. This issue is of concern because one of the procedures used in treating LDA involves an incision in the abdomen at a point which would be considered *basar hahofeh et rov hakeres*. There is no dispute among Rishonim that such an animal, when healed, is not a *treifah*. The maxim (*Hullin* 68b) which says that an animal can never be restored to kosher status once it has become *treifah* is widely misunderstood as presenting a halakha rather than simply stating a fact. As *Ran* explains (11a in the *Rif*), *Hazal* meant that any type of *treifah* damage that could be healed by any known medical procedure is not a *treifah*, even when there is a hole, a rip, or destruction of an organ. The animal in question would not be considered *treifah* even *prior* to the healing by the mere virtue of the potential of healing. Only that type of damage which cannot be healed can render an animal a *treifah*. Thus, by definition, a *treifah* is a condition which can never be restored, and this is the meaning of the maxim. (For a fuller discussion of this issue, see Rabbi Belsky's article in *Torah veDaath's Hamesivta*, 5741 [1981].)

The implication seems to be that if we were to discover a new procedure which was unknown at the time of the Talmud, it would remove that type of damage from the list of *treifot*. *Hazon Ish* (YD 5) held that the original list of *treifot* can never be altered because those conditions were classified as *treifah* at the time of *Mattan Torah*. However, if the condition *actually disappears* and the animal is completely restored, it is no longer a *treifah* because the condition no longer exists. This principle is discussed at great length in *Torat Yekutiel* (#54) and in other sources.

Another important consideration in our discussion is the actual prevalence of the various procedures. Many who discuss this issue cite facts supplied by Cornell University. These statistics were not based on

a broad country-wide study, but rather on the practice of the veterinarians at Cornell who treat many of the cows of the local farms. As this is a teaching facility, the *keva* is often punctured in order to demonstrate the procedure to students. However, our interviews with doctors in many areas indicate that every surgeon's method is unique and that most of the doctors assiduously avoid puncturing the *keva*, because of the attendant risk of peritonitis. Furthermore, even among the minority who do make the puncture, some make it in the small inside curve of the *keva*, a part which is covered by permitted fat, which would not render it a *treifah* (unless the fat was ruptured to the point of leaving the flesh permanently exposed (*P'ri Megadim* YD 46 SD 2), which does not occur in our case).

The animal's medical records show only that an omentopexy was performed, but not whether the *keva* was punctured. Therefore, it is impossible to discover, either by reading the records accompanying the animal or by examining it, whether there was indeed a puncture. Because of that, we rely on the halakha of *rov* (majority), just as we do with all animals. It is true that when an animal is examined after the *shehita*, it might be found to be *treifah*. But we can't perform that examination when the animal is alive and we must therefore assume that each and every animal is a member of the majority and its milk permissible. So too, even if we know that a particular animal has had an omentopexy, since it is impossible to determine if its *keva* was punctured, standard halakha tells us to assume that it is among the majority. Of course, all of this is aside from the fact that, generally, the type of puncture that is made doesn't make it a *treifah* at all.

(Actually, we are aware that, in general, *more than 10%* of animals are *treifah*. There is a rabbinic requirement to check the lungs of all animals after slaughter because *treifot* of the lungs, as opposed to other organs, are considered to be a *mi-ut hamatsui*, a prevalent minority occurrence. Despite the fact that there is a *rov* of kosher animals, a *mi-ut hamatsui* is statistically significant according to rabbinic law. The requirement to check the lungs shows that we concede that the threshold of *mi-ut hamatsui*, which *Mishkenot Yaakov* places at 10%, has been met. Cows, in fact, have a much greater *treifah* rate than even steers, and despite that we have for countless generations relied on the principle of *rov* and have continued to drink milk. Indeed, the question of *treifah* regarding LDA is less problematic than the general problem of *treifah* in all cows where there are many more concerns, such as *treifot* in the lungs and reticulum.)

Generally, we have maintained the position that there is strong

reason to doubt that any significant percentage of the cows are actually rendered *treifah* by the LDA procedure. In every single case, without exception, the majority portion of any sample of milk is permissible *mideoraita* because of *bitul berov*, as all the milk from the same farm is mixed together *min bemino*. Rabbinically, there is a requirement that the milk be nullified by a preponderance of sixty parts against any questionable milk. There is significant doubt about any claim that this requirement has not been met. (This is because we do not have reliable statistics on either the actual number of procedures being done or on the number of cows rendered *treifah* by the LDA procedure.) The halakha is that *safek shishim bemin bemino* is permitted (YD 98:2).

Moreover, even if we did not have sixty parts against the questionable milk, there is *bitul berov bemin bemino* on the *deoraita* level, and hence we are dealing with only a rabbinic question. The issues that I have presented above certainly establish that there is a *safek* as to the validity of any halakhic argument challenging the kashrut of the milk. In rabbinic matters, we follow *safek rabbanan lehakel*. It is true that *Shakh* (101:19) holds that in cases like this where the question derives from one that is biblical (the kashrut of the cow), the fact that the issue now presents itself in rabbinic form (*bittul*) does not allow it to be treated *lehakel*. Nonetheless, *P'ri Megadim* and R. Akiva Eiger (responsum no. 79) hold that when the issue arose (*noda hasafek*) after the mixture, we treat the question as a rabbinic one and rule *lekula* in cases of *hefsed meruba*; other opinions hold that it is permitted even without *hefsed meruba*.

We have not attempted to discuss all of the relevant arguments in this short article, and the reader literate in the minutiae of the laws of kashrut should consult Rabbi Belsky's forthcoming article.