



What's Changed?

One of the recurring questions in Halacha is how to reconcile Halachos that are predicated upon premises that are inconsistent with modern scientific knowledge, particularly in medicine. There are two main issues raised by these conflicts:

1. How should we interpret *Divrei Chaza"l* when they appear to be erroneous?
2. How should we apply *Halacha l'Ma'aseh* in these cases? Do we continue to practice according to *Chazal's* assertions, even though they seem to be based on incorrect assumptions, or do we modify the Halacha to reflect the modern understanding?

We have dealt with this extensively in past essays and will not repeat the entire discussion. Those essays can be reviewed on our website.¹

This essay will focus on a slightly different question, though equally fascinating from the standpoints of both *Metzius* and Halacha: How should we apply *Halacha l'Ma'aseh* in cases where the *Metzius* may not have changed but scientific and technological advances have dramatically improved medical outcomes from what *Chaza"l* experienced?

When a baby is born on Shabbos, the *Shulchan Aruch* rules (*O.C.* 330:7):

Anything that is needed for a newborn baby may be done for him...This is true of one born at nine or seven months [after conception], but [if a baby is] born at eight months (a "Ben Shmoneh") or it is uncertain whether it is seven or eight months [after conception], we do not desecrate [Shabbos] for it unless its hair and nails have completely developed.

The source of this Halacha is a *B'raisa* in *Maseches Shabbos* (135a):

The Rabbis taught: [If] a child is born at seven months [after conception], we desecrate Shabbos on its account. [If it was] born at eight months [after conception], we do not desecrate Shabbos on its account. If there is a doubt if it was born after seven or eight months, we do not desecrate Shabbos for it. A child born after eight months has the status of a stone, and it is forbidden to move it. However, its mother may bend over and nurse it due to Sakana.

In other words, based on the current scientific knowledge, *Chaza"l* determined that a fetus is considered to have had a full-term gestation at the end of either the seventh month or the ninth month of gestation, but never at the end of the eighth month

¹ See the three-part series "*Chaza"l & Science*" (*Shemos, Vaeira, Bo* 5782) and *Lech Lecha* 5780.

(and certainly not earlier than seven months). A baby born at the end of the eighth month was certain to die, leading to an important Halachic stringency that it was forbidden to desecrate Shabbos on its behalf.

However, as *Tosfos* point out (*ad. loc. s.v. "Ben"*), there is an important exception, described by the Gemara in *Maseches Yevamos* (80b).² A fetus may complete its development in the seventh month, but then "wait in the womb" until the eighth month, and it would not be a *Ben Shmoneh* and could potentially survive.

How can it be determined if a fetus completed a seven-month gestation and had a delayed birth or was an actual *Ben Shmoneh*? The hair and nails of a *Ben Shmoneh* are not healthy and developed; if they are healthy, it is a sign that the baby is not a *Ben Shmoneh*.

(The *Rosh*, followed by the *Shulchan Aruch*, ruled like *Tosfos*. However, the *Gra* disagrees and rules that if the child is not yet thirty days old, one may not desecrate Shabbos on its account even if its hair and nails were fully developed, although it may be moved.)

The *Metzius* today does not correlate with the Gemara; many children are born after eight months of gestation and are perfectly healthy. Moreover, with the advances in modern neonatology, newborns can survive even if they are born after only five or six months, and certainly if they completed eight months of gestation. Has the *Metzius* actually changed such that Halacha would also change? How should we relate to the advances in medicine, including both technology (e.g., incubators and ventilators) and medications (e.g., surfactant) that allow for the survival of extremely premature infants?

The first to address this subject was the author of *Imrei Yosher*³ (1:177:2):

Regarding his question about Orach Chaim 330 that we do not desecrate Shabbos on account of a fetus whose hair and nails were not fully developed. Now that there has been the invention of the device in Paris and other big cities [such] that even an absolute Nefel whose hair and nails are not fully developed [is warmed] for the period during which it develops and it survives. What would the Halacha be regarding Shabbos?

The "device in Paris" mentioned by the *Imrei Yosher* is the incubator. In his *Teshuva*, he is skeptical of its efficacy, pointing out that it may only help a little bit, which is insufficient to alter the Halacha. However, there is clearly no comparison between

² The Gemara there records a *Machlokes Tana'im* about this matter.

³ R' Meir Arik zt"l (1855-1925), Rav of Jazłowiec and Tarnow.

the practice of medicine at the turn of the 20th century and modern neonatology over 120 years later. We will return to this point shortly.

The first of the contemporary Poskim to discuss this issue in light of the current *Metzius* was the *Chazon Ish zt"l*, who devotes a few brief words to it, quoted below. As it happens, the *Sefer Ma'asei Ish* relates that the *Chazon Ish* began relating to the subject after he was informed of a contemporary *Ben Shmoneh* who had survived and developed normally. He allegedly wrote an entire *Kuntres* on this topic, though, unfortunately, it does not appear to be available and is not clear whether it was ever published.

Some mistakenly believe that a child born before nine months is a Nefel and give up on it and do not act with urgency to treat it. But this is a mistake. Any child whose hair and nails are fully developed is a possible Ben Kayama (viable infant), and, according to some Poskim, is a definite Ben Kayama, and one is obligated to treat it, and to desecrate Shabbos [if necessary]. They testify that now many Ben Shmoneh [infants] survive. (Chazon Ish, Yoreh De'ah, Hilchos Mila, 155:4)

In other words, the *Chazon Ish* noted that today a *Ben Shmoneh* can survive and ruled that we must desecrate Shabbos on its behalf and not treat it like a *Nefel*. However, this can only be determined by checking its hair and nails. As mentioned, *Tosfos* assert that fully-developed hair and nails indicate that the child was not a *Ben Shmoneh* **but** a *Ben Shiva* that waited a month before birth. Is this the basis for desecrating Shabbos to treat a “*Ben Shmoneh*” today? The *Chazon Ish* continues:

In earlier times there was a minority that completed [gestation] at seven months... but the majority was at nine months. However, they did not complete [gestation] at eight months, thus they said, “It is a Ben Shiva that stayed [in the womb].” It would seem that today the Metzius has changed, as determined by doctors – it is possible that [the fetuses] continue to develop after seven months and complete gestation at eight.

In other words, there is no need to assume that children today that are born during or after eight months of gestation had actually completed their gestation in seven months but their delivery was delayed. Today, the *Metzius* has changed and some viable fetuses have an eight-month gestation.

The *Chazon Ish* provides another example in which the *Metzius* has changed. The *Shulchan Aruch* rules (*E.H.* 156:4):

One who dies and leaves behind a pregnant wife: If she miscarries, she must undergo Yibum. If she gives birth and the child emerges into the world alive, even if it dies when it is born, she is exempt from Chalitza and Yibum. However,

mi'd'Rabbanan [she is only exempt] when it is known with certainty that it completed its months and was born after nine full months.

The *Rema* quotes another opinion:

Some say that today, even if she began the ninth month, [even] only by one day, the fetus is a Ben Kayama. Though the Gemara states that a woman who gives birth in nine months does not do so in partial months, many have already expressed surprise at this for the Metzius contradicts this. We must say that today matters have changed, as is the case with many matters (Beis Yosef, citing the Tashbetz).

The cases are very similar. Just as the *Rema* asserts that the *Metzius* has changed with regard to giving birth in partial months, the same is true of a *Ben Shmoneh*. If so, there are two possible reasons why the Halacha of a *Ben Shmoneh* is different from the ruling of the *Gemara* and *Shulchan Aruch*:

1. The *Metzius* has changed; a *Ben Shmoneh* can survive, unlike in the past.
2. *Refua* has progressed and can be relied upon when it comes to the viability of a *Ben Shmoneh*. The chances of its survival are high, unlike in the times of *Chazal* when medical care was not as advanced as it is today.

For both of these reasons, Shabbos should be desecrated on account of a *Ben Shmoneh*.

The *Minchas Yitzchak* (4:123 and 10:33:13) writes at great length of multiple reasons for leniency to establish that the Halacha has changed from that stated by the *Gemara* and *Shulchan Aruch* due to the availability of incubators. His conclusion is clear: There is no comparison between the incubator used in the times of the *Imrei Yosher* and those in use today. (We should add that today there are also many other devices and medications that improve the prognosis of premature infants.) One should therefore definitely desecrate Shabbos for a *Ben Shmoneh*.

There is a big difference between the approach of the *Chazon Ish* and that of the *Minchas Yitzchak*. In general, incubators are widely available, but would we still desecrate Shabbos for a *Ben Shmoneh* if no incubator was available? According to the *Chazon Ish*, the *Metzius* has changed independent of medical advances, and we would desecrate Shabbos for an extremely premature infant and *Ben Shmoneh*. According to the *Minchas Yitzchak*, the only basis for leniency is the advanced medical technology and capability, in the absence of those resources, a *Ben Shmoneh* will not survive and one may not desecrate Shabbos on its account.

The *Shemiras Shabbos Kehilchasa* (Chapter 36, footnote 26) notes this distinction between the two approaches in the name of Rav Shlomo Zalman Auerbach *zt"l*. However, he also quotes that Rav Shlomo Zalman held that if the child's hair and

nails are fully developed, one may rely upon the aforementioned argument of *Tosfos* (and codified by the *Shulchan Aruch*) that it is likely a *Ben Shiva* that “waited” a month before birth. However, in the case of an infant born after six months where this argument is inapplicable, one may set aside *Hilchos Shabbos* where there are facilities to treat him, as per the *Minchas Yitzchak*.

Rav Shlomo Zalman’s intent was that the *Chazon Ish* only argued that the *Metzius* had changed in the case of a *Ben Shmoneh*, not a *Ben Shisha* or *Chamisha* which are both considered a *Nefel* by the Gemara. In their case, we have no proof that the *Metzius* has changed; they will not survive without significant medical intervention. Therefore, we can only permit *Chillul Shabbos* when an incubator and advanced medical care is available.

In practice, the Poskim have concluded that Shabbos should be desecrated for all prematurely born infants, for both of the reasons explained above. In addition, there are often doubts as to the situation, for example: what is considered “fully developed” with regard to nails and hair (premature infants often have hair and nails that are only developed partially)? Determining the actual length of gestation can also sometimes be difficult.⁴

⁴ See *Shevet haLevi* 3:141 and 8:89:7.