



Tiny Beginnings: Halachic Considerations on Prematurity and Incubators

Medical and technological advances have raised many Halachic questions that the earlier Poskim did not contemplate. Some have become the subject of immense debate, such as paternity testing or determining maternity in cases of assisted reproduction or gestational carriers. In other cases, Poskim have broadly accepted information revealed by laboratory testing and the like.

For instance, determining the gestational age of *Nefalim* (stillborns or babies who pass away within thirty days of birth) has implications for *Avelus*:

One does not mourn over a baby for the entirety of thirty days, including the thirtieth day itself, even if its hair and nails are fully developed. From that day on, one does mourn over it, unless it is known to have been born after eight months (of gestation). If it is known that its gestation was complete, such as if they cohabited and then abstained, and the baby was born alive after nine full months, even if it dies on the day of its birth, one mourns for it. (Shulchan Aruch, Y.D. 374:8).

In other words, a baby can only be considered a “*Ben Kayama*” if it is born after nine definite months of gestation. If the length of gestation is not certain, the baby must survive longer than thirty days to be considered a *Ben Kayama*. According to the *Shulchan Aruch*, the only way to be certain of this is if the husband does not cohabit with his wife during the pregnancy and the baby is born nine months after their last intercourse.

Today, there are two reasons that *Avelus* should be conducted in other cases as well:

1. Even if a baby is born before nine complete months, its chances of survival are far greater than in earlier times due to medical advances. Although Halacha determines that a baby born after eight months should be considered like a corpse and Shabbos may not be desecrated to treat it¹, this is no longer the case.² If so, the same should apply to the Halachos of *Avelus*. For this reason,

¹ *Talmud Bavli Shabbos 135a*

² In our essay on *Ki Sisa 5783*, we discussed whether this is due to the notion of “*Nishtanu haTeva'im*” – nature has changed, as asserted by the *Chazon Ish* – or due to the superior medical care possible due to incubators and other technological and scientific advances.

Rav Elyashiv *zt"l* concluded that *Avelus* should be observed for a (formerly) premature baby that died, under the assumption that it could have lived with appropriate treatment.³ (However, if it did not survive the NICU [even if it lived for longer than 30 days], we can assume that it was indeed a *Nefel*, and *Avelus* is not observed.)

2. Even if the parents did not abstain from intercourse during the pregnancy, we can determine the length of a pregnancy through imaging (typically with an accuracy of plus or minus one week). If scans show that the pregnancy was nine months, *Avelus* would apply.

As quoted above, the *Shulchan Aruch* rules that if it is unclear whether the pregnancy was eight or nine months, *Avelus* is only observed if the baby survives for longer than thirty days. What if it reached this age only because it had been placed in an incubator?

On one hand, one could argue that since the incubator imitates the conditions of the uterus to a degree, survival of thirty days does not indicate that it was a *Ben Kayama*. On the other hand, perhaps surviving for thirty days outside of the uterus is enough for us to consider it not to be a *Nefel*, regardless of the circumstances.

To answer this question, we will first address another case: A baby was extremely sick (though it was not placed in an incubator) but managed to survive for thirty days, although it died soon afterward. The *Maharam* (*Shu"t* 67) rules that if its condition progressively deteriorated and it had always been sick, "and it is clear that it was not a *Ben Kayama*", one does not observe *Avelus* even though it managed to survive for thirty days.

R' Shmuel Wosner *zt"l* argued that the same should apply in our case. Since the baby cannot survive without the incubator, it is clear that it is not a *Ben Kayama*. It should therefore have the status of a *Nefel*, and *Avelus* should not apply.

R' Wosner adds (*Shevet haLevi* 3:143) that although the *Maharam* was only lenient due to the presence of two other mitigating factors, that was only with a "regular" sick baby:

Those dependent on an incubator, where it is nearly certain that they would not survive for more than a few days without it and were born as absolute Nefalim who have no way of surviving naturally in the world, but some complete their development there and go on to live, revealing that they were Bnei Kayama, as I have discussed elsewhere. But in our case and similar cases where upon

³ [Editor's note: This ruling of R' Elyashiv *zt"l* seems to be predicated on the assumption that the death of a premature infant following discharge from the neonatal intensive care unit (NICU) can be attributed to the proximate illness and not prematurity.]

removing them from the incubator they die after several days – it is clear that they have the status of Nefalim.

R' Vosner's words are simple in principle, though they are a *Chiddush*. Since the "rule" of thirty days is used to determine whether the newborn is a *Ben Kayama* or a *Nefel*, and in this case, it is evident that the baby is not a *Ben Kayama*, it is a *Chiddush* to say that this baby is considered a *Ben Kayama* once it has survived for more than thirty days after delivery. It is worth appending R' Shlomo Zalman Auerbach zt"l's arguments in *Minchas Shlomo* (2:99). First, he states that in the case of a baby born after eight months – for whom Shabbos may not be desecrated according to *Dinei Chazal* – we should be *Mechalel Shabbos* if it can survive in an incubator. Then he adds:

On the contrary, regarding a baby born after eight months that has been living in an incubator for more than thirty days. I thought that since the pregnancy was certainly incomplete, but the warmth of the incubator mostly completes the pregnancy, in some sense (see the Chasam Sofer E.H. 2:69), therefore, there is room to say that even if it dies after thirty days, nevertheless, it transpires that the machine did not succeed in completing the pregnancy, and it should be treated like a baby born after eight months for whom Avelus is not observed. However, I nevertheless do not question the Minhag which is to be stringent about this.

In other words, according to R' Shlomo Zalman, we can view a baby in an incubator as not yet born but that the gestation is being "completed" in the incubator. However, this is only the case if the baby completes its development. If it dies, even after more than thirty days (and there have been at least nine months since conception between the uterus and the incubator), it indicates that the gestation was not completed. It was born prematurely and should be considered a *Nefel*.

Despite the above, R' Shlomo Zalman notes, that he does not wish to dispute the Minhag to be stringent and observe *Avelus*.

R' Elyashiv disagreed with R' Shlomo Zalman's argument, as detailed by R' Yitzchak Zilberstein *shlit"a* in *Toras haYoledes* (p287):

We heard from R' Elyashiv zt"l that we count the thirty days from the birth of a premature baby that was in an incubator and died. Its stay in the incubator is not considered part of the pregnancy – it is simply a device that aids the baby's treatment. Though we see that it was deteriorating, one is obligated to mourn for it if it dies after thirty days...

In other words, just as a sick baby may need life-saving medications and thereby survive for more than thirty days, and may then be considered a *Ben Kayama*,

the same is true of a baby in an incubator. An incubator is one of the means of medical treatment administered in the child's lifetime, not an extension of the pregnancy. The inability to survive outside of an incubator does not prove that the baby is a *Nefel*; on the contrary, the incubator is (hopefully) a means to ensure that it will be a *Ben Kayama*.