



## Fertility Treatment on Shabbos

*"And Hashem blessed them and Hashem said to them, 'Be fruitful and multiply, and fill the land and subdue it..." (Bereishis 1:28)*

Fertility treatments include a wide range of procedures that must often be performed according to a strict timetable. As some of these treatments involve *Chilul Shabbos*, the questions of whether, and how, they may be performed on Shabbos must be addressed. Medical centers, particularly in *Chutz la'Aretz*, often make appointments for patients on Shabbos, either for medical reasons (namely, that the treatment will be more effective on that day) or simply for clinic scheduling purposes (which people are loath to alter, having waited a long time for an appointment).

Fertility treatments entail a great deal of stress and mental anguish, and can impose numerous difficulties in all areas of a couple's life. Discontinuation of a series of treatments due to refraining from treatment on Shabbos can take a heavy toll, both physically and mentally. Therefore, while couples should try and avoid treatments that may involve *Chilul Shabbos*, the Halacha needs to be determined for cases where this isn't possible.

In this essay, we will attempt to classify the Halachic status of patients facing with fertility issues, and examine the ramifications of that determination with regard to treatments on Shabbos.

The most common issues to arise are taking medications (usually prohibited on Shabbos – see the *Shulchan Aruch* 328:1), undergoing injections (which may draw blood) to increase ovulation or performing blood tests to clarify when the next period of ovulation will be (potentially violating *Melech Chovel*), ultrasound scans (which require the use of electricity and the *Melachos* of *Kosev* or *Boneh*), extracting eggs and fertilizing them (also requiring electricity and drawing blood), injection of sperm in cases of intra-uterine fertilization, and returning embryos to the uterus in cases of in-vitro fertilization (both of which require electrical devices).

The fundamental question is whether fertility issues are considered *Choli she'Ein Bo Sakana*. If they are, there are many Halachic ramifications - for example, it would be permissible to take medications on Shabbos, as ruled by the *Rema* (*ibid.* 37). As fertility issues can certainly not be considered *Choli she'Yesh Bo Sakana*, it is certainly prohibited to violate any *Issurim d'Oraisa* in the course of fertility treatment. However,



it may be permissible to instruct a non-Jew to perform *Issurim d'Oraisa*, as *Amira l'Nachri* is only an *Issur d'Rabbanan*.

There is an important *Machlokes* among the Rishonim regarding *Amira l'Nachri*. According to the *Itur* (cited by the *Ran*, *Shabbos* end of Chap. 13), where there is a great need, or for the sake of a *Mitzva*, or to alleviate a great deal of distress, one may ask a non-Jew to perform a *Melacha d'Oraisa*. However, according to most Rishonim, one may only ask a non-Jew to perform an *Issur d'Rabbanan*. This question is discussed by the *Shulchan Aruch* (O.C. 307:5):

*Regarding something which is not a Melacha, and it is only forbidden on Shabbos due to a Shevus (an Issur d'Rabbanan): A Jew may instruct a non-Jew to do it on Shabbos – but only in a case of slight illness, or if there is a great need for it, or for the sake of a Mitzva. How so? A Jew may ask a non-Jew to climb a tree on Shabbos to retrieve a Shofar in order to perform the Mitzva of Tekios, or to carry water through a courtyard that does not have an Eruv in order to bathe a person in distress. Some, however, forbid this.*

The *Rema* notes:

*Below in 586 he permits this. See above in 276 where he cites those who even permit an Issur d'Oraisa – see there Se'if 3.*

According to the *Shulchan Aruch*, one may only ask a non-Jew to perform a *Shevus*.<sup>1</sup> The *Rema* cites the view of the *Itur* that it is even permissible to instruct a non-Jew to perform a *Melacha d'Oraisa*. It is unclear whether the *Rema* means to rule like the *Itur*, or merely to prove that a *Melacha d'Rabbanan* must be permissible given that the *Itur* even permits a *Melacha d'Oraisa*.

Elsewhere the *Rema* clearly expresses his view (O.C. 276:2):

*Some say that one may instruct a non-Jew to light a candle for Seudas Shabbos. This is because they hold that Amira l'Nachri is even permissible for a Melacha d'Oraisa for the sake of a Mitzva (Ran, end of Shabbos Chap. 13, in the name of the Itur). This is the basis for those who are lenient and instruct a non-Jew to light candles for a Seuda, particularly a Seuda of a Bris Mila or Chasuna, and nobody protests it. **However, one should be stringent if there is not a great need as the majority of the Poskim disagree with this view.***

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<sup>1</sup> The *Mechaber* only cites the “*Yesh Osrin*” (“those who forbid it”) at the end of his ruling. According to the general rules of interpreting the *Shulchan Aruch*, this means that he holds that the Halacha is in accordance with the first opinion he cites – “*Stam v'Yesh Halacha k'Stam*”.



According to the *Shulchan Aruch*, one may not instruct a non-Jew to perform a *Melacha d'Oraisa*, even in a case of great need or for the sake of a Mitzva. However, according to the *Rema*, if there is a great need one may be lenient. The *Mishna Berura* (*ibid.*) cites the stringent opinions and appears to side with them. In 307:24 he states so explicitly: “*And this is the basic Halacha – for this view is a sole view and the Rif, Rosh, and Rambam, and many of the Gedolei haRishonim disagree with it.*”

Therefore, we generally cannot permit *Amira l'Nachri* to perform *Melachos d'Oraisa*. However, it is permissible for a *Choleh she'Ein Bo Sakana*, as ruled by the *Shulchan Aruch* (O.C. 328:17):

*A sick person who is bedridden due to his illness, but he is in no danger – one may instruct a non-Jew to treat him. However, one may not violate an Issur d'Oraisa on his behalf ... To violate Shabbos by directly violating an Issur d'Rabbanan – some permit it even if there is no danger to any of his limbs. Other say that if there is a danger to one of his limbs one may do so but if not, one may not [violate an Issur d'Rabbanan].*

The *Mishna Berura* (*ibid.* 47) infers that, according to the *Shulchan Aruch*, a non-Jew may be instructed to perform a *Melacha d'Oraisa* for a *Choleh she'Ein Bo Sakana*.

Generally, a *Choleh she'Ein Bo Sakana* is defined as somebody who is “*Nofel l'Mishkav*” (bedridden). If he is not actually sick but is in pain, the *Rema* (*ibid.*) rules that if he is in great distress due to the pain and his whole body is affected “*though he is moving around, it is as though he is bedridden.*”

Ostensibly, a woman in need of fertility treatments would not be considered a *Choleh she'Ein Bo Sakana*. However, several contemporary Poskim do attribute (at least) that status to her, including *haGaon Rav Asher Weiss Shlit"a*. His arguments are summarized below:

First, he suggests that although it is not usually permissible to violate *Issurim d'Rabbanan* in order to fulfill a Mitzva (including *Issurim d'Rabbanan* of Shabbos – which is why most Rishonim only permit a *Shevus d'Shevus* for the sake of a Mitzva), perhaps in the case of a very important Mitzva like *P'ru u'Revu* it is permissible. *Chaza"l* state that the world was only created for the sake of *P'ru u'Revu* (*Gitin* 41b), and *Tosfos* even permit a person to free his Canaanite slave (which is usually prohibited *mi'd'Oraisa*) so that he can fulfill *Pru u'Revu*. Although most Rishonim disagree with *Tosfos*, it is likely they would agree in cases which only entail an *Issur d'Rabbanan*.

However, Rav Asher concedes that one cannot permit it on this basis without a clear proof, particularly given that the *Noda b'Yehuda* (*Tinyana, E.H.* 35) did not permit an *Issur d'Rabbanan* for the sake of *Pru u'Revu*.



Rav Asher continues:

*Nevertheless, l'Aniyus Da'ati, it is logical to say, that since we find that they permitted a Shevus, in particular the Shevus of Refua for the sake of a Choleh she'Ein Bo Sakana, **it is unlikely that they permitted it for a Nofel l'Mishkav but not to help a person merit to have children.** For a person with no children is comparable to a dead person – and we know the extent of their indescribable pain. Sometimes [childlessness] affects the mental wellbeing of the couple, and [this leads to a] state worse than that of a Choleh she'Ein Bo Sakana. It is, therefore, very likely that one may be lenient in this matter, at least to the degree of a Choleh she'Ein Bo Sakana.*

If so, a range of fertility treatments may be performed on Shabbos, either by means of *Amira l'Nachri* (if the treatment entails a *Melacha d'Oraisa*), or even directly by a Jew (if it is only a *Shevus*).

Moreover, in most cases, no direct instructions need to be offered to the doctors, nurses, or technicians. It therefore is not even considered *Amira l'Nachri* but "*Amira l'Amira*", meaning that the non-Jew is instructed indirectly, or by means of another non-Jew. According to the *Chavos Ya'ir* (46) this is permissible on Shabbos. Though many dispute the *Chavos Ya'ir's* contention (the *Biur Halacha* in 307 rules stringently), the *Mishna Berura* (307:24) rules that in a case of great loss one may rely on the lenient view.

All of the above applies when the non-Jew is performing the *Melacha* entirely. However, in many cases, the treatment requires the active participation of the patient. (For example, a woman may need to position herself in a specific manner for a procedure or scan.) An *Issur* that is performed with a person's active participation is considered, on some level, to have been performed by him – he is considered a "*Mesayei'a*".

There does, however, appear to be some contradiction in the Halachos of *Mesayei'a*. The *Gemara* (*Beitza* 22a) permits a person to allow a non-Jew to apply eye ointment on Yom Tov, though he necessarily opens and closes his eyes to allow him to do so. This is because "*Mesayei'a Ein Bo Mamash*" – the act of a *Mesayei'a* is inconsequential.

However, with regard to *Hakafas haRosh* (the prohibition of shaving all of one's hair), the *Issur* applies not only to the barber but also to the person who is shaved because he presents himself to the barber to perform the act. In this case, the act of a *Mesayei'a* is consequential.



Rav Asher cites two main approaches to distinguish between the cases. According to the *Taz* (321), there is a difference between an insignificant act by the *Mesayei'a*, such as closing his eyes, which is an act he naturally does from time to time, and a significant act such as opening his mouth so that a dentist can extract a tooth, presenting a hand to a non-Jew to cut his nails (see the *Taz*, *Y.D.* 198:21), or presenting oneself to a barber to shave all of his hair.

According to the *Shach*, there is no distinction between different types of participation. The act of a *Mesayei'a* is always considered to be inconsequential except in the case of *Hakafas haRosh*, which is due to a specific *Gezeiras haKasuv*.

At first glance, according to the *Taz*, if a woman positions herself in a specific position in order to facilitate a procedure or scan, she has performed a significant act, which should be forbidden due to the principle of *Mesayei'a*. It certainly seems no less of an act of participation than a person who presents himself to a barber or a woman who allows someone to cut her nails.

However, Rav Asher argues that it is still permissible:

*In truth it would appear that this does not constitute an Issur at all. The Issur of Mesayei'a surely only applies to someone who assists **in the actual act of sin**, such as in the case of applying eye ointment (which is a violation of the Issur of Refua on Shabbos), cutting hair or nails, and the like. But in our case, there is no Issur **in the actual act** performed by the doctor or technician, but only **in activating the electrical devices**, which the woman does not assist in at all.*

Truthfully, one could humbly question Rav Asher's reasoning. The *Mesayei'a* never assists in the actual act of sin – he merely presents himself so that it can be performed, and the *Taz* nonetheless forbids it. If so, what difference is there between presenting himself so that the actual forbidden act can be performed, and presenting himself for a procedure which involves some form of *Issur* though not directly in the act that is performed? In both cases, it is certain that some form of *Issur* will be violated with his participation.

If it were possible for the act to be performed in a *permissible* manner, the *Mesayei'a* would indeed not be assisting in the violation of the *Issur*. He would merely be presenting himself for an *act* to be performed, which may be performed in either a permissible or prohibited manner. If the physician chooses to do it in a manner that violates an *Issur*, it is not the *Mesayei'a's* responsibility. But in our case, the treatment can only be performed by means of an *Issur*, thus the *Mesayei'a* should surely be considered to be participating in an *Issur*, according to the *Taz*.



In conclusion, fertility issues are considered *Choli she'Ein Bo Sakana*. If treatments are to take place on Shabbos and cannot be postponed or rescheduled, one may violate *Issurim d'Rabbanan* (such as taking medications) and *Issurim d'Oraisa* may be performed by a non-Jew. It is preferable that the instructions to the non-Jew be hinted at rather than stated explicitly.

Regarding injections to increase ovulation, as these injections are subcutaneous or intramuscular and not intravenous, it is therefore not a *Pesik Reisha* that blood will be drawn and is permissible. One should ensure that no other *Issurim* are violated in preparing for the injection. (As a rule, it is permissible to break the packaging in order to assemble the injection. A piece of cotton wool (or other swab) should be prepared before Shabbos to clean the area that will be injected. Alcohol or other disinfectant should not be applied to the cotton wool and squeezed out onto the skin, rather it should be applied directly to the injection site, and then wiped carefully. If the needle is not attached to the syringe before Shabbos, one may be lenient and attach it to the syringe, but it should not be attached so firmly as to be permanent.)

We will conclude by mentioning a fascinating issue raised by our dear friend, R' Shlomo Kushlevsky in an essay published in "*Tevunos*". He cites the *Machlokes* between the *Teshuras Shai*<sup>2</sup> and Rav Shmuel Vosner *zt"l* as to whether causing animals to mate constitutes a *Melacha* on Shabbos. The Gemara in *Moed Katan* (12a) rules that one may not cause animals to mate on Chol haMoed. Rashi explains, "*because he is performing a Melacha on Chol haMoed*".

Simply understood (as apparent from the *Beis Yosef O.C.* 536), Rashi does not mean that it is a *Melacha* of Shabbos and Yom Tov but rather that it is an act of exertion, which was forbidden by the *Chachamim* on Chol haMoed, except in cases of *Davar haAved* (where a loss will be incurred). However, the *Teshuras Shai* (1:181) maintains that it is an actual *Melacha*!

Not only that, the *Teshuras Chai* also rules that while on Chol haMoed it is forbidden to manually cause animals to mate, on Shabbos it is forbidden to bring male and female animals into one area where they will mate of their own accord. This is because on Shabbos any "*Melech Machsheves*" is forbidden, meaning that *Melachos* that occur on their own accord when a person arranges it are prohibited. Rav Vosner strongly disagreed, arguing that the simple understanding of the Gemara is that causing animals to mate is an act of exertion rather than a bona fide *Melacha*. Moreover, it is difficult to understand which *Melacha* this act would violate.

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<sup>2</sup> R' Shlomo Yehuda Leib Tabak *zt"l* (1832-1907), *Av Beis Din* of Sighet and among the *Gedolei haPoskim* in Hungary.



Rav Kushlevsky suggests that, according to the *Teshuras Chai*, the act of causing animals to mate violates the *Melacha* of *Zorea* (planting), since it causes impregnation. This follows the logic of those Rishonim (*Shabbos 107b*) who rule that extracting a fetus from an animal is an *Issur d'Oraisa* of *Kotzer* (reaping).

This is a fascinating proposition which could generate a great deal of discussion. In particular, it has broad relevance to the question of introducing embryos to the uterus on Shabbos. Most Poskim do not believe this to be a *Melacha* in its own right, except for the fact that electrical devices are utilized, but according to Rav Kushlevsky, the *Teshuras Shai* would consider it an act of *Zorea*. We will discuss this on another occasion, God willing.