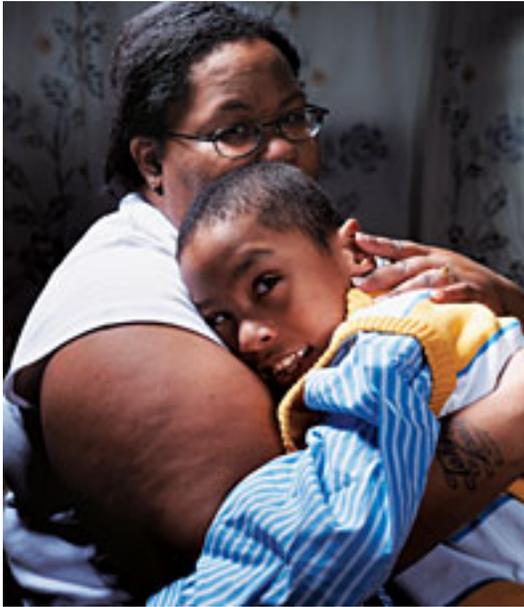


The Equation

Malpractice is a carefully orchestrated negotiation played out in front of a jury audience. Is it unfair? Probably. But it works because everybody knows the rules.

- By [Mark Gimein](#)



Halfway through the first day of the trial, she sits alone in the courtroom. First the judge left, then the doctor watching from the front row, then the lawyers, until finally it was just her, a hot day outside, white sleeveless top showing off a tattoo. Her own lawyer had rushed out, work to do while the judge ate lunch, witnesses to prepare for. The judge had told the jury to take a break, had some words with the lawyers, and then it all just faded out. The lawyer had not been happy about the outfit; she thought the jury wouldn't react well, a casual top in a stuffy courtroom, a smudged tattoo that you couldn't really make out—and only if you asked would you know it was of the name of her dead son.

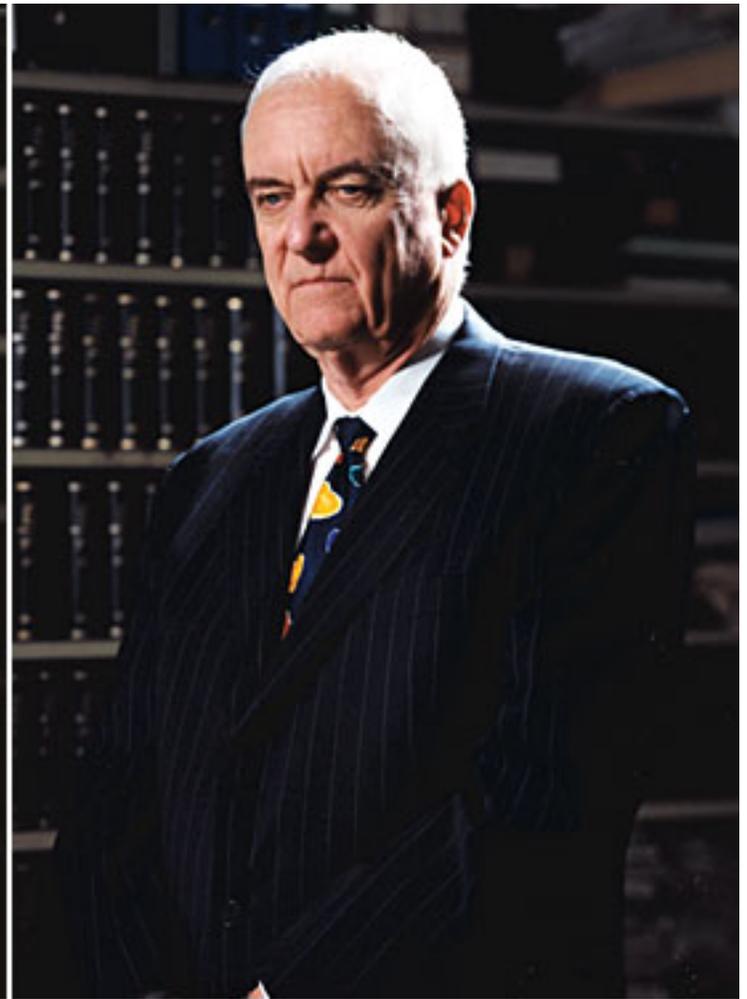
The dead son was named Tahliek. He was born on October 6, 1999, and died 30 hours later. From a human point of view, a tragedy. From a legal point of view, a nonevent. Nashaba Torres, Tahliek's mother, had missed the deadline for filing a wrongful-death suit against the hospital, and this was probably just as well because, tragic as Tahliek's death was, the real issue—for Torres, for her lawyers, for the hospital—was not Tahliek's death but his twin brother Taamel's life: wheelchair-bound, unable to talk intelligibly, and dependent for his continued survival on a pump that injects a monthly \$8,000 of drugs into the base of his spine.

Tamel [sic] Dawson v. Beth Israel Medical Center went to trial in a Manhattan courtroom in September, one of thousands of malpractice suits filed in New York. Fitzgerald & Fitzgerald, the law firm that represented Nashaba Torres and her son, is familiar to many New Yorkers from its ads in the subway. This in itself tends to raise eyebrows because advertising is something that high-class lawyers just don't do. The ads themselves are not subtle. For a while, the ads' slogan—they are written by the firm's founder, John Fitzgerald—was WE FIGHT FOR KIDS WITH BRAIN DAMAGE. The current ones tone it down just a bit with BABIES AND CHILDREN CAN BE INJURED BY MEDICAL MALPRACTICE. Splashed across the ads is a list of top verdicts, going up to \$30 million, and across the bottom are dense footnotes qualifying the amounts. On the side, incongruously, there is a sketch of a boxing green leprechaun.

Fitzgerald & Fitzgerald—the second “Fitzgerald” was John's wife, but she has not practiced in more

than two decades—specializes in two kinds of complex cases: lead poisoning and malpractice leading to birth injuries. Over the years, John Fitzgerald has developed an eye for finding what might have gone wrong in a delivery. In his office, he keeps a foam model of the pelvic bones, and when he uses it to demonstrate the ways a baby can get stuck in delivery and the ways a doctor can get it wrong, you can almost forget that his delivery experience is confined to foam-and-cloth models. When Fitzgerald started doing “med-mal” cases in the early eighties, after a career in landlord-tenant law—“lucrative but not rewarding,” he says—firms like Fitzgerald that charged a contingency fee could take about a third of any award. Now their take is capped by law at a third of the first \$250,000 and goes down to 10 percent of any amount over \$1.25 million, making routine adult cases less feasible. But in the case of brain-damaged infants, the potential damages—pain and suffering, lost wages, and cost of care counted over a life span of 50, 60, or 70 years—can quickly spiral to enormous sums. For parents, contrary to ghoulish popular conception, suing on behalf of a disabled infant is not a way to get rich: The money they win goes into a trust administered for the child by a court-appointed manager. Nonetheless, the clear economic incentives (and probably Fitzgerald’s ads as well) set up the uncomfortable equation of tragedy equals cash.

Nashaba Torres gave birth to Taamel and Tahliek at 26 weeks, eight days after her last prenatal screening at Beth Israel’s obstetrical clinic. The tiny babies were delivered by C-section two and a half hours after she got to the hospital and immediately went into the intensive-care unit. It was exactly the kind of delivery that John Fitzgerald looks for—“a stormy neonatal course and a child in the nicu.” Before Torres left the hospital, a nurse had confided to her that a tissue sample had shown she was carrying a group-B strep infection. Torres had recently moved to Avenue D from Brooklyn, and was looking forward to giving birth at the nearby Beth Israel, a prestigious teaching institution and, as Torres joked, “no offense—but a white person’s hospital.” The tidbit from the nurse raised Torres’s first suspicions that she might have gotten subpar care from doctors—it looked like they’d done nothing about a potentially serious infection.



Close to a year after she'd given birth to the twins, Torres contacted a lawyer, who sat on the case for two years before declining to press it. At that point, she called Fitzgerald. "It was about getting the answers that I needed," she says. "I needed to know why this happened to my son. Nobody ever talked to me when my son died. Everything got quiet. Every time I asked a question, no one answered."

The lawyer who eventually came to represent Torres was Randy Nassau. Nassau is the attorney whom John Fitzgerald counts as his firm's top malpractice litigator, and the lawyer whom Fitzgerald himself would be "the last person in the world he'd want to try a case against." Nassau gets credit for two of the firm's biggest verdicts—\$29 million and \$32 million—featured in the firm's ads. A mother of three herself, she works out of her home in New Jersey when she doesn't have a trial. Nassau, a 40-year-old with deep black hair, had moved from Florida to New York to join the Bronx D.A.'s office, where she spent five years prosecuting sex crimes, child abuse, and domestic violence. Uninterested in the usual path of moving from prosecuting criminals to defending them, she turned to defending doctors and hospitals from malpractice suits. Nassau was not opposed to defense work in principle, but she quickly found that only the partners got to do trials, and she had a background in defending children. After two years, she went to work at Fitzgerald. "I had the same moral understanding on both sides," Nassau says. "Even when I did defense work, I felt that where there was a departure and it caused injury, you should pay appropriately."

A star trial lawyer like Nassau is too valuable for her time to be spent on the years of research and motions and depositions that lead up to a trial. Nassau usually starts working intensively on a case only weeks before it goes to trial. This is a key moment, because in cases that are strong for the defense, hospitals will not offer a settlement until the last possible instant. One of Nassau's cases got settled after the jury had reached a verdict but before it was announced. In eight years with the firm, eleven of Nassau's cases had gotten to final verdicts—all victories, most in the millions of dollars. Her total may well have been even higher if she didn't recommend to clients that they settle, reasoning that a settlement of \$2 million was from their point of view a better bet than going for a huge verdict and getting nothing. And Nassau has never walked away from a case without getting any money for her client.

Taamel's case did not promise to be an easy one. This is common, because the defense has the luxury of deciding which cases it wants to settle early. "When they see the cases I'm dying to try," Nassau says, "they just look at the case and put \$4 million on the table." This wasn't going to be one of those: The hospital was promising to "no pay" the case and had not offered even a small settlement. The hospital's lawyer, Robert S. Melnick, was no less accomplished than Nassau: A partner at Aaronson Rappaport Feinstein & Deutsch, he had (in a longer career than Nassau's) taken 40-plus cases to a verdict, with just one loss. The trial was to be held in Manhattan, a borough where juries are less hospitable to plaintiffs than the famously plaintiff-friendly juries of Brooklyn and the Bronx.

Nassau was not onboard with a key theory of the case pursued by Fitzgerald's other lawyers and investigators, and in a risky maneuver decided to change the focus as the case moved toward trial. Since the suit had been filed in early 2004, Fitzgerald's lawyers had spent dozens of hours mostly pursuing the question of the group-B strep infection in depositions with the attending physician in charge of Torres's care, Janet Stein. Torres had come to think that the untreated infection was the cause of Tahliek's death and Taamel's cerebral palsy. But treating it during pregnancy in a case like Torres's has never been standard procedure, and even Nassau believed the hospital had acted appropriately. In fact, going into the trial, both Nassau and Melnick agreed that the direct cause of Taamel's disabilities was his seriously premature birth. Nassau's job was to prove that this was the hospital's fault.

Whatever problems she may have had at Beth Israel's prenatal clinic, it was clear to everyone that Torres's pregnancy was high-risk from the start: She was overweight, had been repeatedly hospitalized for serious asthma, and was pregnant with twins. Treated at the clinic by three different residents, Torres had felt ignored. Nassau saw this as a kind of class issue. Nassau's own recent pregnancy—covered, unlike Torres's, not by Medicaid at a clinic but by private insurance at an obstetrician's office—had been difficult, and for seven weeks she was monitored constantly and put on drugs that would forestall a risky preterm birth (she gave birth at 36 weeks).

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In a visit to the clinic several weeks before the premature delivery, Torres had complained of contractions. For Nassau, that was a key sign that her doctors had ignored the signs that she was going into labor and failed to administer the medicines—called tocolytics—that would stop it.

There was another, more tactical problem: Nassau's key medical expert had bailed on her the night before the trial, pleading a scheduling conflict. Not only did she have to find a new expert; she also had to reorder her witnesses and present the experts who would explain the extent of Taamel's injuries and the costs of his care: Essentially, she would have to ask the jury for money first—by calling her economic experts—before her medical expert would be able to make a strong case that the hospital had erred.

Janet Stein, the first witness Nassau called, was the attending physician in charge of Beth Israel's obstetrics clinic when Taamel was born in 1999. On most of Torres's visits to the clinic (it handles 700 births a year), Stein had signed off on the examinations of three separate residents.

Stein spoke in a voice so low that the judge repeatedly had to ask her to speak up. Stein had been called as a hostile witness, which meant that Nassau had to confine herself to "leading" questions with very clearly defined answers, lest she give Stein an opening to turn to the jury and reel off her version of the story.

The encounter between the two women grew progressively more tense. Nassau's goal was to show that there had been unheeded signs that Torres was going into labor: contractions and a dilation of the cervical canal. Over and over, Nassau prodded Stein, asking if the signs were "consistent" with labor. And over and over, Stein said that it was "not a yes-or-no question." Stein was understandably unhappy to be on the stand, being held to a standard of 100 percent perfect outcomes that no obstetrician could meet.

"It's hard not to take it personally," she told me after the trial. "I don't believe that every premature baby or less-than-perfect outcome is within my control."

Both women were clearly frustrated; at one point, Nassau had to turn away from the jury to compose herself. During a break, Nassau frankly asked me if she seemed bitchy (I said she did), knowing this was

especially dangerous for a woman lawyer. “Why is it,” Nassau asked me in the same break, “that a man can do an aggressive cross-examination but a woman can’t?”

Nassau made some inroads in showing the jury that the records had Torres’s cervix going from “closed” to “fingertip dilated,” but Stein steadfastly refused to grant that any significance. Nassau thought that Stein’s repetition of the rote response that it “is not a yes-or-no question” made her appear cold and evasive. Melnick, however, was satisfied with her performance on the stand and didn’t even bother to cross-examine her, calculating that he’d rather save her testimony until after he’d seen Nassau’s expert witnesses and knew the case he was responding to.

From the beginning, Nassau worried about how her client was coming off to the jury. Nassau’s relations with her client were strained. Torres had worked with another lawyer in the three years that led up to the trial. Nassau’s discarding the strep theory had surprised and disturbed Torres, and she had called the other lawyer to vent.

Torres was an unmarried mother of four living with her boyfriend (Taamel’s father, Louis Dawson) in a project on Avenue D. But she had gone to community college before her asthma got too bad. She was active in her local school district, had met with the school chancellor, and had also met the mayor. These weren’t things that Nassau knew or guessed. “She talked to me as if I was beneath her,” Torres recalls of her first experiences with Nassau. “Like I’m this ghetto chick from the projects just looking for some money for her kid. She didn’t know me, she didn’t know anything about me, all she knew was what was on the paper.”

The irony of this relationship was that if anything, Nassau was extremely worried that an upper-middle-class jury would be unsympathetic to her client. “Where were Nashaba’s peers on this jury? Did you see anyone with her socioeconomic background? It was the hospital’s peers, it wasn’t Nashaba’s or Taamel’s peers,” Nassau would tell me after the trial.

Torres often came in late, and when she was there, she sat not at the front but near the door. To Nassau, that “made it seem that she didn’t care.” It also meant that the jury was concentrating not on the aggrieved mother but on the procession of experts. And in this area, Beth Israel had a distinct advantage, since few obstetricians are willing to testify for plaintiffs. Nassau’s first expert was a prickly 79-year-old pediatric-neurology specialist named Leon Charash. Charash was well known to Melnick—he knew that he’d testified in hundreds of cases and that every defense firm kept a dense file on him.

Usually, Melnick is soft-spoken, even reticent. A tall man, he has a soft manner and a civility that make him seem to float rather than tower. All of this makes his sudden turn to aggressiveness in cross-examination especially compelling.

Charash (who’s a regular on the Jerry Lewis telethon; he’s the guy who turns the numbers), old enough that pediatric neurology didn’t even exist as a specialty when he started working with children, rose to the bait, thundering out the list of his well-aged qualifications and telling the jury that of the 600

members of the Child Neurology Society, “only one, me!” was so eminently qualified that he was allowed in without the usual prerequisites.

Charash had examined Taamel, and his examination merely confirmed what everybody knew: that he was, in Charash’s words, “a sweet kid,” as Charash simply put it, who “can’t count to 10” and who would need lifelong care for cerebral palsy that would never get better. Charash said that a child like Taamel was likely to live and need continued, expensive care into his fifties: maybe on the longer side of the estimates for a child with his condition, but not unreasonable.

Though Melnick found the substance of Charash’s testimony unobjectionable, he was in other ways a target of opportunity. Melnick repeatedly tried to turn the questioning toward a case in which a judge had stricken Charash’s testimony as not believable. Charash had testified that he’d spent 30 or 40 hours looking over Taamel’s medical records—at \$175 an hour. But he had arrived in court with only a very slim folder to refer to that couldn’t have contained more than a few pages, and under Melnick’s aggressive cross-examination, he testified that he’d just discarded most of his work, a credulity-straining moment.

The jury, Nassau noticed, didn’t take notes when she presented the economic experts who would testify to Taamel’s lost earnings and the cost of his care. This was what Nassau had feared: “We had to ask for money before we’d established that there was something that was wrong.” The economic expert’s testimony was largely uncontroversial. Melnick was careful in his cross-examination because no extended discussion of damages is good for the defense. He did, however, press on whether Taamel, had he not been born disabled, would have been likely to have college-grad-level earnings. Though Melnick never mentioned race (in fact, the core of his argument was simply that most Americans did not finish college), the episode upset Torres, who said she believed it was a personal attack on her and her son.

When her medical expert, Dr. Bruce Halbridge, finally got to the stand, the gap between his credentials and those of, say, Janet Stein was evident. A doughy-faced family practitioner with a sideline in courtroom testimony (he advertised in law journals), he had none of the fellowships and academic appointments that would endear him to a Manhattan jury. Halbridge testified that Torres’s pregnancy might have been extended with bed rest and tocolytics. But he did so with the disadvantage of examining the medical records long after the fact. It was essentially his call against the calls of the doctors who had examined Torres at the time.

The fact that Halbridge was called in at the last minute, leaving little time to research his background, was potentially as much of a problem for Melnick as for Nassau, maybe more. But Melnick had lucked out and found a Texas lawyer who had just been up against Halbridge and compiled an impressive dossier. The lawyer had visited Halbridge’s office and found two of three examining rooms filled with boxes, an indication to Melnick that Halbridge’s practice consisted more in testifying for plaintiffs than examining actual patients (Halbridge denied the story on the stand, and mentioned that he’d just moved to new offices). The lawyer who’d dealt with him in Texas even managed to find Halbridge’s post on an online personals site, a largely irrelevant but still embarrassing detail. Having all this was valuable to

Melnick in part because it let him psych out the doctor—“put him on notice,” as Melnick says—with the implication that he could have even more information up his sleeve. “I used [the information about the boxes in his office] partly to let him know that I knew, that he should be a little bit cautious,” says Melnick.

Nassau knew that, as much as an evaluation of the medical evidence, a malpractice trial is a theater of sympathy. Torres's absences—a medical appointment, a school appointment—weren't helping in this regard. On one day, Nassau was furious that she didn't even know where Torres was. “All the medical testimony,” Nassau fumed, “is going to go over the jury's head. They're going to decide this based on what they think of Nashaba. Where is she?” Nassau even suspected that Torres could be avoiding her. “I don't think she wanted to come in because she was tired of me yelling at her,” Nassau told me after the trial.

Nassau ended her case by putting Taamel and then Torres on the stand. Taamel was wheeled in front of the jury just long enough for everyone, including the judge, to coo over the sweet 6-year-old in the wheelchair, but not long enough for it to seem blatantly manipulative to the jury. His smile was broad, and his first adult teeth were coming in. His palsied body was scrunched up into the side of an electric wheelchair, and it made him seem like a child playing at making himself small, but for anybody who understands his condition, there was always the consciousness that he will not appear this way at all when he is fully grown. His mother asked him what he wanted to eat, then translated his syllables into “chicken and French fries.” Melnick understandably passed up the chance to cross-examine Taamel. With his mother, however, Melnick's choice was harder. Torres told the jury about her pregnancy and the difference between the care she'd gotten in her previous pregnancies from a single physician, when she had private insurance, and the difficulty of starting over again at the clinic with each new resident.

Melnick cross-examined her briefly and carefully. Months before, Torres had given a deposition in which she'd said she hadn't had contractions—the very essence of what the layperson calls “labor.” Torres's medical records from Beth Israel did in fact say that she had complained of contractions during her pregnancy. But occasional contractions are common in mid-pregnancy. It is only when they become sustained and regular that they signify the onset of labor. For Melnick, the contradiction between the deposition and what Torres said on the stand was a big deal. In addition, Melnick knew that nurses who'd stopped by Torres's home to monitor her asthma had also noted that she had no contractions—in the very week before she gave birth.

Melnick, however, kept the contradictions in Torres's account in reserve, planning to make the point in his closing statements so as not to appear callous by attacking a grieving woman on the stand.

The underlying engine of Nassau's case was that Torres, as a poor woman and a Medicaid patient, had received substandard care. Juries tend to view consistently excellent medical treatment as a basic human right, even if our health-care system doesn't reflect that belief. “I know Randy wanted to get into that as an issue,” says Melnick, “but I knew the witnesses the jury would be seeing would be people like Dr. Stein.”

Melnick again called Stein, along with one of the residents who had treated Torres. Neither recalled the visits in great detail, so, in essence, their role was not so different from that of the independent witnesses called by the defense: They too reviewed the records after the fact and testified largely to their “custom and practice.”

In a case going well for the plaintiffs, the defense testimony would be the second stage of a duel. But in this case, it already seemed like the endgame. Nassau had not been able to rattle Stein on the stand. The second time around, instead of answering “yes or no,” she got to give the jury her full explanation of what had taken place. Melnick led her through this in a way that let her conclude with the records of Torres’s last visit to the prenatal clinic: no contractions. It was precisely the point he believed the judge would later let him pick up from Torres’s deposition. He then called the resident who’d seen her on her last visit, Mario Leitao. A common complaint of the plaintiff’s bar is that too much of the care in teaching hospitals is administered by overwhelmed and inexperienced residents. Leitao, however, was a fourth-year chief resident (he went on the next year to a Sloan-Kettering fellowship in gynecological oncology): even by John Fitzgerald’s standards a pretty experienced physician. He, too, noted that there were no contractions. Nassau saw clearly that this was a huge flaw in her case. She tried mightily to get him to admit that it was at least possible that Torres had contractions that even she hadn’t noticed and a transvaginal ultrasound would’ve picked up. Leitao, however, didn’t budge.

From Torres’s viewpoint, the subtext of the trial was about impressive degrees versus a black mom, and she’d eventually bonded with Nassau over the issue. She’d been angry about Melnick’s line of questioning about college and income, as if, as she told me later, “a black kid from the projects wouldn’t go to college.” When one of Melnick’s last witnesses, Dr. David Berck, said that, yes, he sometimes did prescribe bed rest (though he told the court he wouldn’t have prescribed it for Torres), it was for Torres a victory of ordinary common sense against “their expert, their Harvard guy, their Yale guy.”

From an outsider’s perspective, though, it didn’t look good for Taamel’s case. Berck was a doctor who’d seen Torres on some early visits and did in fact boast a résumé that stretched neatly from Yale to Harvard Medical School to a residency at the famous Massachusetts General to a faculty appointment at the Albert Einstein College of Medicine. He had appeared not only qualified but exceedingly sensible. Instead of evading Nassau’s questions, he’d managed to neatly tie up the hospital’s loose ends, gesturing with his hands and a paper cup to show how small contradictions in the records—a cervical canal marked in one report as closed, in another as slightly dilated—were just a routine result of different doctors using a slightly different degree of touch and feel.

As the trial progressed, Nassau worried increasingly about the jury. Only one member had ever been pregnant. “If [only] I had anyone on that jury that ever had a complicated pregnancy, anyone who’d had a C-section,” Nassau says. “All these men on the jury thought they knew what an obstetrician was, and the 27-year-old women are still partying every night. Did they have any clue as to what I was talking about? No.”

Melnick had a different kind of problem, a gambler’s problem. He was highly confident that he would

win the case. Still, if Melnick didn't win, a verdict could run \$10 million or more. So the hospital's insurance managers (Beth Israel is part of a self-insured pool of nonprofit hospitals) had to make a decision not only about whether they were likely to win, but what the odds were. Nassau, from her own experience on the defense side, gets it down to a simple process: "If there might be a \$10 million penalty and they think they have a 50 percent chance of winning, offer \$5 million."

The evening before the jury was to be given its charge, the insurance company called Nassau to offer a settlement of \$1.5 million. It was, for this kind of case, a pretty good outcome for the hospital. Under the circumstances, it was also a good figure for the plaintiff. Nassau and Torres accepted the offer.

The settlement naturally will confirm many people's feelings about malpractice law. John Fitzgerald says that he asks for medical records in only one in 50 to 100 inquiries that come into the firm's referral line. But in the cases in which the firm does go to the step of getting medical records, it files suit in fully half. The math here is clear: Simply delivering a child who is seriously premature and seeing its patient go to a law firm like Fitzgerald's means that a hospital is already facing a 50-50 chance of finding itself in a position in which a \$1.5 million settlement is a pretty good outcome for the defense.

Whatever Taamel's real disabilities, more than a few readers will agree with Janet Stein that it's "sad and disappointing and disheartening that the system uses this to compensate the family for a bad situation." And the natural impulse is to blame the lawyers, people like Randy Nassau and John Fitzgerald, whose firm earned \$295,000 for its work.

But Nassau takes seriously the idea that she is an advocate for exactly the people the medical system tends to ignore. For Nassau, as she and Melnick were moving toward the dollar figure that was their center of gravity, the system was working. "When people go to private physicians, when they're monitored, things go well," she maintains. It's when they go to a clinic and see all these different doctors that this happens.

For the lawyers, as much as both of them would have loved—great records be damned—to get to a verdict and find out how it ended, a trial is ultimately not about getting to a satisfying conclusion as to who was right but about getting to a number that both sides can live with.

Torres got just under \$1.1 million in trust for her son, but the money, while welcome, is not her most important reward from the trial. We met in a restaurant on the Lower East Side after the trial, and Torres told me that the trial gave her answers about why her son was born the way he is. It seemed a startling conclusion to come to, since the trial I saw tended to show the opposite. But it was understandable.

"For a long time, I blamed myself [for Taamel's condition]," Torres told me. "For a long time, I blamed myself that it was my fault that Taamel was that way, it was my fault that Tahliek died. For a long time." The ritual of the trial let her transfer the guilt—not because of the evidence presented but in spite of it.

Justice is supposed to be the outcome of a trial and verdict, but in a culture used to legal procedurals, the

aim of justice can appear to be the fact of an open hearing itself.

Torres is pregnant again; she'll have this baby at Bellevue. But for Taamel's frequent hospital visits, Torres takes him to Beth Israel, where, despite the lawsuit, he now has a regular pediatrician.

- [Next: Pricing a Damaged Brain](#)

Pricing a Damaged Brain

The balance sheet for a life that went wrong from its first moments.

Settlement....\$1.5 million

Fitzgerald & Fitzgerald....\$295,000

Total court fees....**\$580**

Depositions....**\$1,585.80**

Daily copy (transcripts from the court)....**\$4,649.30**

Review by OB-GYN....**\$2,750**

Bruce Halbridge's fee to testify....**\$7,782**

Economist testimony....**\$2,975**

Report from life-care specialist....**\$3,943.75**

Testimony of life-care specialist**\$4,750**

Pediatric neurologist Leon Charash's review and report....**\$2,500**

Pediatric neurologist testimony....**\$6,500**

Miscellaneous....**\$3,264.96**

Total Expenses....\$41,280.81

Medicaid....\$80,000

Taamel....\$1,079,597.27

-By Yael Kohen