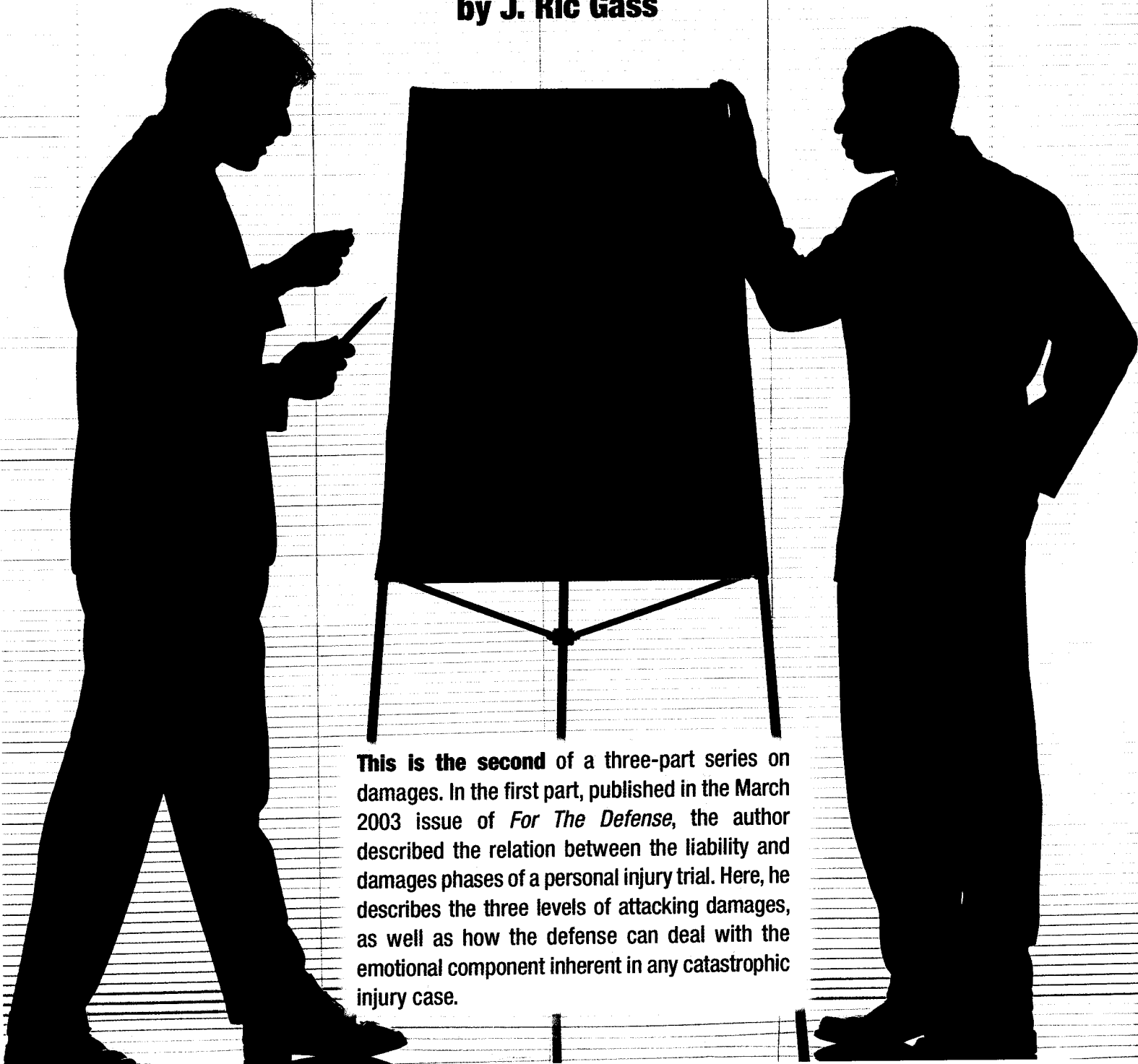


# Attacking Damages in the Catastrophic Injury Case

Part II

by J. Ric Gass



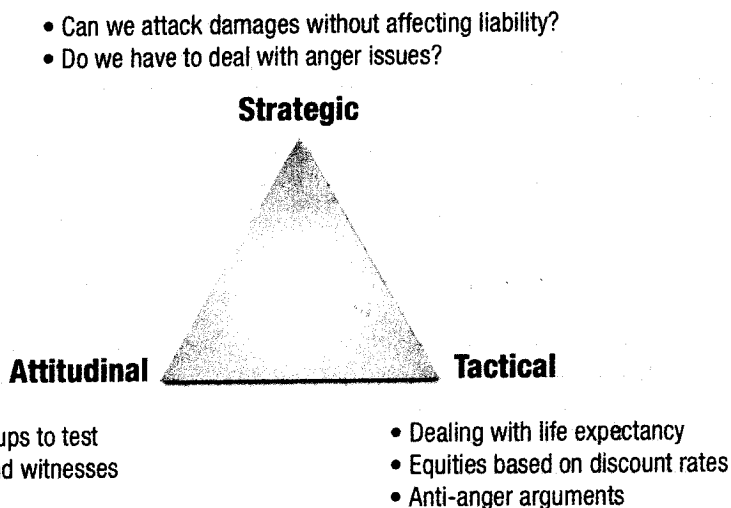
**This is the second** of a three-part series on damages. In the first part, published in the March 2003 issue of *For The Defense*, the author described the relation between the liability and damages phases of a personal injury trial. Here, he describes the three levels of attacking damages, as well as how the defense can deal with the emotional component inherent in any catastrophic injury case.

Attacks on damages must be done on three levels:

**Strategic • Tactical • Attitudinal**

All three levels must be considered—none can be ignored. For example, the *tactic* of attacking life expectancy may not be effective because of juror *attitudes* or it might not fit with the overall *strategy* because it is perceived as sponsoring a number. As a damages attack action plan is developed, the defense lawyer must keep all three levels in mind: tactics, strategy, and juror attitudes. (Figure 1.)

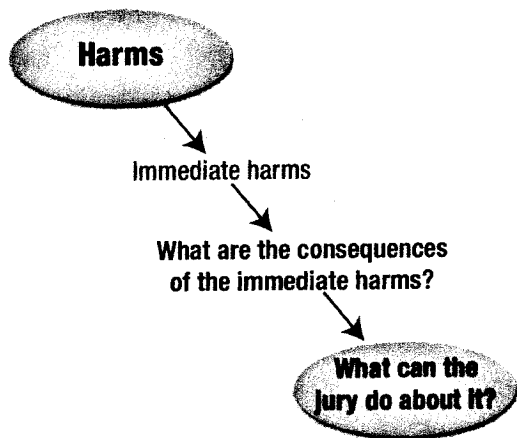
**Figure 1. The Three Levels of Thinking Involved in Catastrophic Case Management**



**Keeping Damages Intangible**

If you haven't yet read *David Ball On Damages* (available at <http://www.nita.org>), you need to do so. It is written principally for plaintiffs' lawyers to show them how to present dam-

**Figure 2. Plaintiff's Counsel's Goal**



ages and win awards. As such, it is a wonderful inside look for defense lawyers to understand the plaintiff's strategy and what plaintiff's counsel is worried about. The next two sections of this article are graphical summaries of David Ball's work.

Plaintiff's counsel's goal is to make the damages as concrete and tangible as possible (Figure 2). Defense counsel's goal is the exact opposite: keep the "damages" as ephemeral and intangible as possible.

The response of the defense is shown in Figure 3.

**Motivations to Give or Not Give Money**

Keep in mind that the plaintiff's counsel's goal is to make the jurors believe they are

dealing with functional harms so they would be motivated to give money to reduce that harm/injury. Going through the following checklists (from Ball's book) helps focus the defense on damages and what the plaintiff's counsel is trying to achieve. (See Figure 4.) Remember these are lists to be selected from. Not every motivation applies to every case.

**Discovery**

In conducting discovery of the injured party's records, be prepared to search for all of the usual categories of documents—medical records, employment records (including applications for employment), motor vehicle driving, the variety of information found in the courthouse, etc. In addition to these obvious sources, don't forget to search the plaintiff's computer usage records, as well as family photo albums, motion pictures of the plaintiff's recreational activities, etc. (Figure 5.) All of these sources could be useful in putting together arguments for impeaching the plaintiff's evidence.

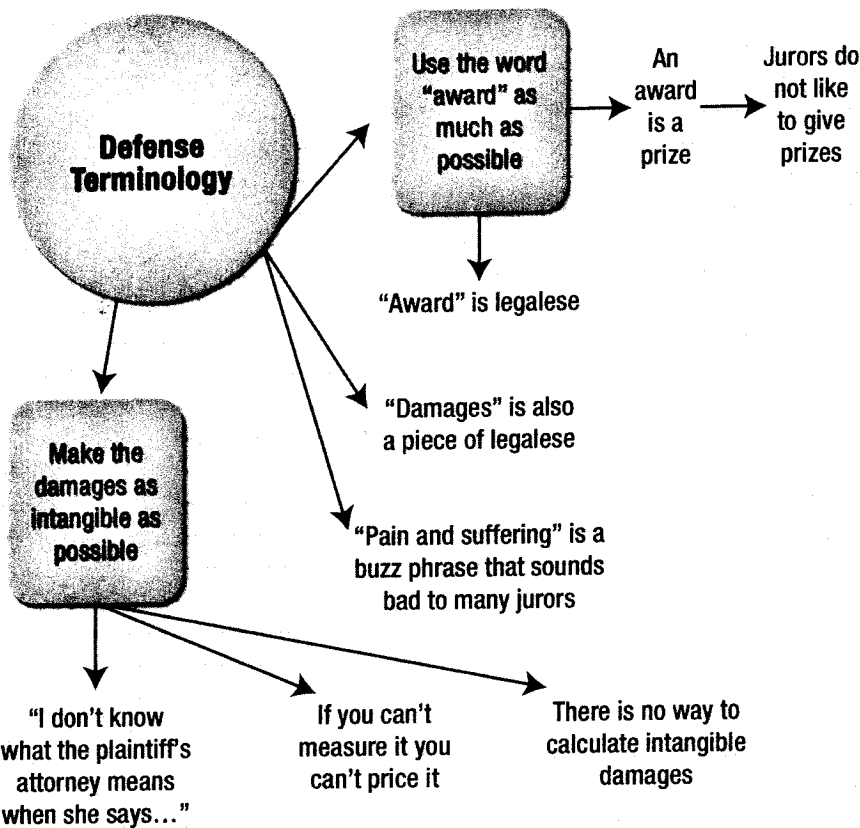
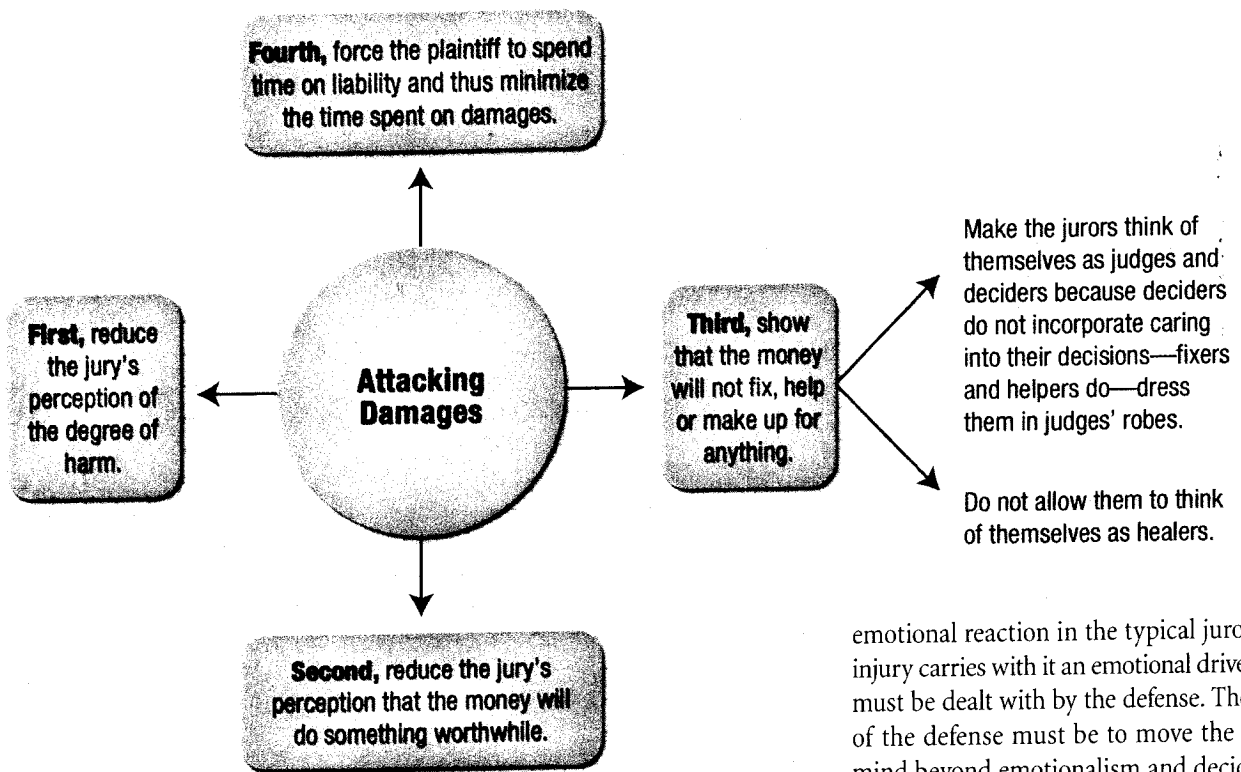
**The Story Above the Evidence**

While there are many civil lawsuits that can be defended successfully on the law and the facts, the defense lawyer must bear in mind that catastrophic injury cases typically have a strong emotional component. The fact of severe, perhaps disabling, injury creates an



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**Figure 3. Defense Counsel Response to Plaintiff's Goal**



emotional reaction in the typical juror; the injury carries with it an emotional driver that must be dealt with by the defense. The goal of the defense must be to move the jury's mind beyond emotionalism and decide the case on the law and the facts.

Unfortunately, law and facts don't tell a story by themselves. Research shows that the vast majority of people organize new information in a story format more than any other organizing scheme. And in particular, in a catastrophic injury in the hands of skilled plaintiff's counsel, the case becomes a compelling story. The defense has to respond with its own "Story Above the Evidence" (Figure 6).

The defense attorney must organize a story (a truthful, accurate story, of course) that makes the case about something. The story/case has to have a name—a theme that will move the jurors to your side. The case is about nothing until the defense names it. If you name it effectively, so that the story resonates with the jury's core values, the law and the facts will fit with a defense verdict. This naming process is called *nominal anchoring*. Once named, the case takes on a life of its own.

The defense needs to develop a story "above the evidence" that fits with the psychology, emotions, and humanity of the case. The story must be one that will affect the jurors, a story to which they will respond.

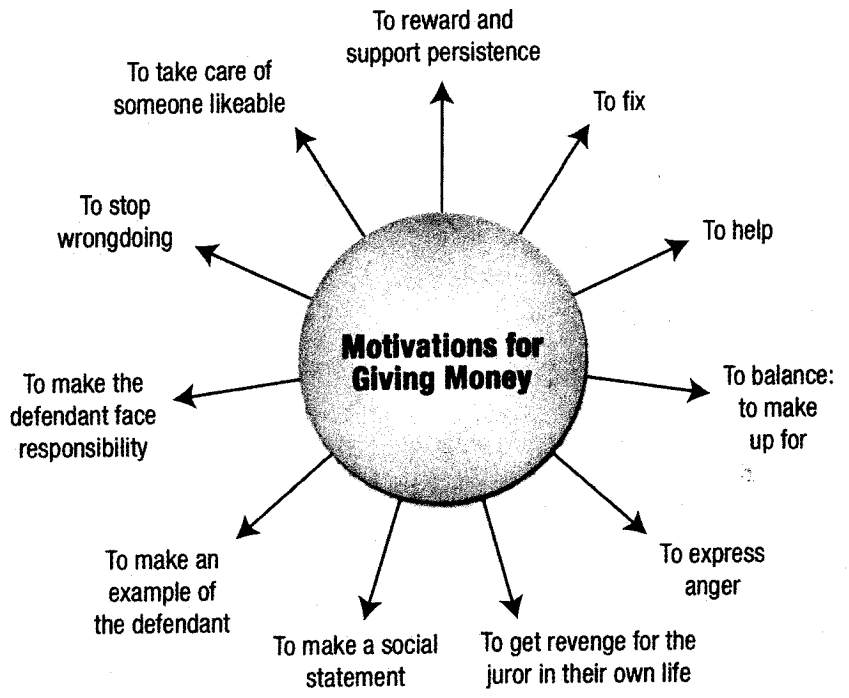
The defense needs to discover not just the "who, what, when, and where" of liability and

damages, but the “why.” (See Figure 7.) Knowing the “why” of everything unlocks an understanding of all facets of the case and allows the defense to craft a presentation responsive to the likely human jury emotions. And, it allows defense counsel to make the “courtroom facts” consistent with the “real world facts” to deliver a defense verdict.

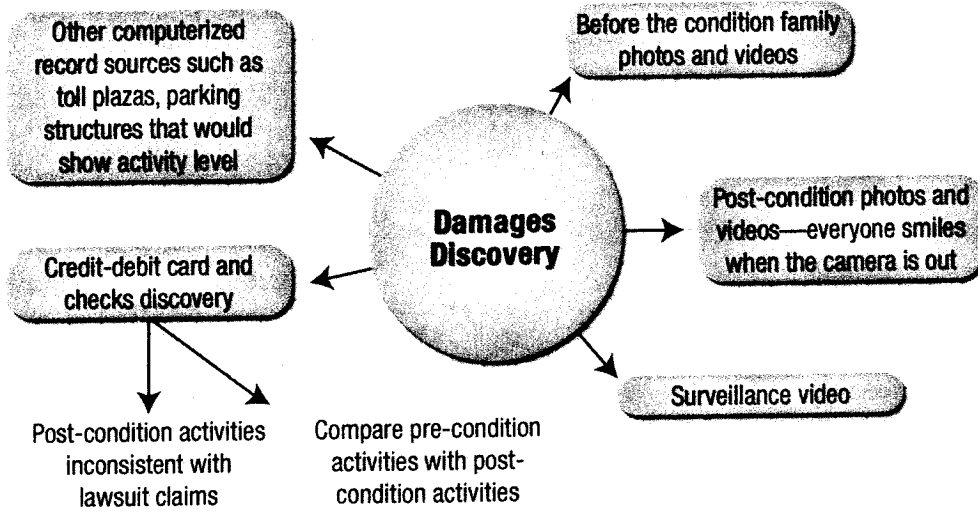
**Consistency**

There is obviously a lot going on in a courtroom during any trial. Yet, it is even more so: busier, more intense, when the trial is dealing with a catastrophe that has led to major personal injuries. Legal theories, factual theories, and your plan to ultimately persuade the jury. Your attack on damages involves all of those theories as a subpart of the overall case and the overall case theories. To be successful on both damages and the total case, those theories need to mesh, fit together and be consistent (Figure 8). **FD**

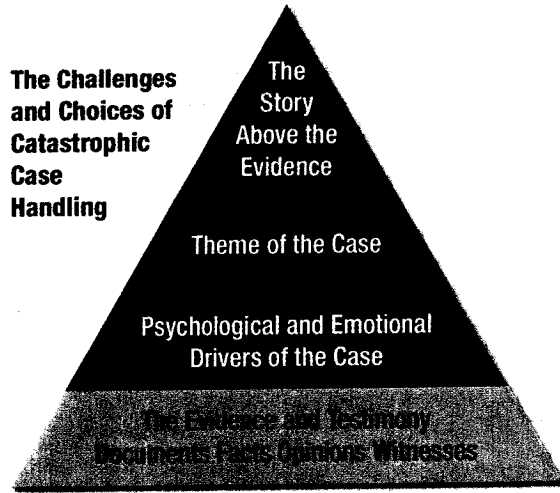
**Figure 4. Motivations to Give or Not Give Money**



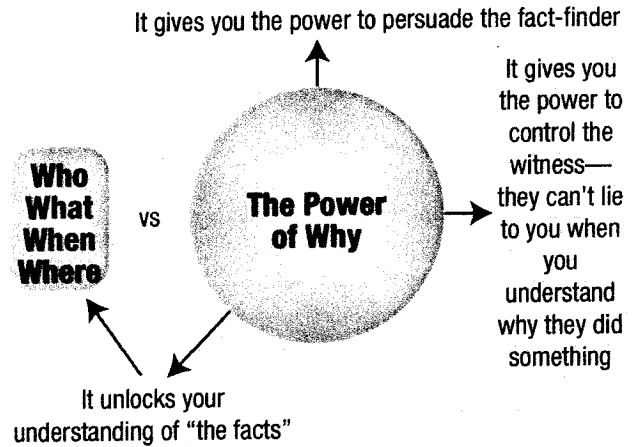
**Figure 5. Discovery**



**Figure 6. The Story Above the Evidence**



**Figure 7. Understanding—The Power of Why**



**Figure 8. The Holy Trinity of Trial Work**

