

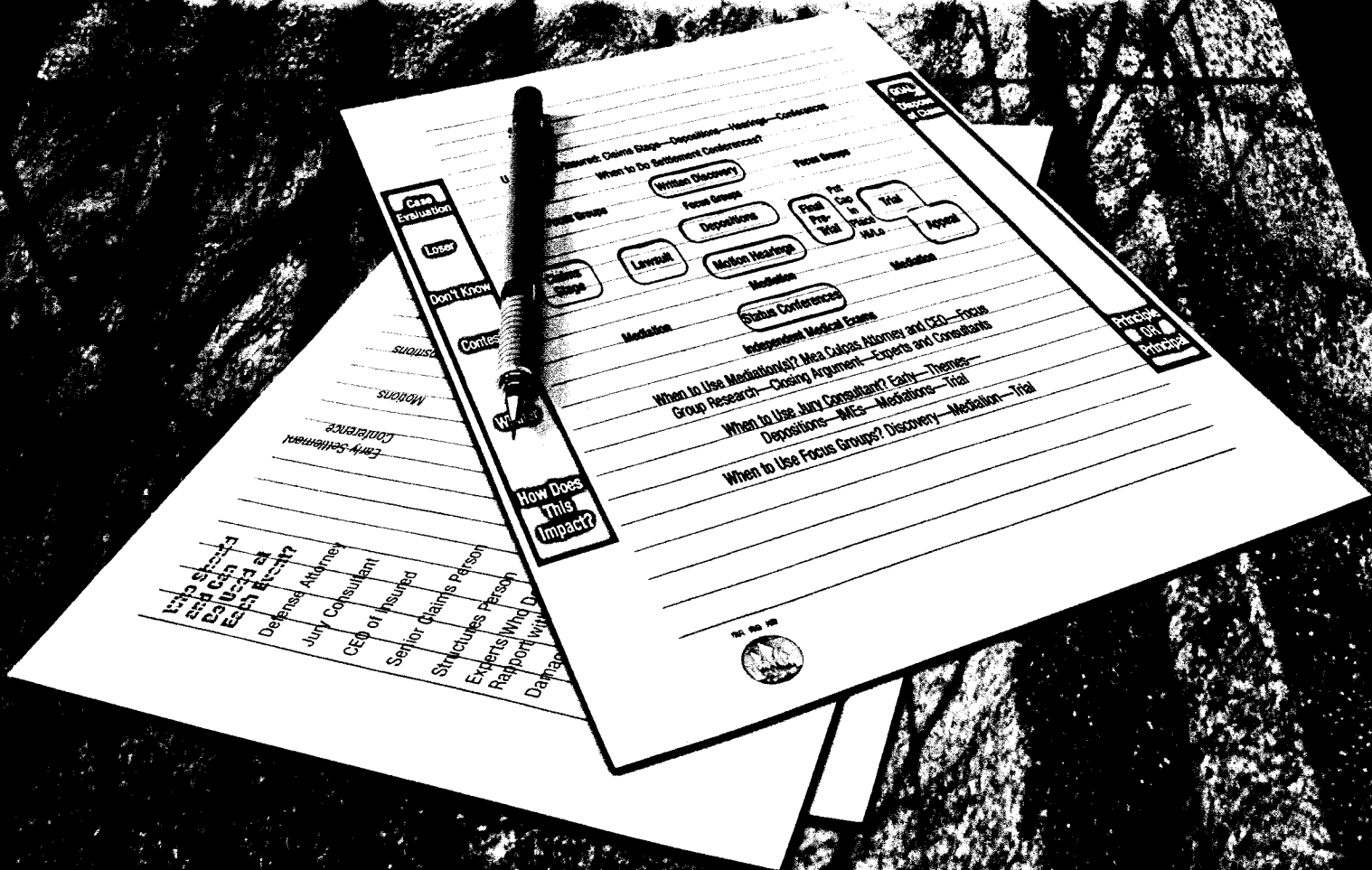
Attacking Damages in the Catastrophic Injury Case

Part III

by J. Ric Gass

This is the third of a three-part series on damages by the author. Previously, in the March and April issues of *For The Defense*, he discussed the relation between the liability and damages phases of a personal injury trial, the three levels of attacking damages, and the emotional component in catastrophic injury cases.

In Part III, he describes the value of a creative approach, that gives the defense flexibility at each stage of the litigation.



Case Evaluation

Loser

Don't Know

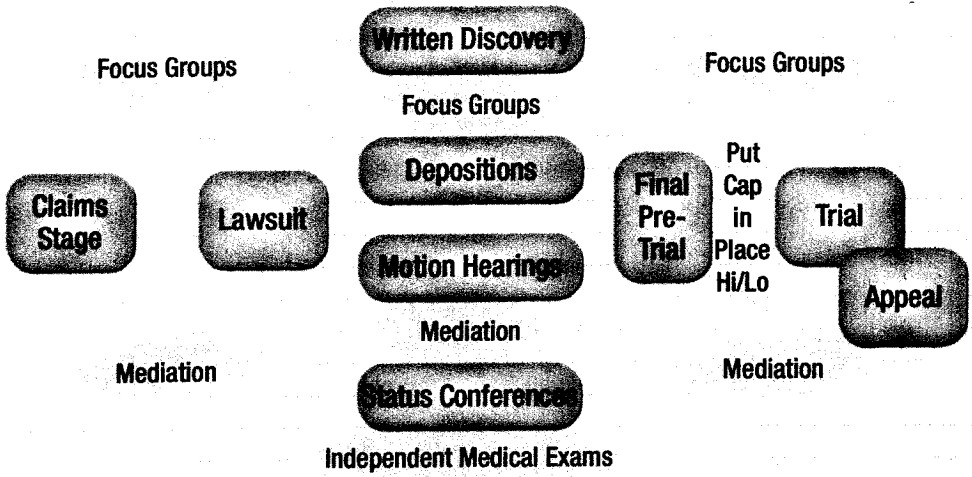
Contest

Winner

How Does This Impact?

Use of Client/Insured: Claims Stage—Depositions—Hearings—Conferences

When to Do Settlement Conferences?



When to Use Mediation(s)? Mea Culpas Attorney and CEO—Focus Group Research—Closing Argument—Experts and Consultants

When to Use Jury Consultant? Early—Themes—Depositions—IMEs—Mediations—Trial

When to Use Focus Groups? Discovery—Mediation—Trial

GOAL

Dispose of Claim

Principle OR Principal

Event Intervention—Non-linear Thinking

Who Should and Can Be Used at Each Event?	Early Settlement Conference	Motions	Depositions	Independent Medical Exam	Mediation	Trial
Defense Attorney						
Jury Consultant						
CEO of Insured						
Senior Claims Person						
Structures Person						
Experts Who Developed Rapport with the Plaintiff						
Damages Consultant						

Multi-Dimensional Approach to Litigation

The kind of thinking that the defense needs to apply in a catastrophic injury case can be described as three-dimensional: curvilinear, non-linear, and elliptical. Thus, "the path of a point that moves so that the sum of its distances from two fixed points (foci—not focus) is constant." That is, when we do one thing in the defense, we are not focused solely on it; rather, we are focusing on what else we can do with the knowledge that we are gaining, future steps that will take advantage of the developing situation.

The multi-dimensional approach fits with what is the correct thinking about the goal of defending catastrophic injury cases. The goal is not necessarily a defense verdict. The goal is disposing of the claim in the most reasonable balance of risk and benefit. Linear, one-dimensional thinking is focused only on the defense verdict (be it no liability, winning on comparison, or keeping the damages at an acceptable level). In multi-dimensional thinking, the defense is considering how each litigation event can be used in the development of the claim/case. Each event is an opportunity to plan a further event in



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the future that will assist in the resolution of the case.

Too frequently, claims—of all sizes—proceed in a linear fashion. The routine thinking and action is: “I have finished this job or time period and now let’s do what is next.” No one is thinking of “what could I do at this step in the process (or who might I involve in this step in the process) so that if the claim is not settled, at least down the road at another step in the process I shall have another option.”

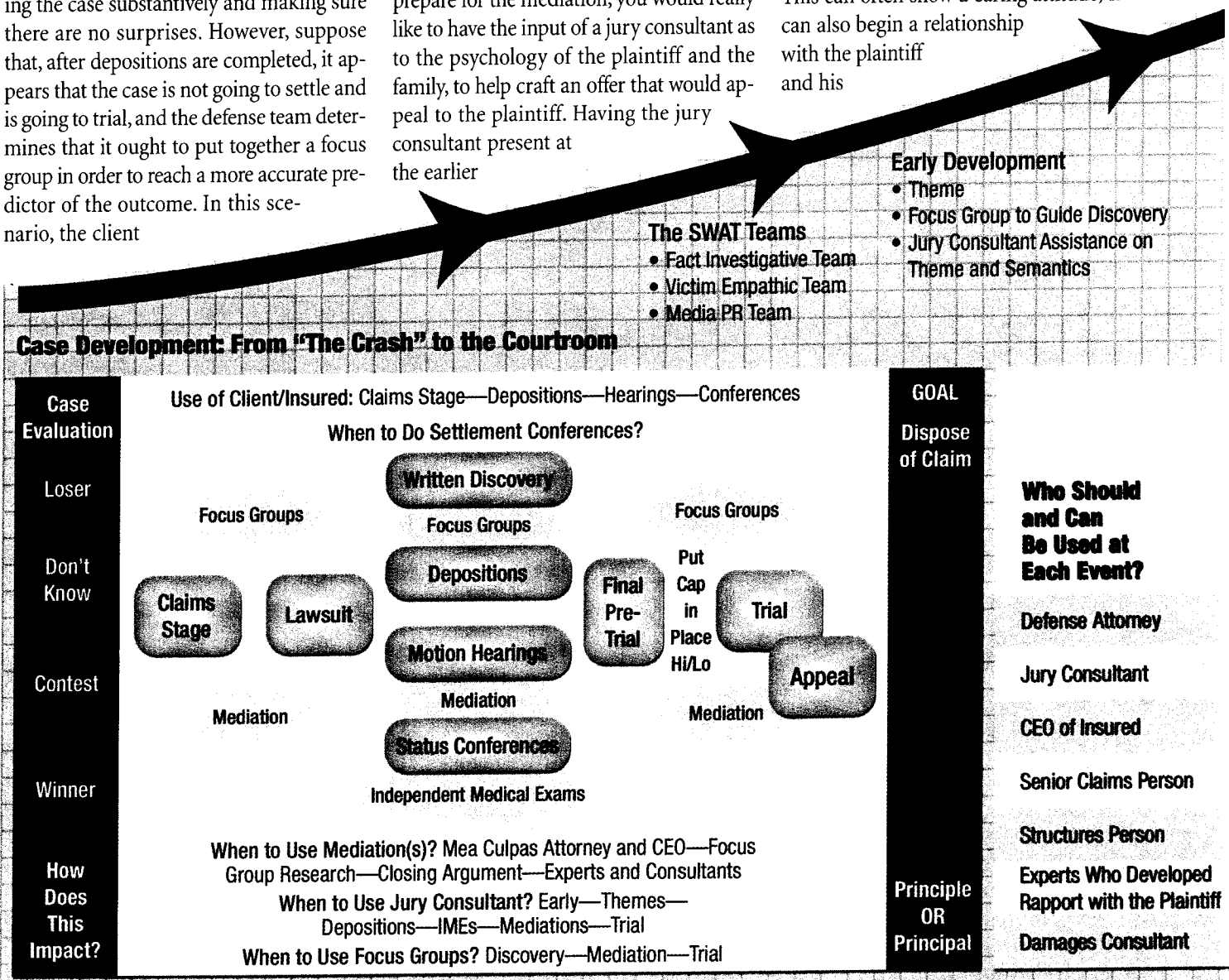
The defense’s approach to the deposition process illustrates the differences between simplistic and creative thinking. Proceeding in a one-dimensional linear fashion, depositions are scheduled and taken for the simple purpose of getting information and building the case substantively and making sure there are no surprises. However, suppose that, after depositions are completed, it appears that the case is not going to settle and is going to trial, and the defense team determines that it ought to put together a focus group in order to reach a more accurate predictor of the outcome. In this scenario, the client

is many times left wishing that the depositions had been recorded on videotape so that the focus group could see the witnesses and hear their testimony and react to both the testimony and the persona of the witness. Focus group testing without videos has obvious validity constraints. Similarly, to use good focus group results at mediation, the lack of video depositions can impose constraints.

The depositions of the plaintiff and his or her family—spouse, parents, or other family decision-makers—might be taken early, long before the defense even considered the desirability of involving a jury consultant. Later, the parties may meet for a mediation or a settlement conference, with the plaintiff and family in attendance. To prepare for the mediation, you would really like to have the input of a jury consultant as to the psychology of the plaintiff and the family, to help craft an offer that would appeal to the plaintiff. Having the jury consultant present at the earlier

depositions, or at least having a video for the consultant to study, would help the defense gain a psychological edge for mediation or settlement.

Another dimension of the litigation that the defense must keep in mind is the plaintiff’s perception of the defense’s attitude toward the plaintiff. At mediation, the defense should provide a *mea culpa*—an acknowledgement to the plaintiff that the defense is truly sorry that the plaintiff has been injured—from both the lawyer and a representative of the insured and/or the insurer. The plaintiff’s settlement position often hardens greatly if he or she perceives the defense as uncaring. A good idea to consider is to have a high level official of the insured or insurer at the plaintiff’s deposition. This can often show a caring attitude; it can also begin a relationship with the plaintiff and his



or her family that can be helpful later at the mediation.

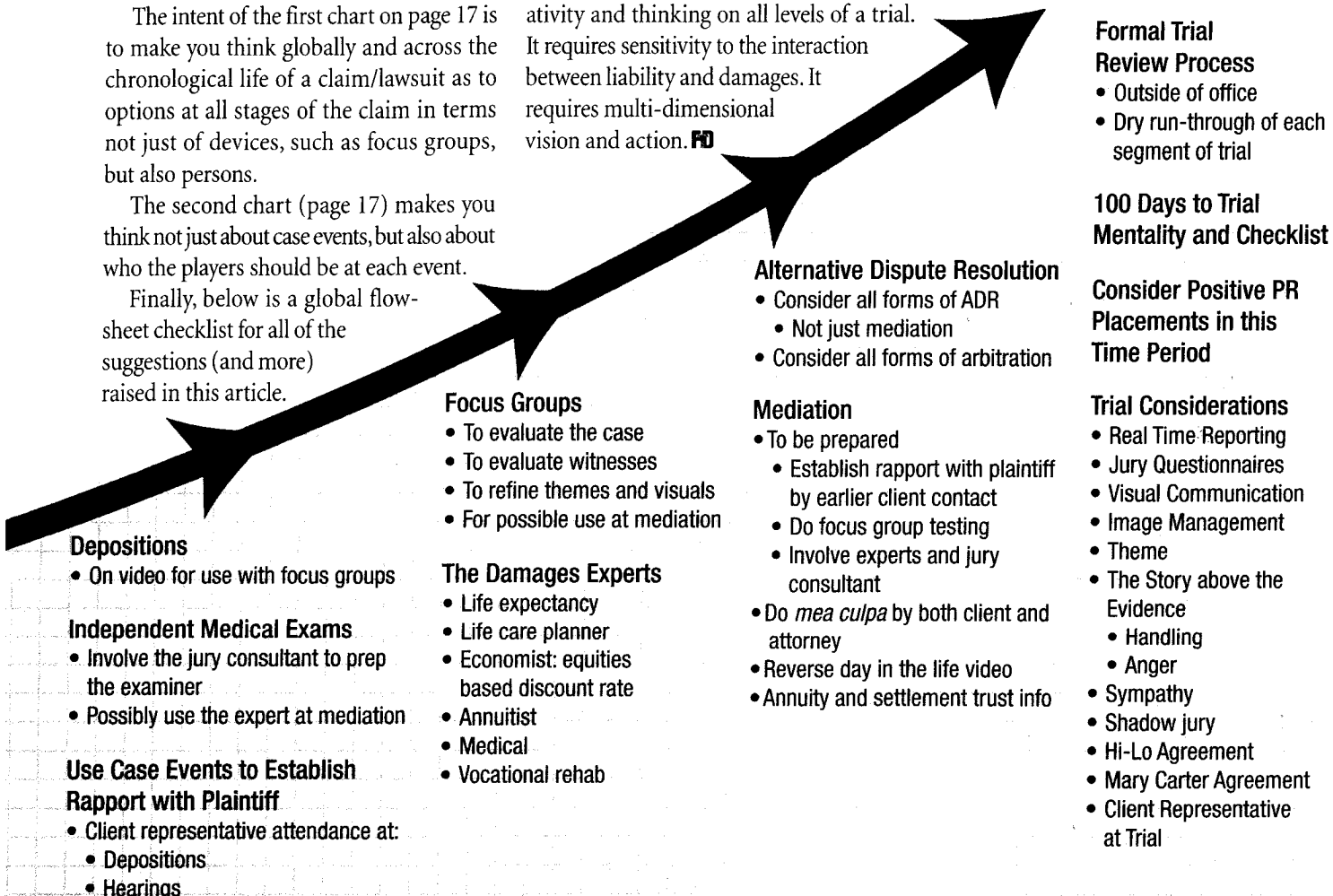
The intent of the first chart on page 17 is to make you think globally and across the chronological life of a claim/lawsuit as to options at all stages of the claim in terms not just of devices, such as focus groups, but also persons.

The second chart (page 17) makes you think not just about case events, but also about who the players should be at each event.

Finally, below is a global flow-sheet checklist for all of the suggestions (and more) raised in this article.

Conclusion

Attacking damages takes courage and creativity and thinking on all levels of a trial. It requires sensitivity to the interaction between liability and damages. It requires multi-dimensional vision and action. **FD**



Depositions

- On video for use with focus groups

Independent Medical Exams

- Involve the jury consultant to prep the examiner
- Possibly use the expert at mediation

Use Case Events to Establish Rapport with Plaintiff

- Client representative attendance at:
 - Depositions
 - Hearings

Focus Groups

- To evaluate the case
- To evaluate witnesses
- To refine themes and visuals
- For possible use at mediation

The Damages Experts

- Life expectancy
- Life care planner
- Economist: equities based discount rate
- Annuity
- Medical
- Vocational rehab

Alternative Dispute Resolution

- Consider all forms of ADR
 - Not just mediation
- Consider all forms of arbitration

Mediation

- To be prepared
 - Establish rapport with plaintiff by earlier client contact
 - Do focus group testing
 - Involve experts and jury consultant
- Do *mea culpa* by both client and attorney
- Reverse day in the life video
- Annuity and settlement trust info

Formal Trial Review Process

- Outside of office
- Dry run-through of each segment of trial

100 Days to Trial Mentality and Checklist

Consider Positive PR Placements in this Time Period

Trial Considerations

- Real Time Reporting
- Jury Questionnaires
- Visual Communication
- Image Management
- Theme
- The Story above the Evidence
 - Handling
 - Anger
- Sympathy
- Shadow jury
- Hi-Lo Agreement
- Mary Carter Agreement
- Client Representative at Trial

Event Intervention

