



Superforecasting:

The Art and Science of Quantifying Loss of Earning Capacity

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Introduction

Quantifying personal injury damages is about predicting uncertain events, both past and future. The lay person turns to her counsel who - using skill, judgment, and experience - forecasts a range where both past and future loss of earnings ought to fall at trial. In turn, that forecast reflects where the case should settle outside of court.

As counsel sometimes find they haven't the evidence to support their case theory. This may be because the evidence doesn't exist, or worse, it does exist but counsel has yet to locate it. Or much worse, counsel has no theory at all.

In suggesting a methodological approach to personal injury practitioners, we'll draw upon research described in the book *Superforecasting: The Art and Science of Prediction* (*Superforecasting*). Based on decades of academic research, the book's authors describe and define individual characteristics that lead to better judgment. Adopting this set of identified intellectual traits, the authors assert, is what distinguishes the exceptional from the average person's ability to forecast uncertain events.

There are a number of important lessons, drawn from practical experience and supported by academic research that, when applied, will assist counsel in offering sound advice.

QUANTIFICATION: A SEARCH FOR METHODOLOGY

There isn't a great deal of practical guidance on how to quantify personal injury damages. Of course case law will tell one what the law is. But, in many instances, it's through practical experience that one develops the ability to do this well. In developing this expertise, query whether the practitioner's most important lessons were drawn from instances where they did not do it so well.

The essence of the task is to visualize two pictures: what likely would have happened without the accident; and reduce that first picture by what has happened to the present and what is likely to happen in the future.

Okay go! Not quite so easy. Some counsel are tempted to just get some records, throw them into evidence, and pitch some abstract figure with a stated or unstated intention of having the judge figure it out. Not a very methodical approach. This is so because, frankly, quantifying loss of earnings, in many cases, is a very challenging aspect of this practice. It requires great skill, diligence, and creativity! It can be very difficult.

Next, we'll look to academia for guidance in methodology before applying broad lessons to the task of quantifying personal injury damages.

SUPERFORECASTING: LESSONS FROM ACADEMIA

The authors draw two broad conclusions: first, foresight is real. Some, seemingly average people, have foresight in spades. Second, high level foresight is the product of particular ways of thinking, gathering information, and updating one's analysis.

The early chapters of the text discuss their methodology to researching foresight and how some individuals distinguish themselves over time. Here, we briefly set out the characteristics of the "superforecasters," which are the traits that make some people so good at prediction.

a) Chapter 5 - Supersmart?

Key Point - Superforecasters view “beliefs” as hypotheses to be tested, not treasures to be guarded.

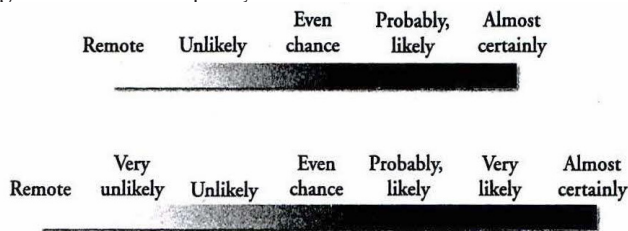
The authors conclude that intelligence and knowledge help with forecasting, but those attributes add little beyond a certain threshold. One must have a reasonably high intelligence to be a superforecaster. But those off-the-chart high IQ people do not have a material advantage. More critical is an analytical approach to dissecting a challenging question. Superforecasters break questions down into smaller bits and try to answer shorter, simpler questions with an eye to building a coherent response to the larger question. This piece-by-piece process is about an original thesis, antithesis, and synthesis.

b) Chapter 6 - Superquants?

Key Point – Superforecasters are numerate people. The greater the degree of granularity one can apply, the greater likelihood of accuracy in prediction.

Superforecasters apply mathematical approaches effectively in assessing degrees of probability. Their research data supports the notion that greater granularity is linked with better forecasting results. For example, the average forecaster who stuck to probability in the tens – 20%, 30%, 40% – is less accurate than the finer-grained forecaster who uses fives – 20%, 25%, 30% – and even less accurate than a finer-grained forecaster who uses ones – 20%, 21%, 22%. This very fine shift in statistical probability amongst forecasters is the product of the forecaster’s meaningful reasoning and precision.

As a further example of precision, the authors cite the following graph, produced by the US National Intelligence Counsel, which allows analysts to express meaning in the context of communicating on ultrasensitive policy decisions:²



c) Chapter - 7 Super News Junkies?

Key point - Superforecasters constantly collect new information from as many sources as possible and update their original prediction based on the weight of the new information.

Superforecasters adjust their initial forecasts constantly by very small margins. In other words, they weigh the value of their prior belief and then adjust it depending on the diagnostic value of the new information. It is tempting to make large adjustments with new information, but superforecasters accurately assess, measure, and weigh the value of new information and then make relatively small incremental changes based on that information.

d) Chapter 8 - Perpetual Beta

Key Point - Superforecasters have a growth mindset.

Believing that one can work hard, learn, and grow is critical to improvement. A growth mindset can be contrasted with a fixed mindset, which is the belief that we are who we are and our abilities can only be revealed, not created or developed. For the perpetual beta, failure is an opportunity to learn from mistakes, identify alternatives, and try again. The authors note that we learn skills by doing, and then doing some more. Importantly, effective practice must be accompanied by clear and timely feedback. Interestingly, the authors note that perpetual beta is the strongest predictor of rising into the ranks of superforecasters – it is roughly three times as powerful a predictor as intelligence.

e) Chapter 9 - Superteams

Key Point – Information sharing and diversity of perspective enhance accuracy of prediction.

When superforecasters were grouped together in a team of superforecasters, individual accuracy increased by as much as 50% in the years following. It’s not simply that more individuals can do more work. Rather, different individuals may interpret the same events in different ways, and often provide insight that is distinct and meaningful, which others may not draw on their own. The authors note cultures that encourage people to challenge each other, admit ignorance, and request help - all in a respectful and professional environment - contribute to more accurate individual forecasting. Notably, the authors identified groupthink (agreeing with others for the sake of avoiding conflict) as a negative trait to be avoided.

**PERSONAL INJURY DAMAGES:
PRACTICAL APPLICATIONS**

Next, we apply the lessons contained in *Superforecasting* to the practice of quantifying personal injury damages.

a) Chapter 5 Supersmart? - What lessons can we draw?

To begin, develop your theory of quantum early and test it. Ensure your client can articulate that theory. Identify the requisite evidence, and then re-test that theory. One may categorize the first phase as evidence gathering. Get records like the employment file, business records, tax returns, earnings histories, etc. Search for evidence that supports your theory, but also search for any existing evidence to the contrary. Identify collateral witnesses in the employment realm.

Then, refine your theory. Weigh the original theory against the evidence as it comes in. Consider how exactly you will articulate that theory with specific arguments. Some say write the closing first. The point is to break down the theory point-by-point. In some instances the theory is very straightforward; in others it’s complex. Watch out for unnecessary complexity. Meaning, sometimes seeming complexity is really a mirage for simplicity.

Consider defense arguments that contradict your theory and your evidence. Have someone else take a look at the file with a

critical eye. Phone up defense counsel, and really hash out what she seems to believe her best arguments are. Maybe you can determine the other side's strongest points from the phone call, or perhaps from a mediation brief or some other written correspondence. Finally, reformulate your theory based on the analytical steps you've taken to this point.

b) Chapter 6 Superquants? - What lessons can we draw?

Counsel advancing a loss of earnings theory must be well versed in the fundamentals of economic reports. If you don't know how to describe the difference between an economic and an actuarial multiplier, then you need to figure this out. If you don't know how to complete a present value calculation for a future stream of income based on a multiplier, including simply using the present value table multiplier in the manual *Civil Jury Instructions* (CIVJI), then figure it out.

One must be numerate and preferably articulately so. As others have eloquently written, it is critical that you do some math.³ So what does this mean?

First, define what your client's work would have been but for the accident. This is your client's earning capacity without the accident. Visualize and draw or describe a curve on a graph with income on the vertical axis and time on the horizontal axis. Then ask, what are the negative and positive contingencies? Do not simply state these contingencies in the abstract - calculate them out. Weigh each negative and positive contingency as they affect your total without-accident earning capacity based on appropriate multipliers. This can be broken down into a step-by-step mathematical equation. Really address the issue of the multiplier. Distinguish the plaintiff from the, arguably inappropriate, heavy negative labour market contingencies that depress earnings based on the average economic multiplier.

Next, define in detail the with-accident stream of earnings. What specific track will they now be on over, say, five-year increments through to retirement? To find this out, assign a specific mathematical value to positive contingencies, one at a time, and to negative contingencies, one at a time.

Finally, remember that economists' reports are a tool to be used by lawyers to help crystalize the present value of damages. These reports cannot replace the vision and creativity required to value an individual's earning capacity and then to articulate a loss.

Going back to the issue of communicating degrees of probability, query whether the language in the below (modified) graph will help the trial lawyer communicate his or her meaning with precision:

Remote	Very Small Possibility	Very Unlikely	Unlikely	Even Chance	Likely	Very Likely	Very High Probability	Almost Certainly
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c) Chapter 7 Super News Junkies? - What lessons can be drawn?

Critically evaluate new information as it comes in, as often as possible, relative to your original theory of damages. For example, have you received a video of your client doing activity A, B, or C shortly before trial or mediation? What really is the weight of that evidence? Does it hurt your case badly? Or, maybe it supports your case? Repeat the process of weighing new evidence and adjusting your range of damages as each piece of new information crosses your desk.

Importantly, stay current on the law – on all heads of damage and related issues. There are a number of sources where one can quickly and conveniently stay up-to-date on the law as it changes over time, such as:

- Read the weekly digests in detail that get emailed out by the CLE – Law Society;
- Read the yearly case law update put on by Murray Jamieson Law in CLE. This is a wonderful source for counsel wishing to quickly review all the important cases of the year;
- Review the CLE *Motor Vehicle Claims Practice Manual*. This is a tremendously

useful source where one can quickly research many issues in personal injury litigation;

- Use the CIVJI manual, and in particular be aware of the present value calculation tables in appendices;
- Keep a copy of *Personal Injury Damages in Canada* (2nd ed.) by Ken Cooper-Stephenson in your library at your firm. This is the go-to text if you wish to understand the philosophical underpinnings of the various heads of damages on a much broader scale than you are likely to find in case law; and
- Subscribe to the TLABC List-Serve.

d) Chapter 8 Perpetual Beta? – What lessons can we draw?

It speaks volumes about this character trait that the authors of *Superforecasting* think it is the most influential factor in distinguishing superforecasters from the rest. What does perpetual beta mean in the realm of personal injury quantification of damages?

One perspective is honest, critical self-review. And this applies to a number of other areas of improvement outside personal injury damage assessments but, more practically, really analyze your losses is the main take away, however you may define a loss. Did you fail to gather the evidence as you wished you might have in hindsight? Did you not quite hit what you thought you would hit in a trial verdict? Were you outfoxed in mediation where the defense successfully squeezed your client into accepting a lower offer than you thought he or she deserved? These scenarios can all be perceived by counsel as a loss. Discuss them with your circle of advisers, be it co-counsel, law firm colleagues, or other trusted members of the bar. The critical aspect is to undertake this exercise in earnest. Some counsel chalk up a loss as outside their control, and something that just happens as part of the nature of the business. That's fixed mindset thinking. Sure, despite tremendous skill and talent you can still suffer a loss, but on average, a growth mindset will diminish the number of losses over time.

Another component of perpetual beta can perhaps be summarized by saying it's important to push your own boundaries. Analyze what you are and are not comfortable doing within the scope of your practice. Be really honest about what you are not comfortable with doing, and work on improving that area of your practice. Is writing a weakness for you? Read books on legal writing, and then write. You seem outdated on your knowledge of the law? Read one or all of the sources of information cited in the last section on a regular basis. Are clients with challenging personalities difficult for you to manage? Talk with others about how they manage their challenging clients, put your game face on, and go do it. Feel like you're not persuasive enough when it comes time to speak publicly, either at mediation, in chambers, or at trial? Well, go do it. Practice, practice, practice. Go to court, take that speaker's podium, come prepared, and give it your best shot. We all have our weaknesses. Identify yours and work hard to improve those areas.

A further angle on perpetual beta in personal injury damages is the micro-level of an individual case. Marshalling the evidence does not mean a quick gloss over. Marshalling evidence means

getting dirty, thinking, analyzing, and synthesizing new information. You must get out there, or have other qualified people get out there, to find information. Interview those witnesses. If you're not satisfied with the interview information received, then interview them a second time. Talk to the doctors. Get them on the phone and ask them questions about their opinions. If you're not satisfied get them back on the phone. Look for that empirical evidence that supports your theory of the case. Photos of work activity may be very persuasive just like empirical earnings history data. All sorts of documentary and photographic evidence must be found and pursued relentlessly with dogged determination to unearth the information that will support your case or the smoking gun that will damage your opponent's case.

e) Chapter 9 Superteams? – What lessons can we draw?

Collaborating with other legal professionals, if one accepts the thesis of *Superforecasting*, is essential to maximizing skill and talent. The lone-wolf practitioner who never engages with other counsel is not as effective a counsel as he or she could be. It takes a diversity of opinion to point out the fundamental flaw in one's case that the lone-wolf counsel may be oblivious to. Plus, superforecasting in personal injury damages requires a work environment with other legal professionals where one can give and receive guidance, counsel, and constructive criticism. Maybe this is acting as co-counsel on the case, or on every case, be it as it may.

Are you in a work environment where counsel says, "I've been doing it this way for many years therefore my way of doing things must be correct?" Wrong answer. This is the same answer that, according to the authors of *Superforecasting* (see chapter 2), led the field of medicine astray for several centuries. Don't be that lawyer. Look for a culture with an open dialogue where one way of doing things is constantly tested and critiqued until it is accepted as the best way of doing things. Do things the best way because you have reflected on why it is the best way, and in turn encourage other people to adopt the best way unless they can show you a different way that is better. And if another professional can show you a better way, then that method will become your new way. Thesis. Antithesis. Synthesis.

CONCLUSION

Superforecasting offers a scientific and methodically tested analysis of which individual characteristics improve accuracy in decision-making about future uncertain events. These well-researched insights are useful and broad in scope. The trial lawyer wishing to forecast personal injury damages is well-advised to apply them in his or her daily practice. [V](#)

1 Philip Tetlock and Dan Gardner, *Superforecasting: The Art and Science of Prediction*, 2015, McClelland & Stewart.

2 *Ibid.* at p. 146.

3 Jon Harbut, "Connecting the Dots From Chronic Pain to Future Income Loss Award", *The Verdict*, Spring 2014, Issue 40, at pp. 52-56.

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