Flag on the Play: Analyzing the Use of Race-Norming in the NFL's Concussion Settlement

Former players of the National Football League (NFL) filed lawsuits against the league for its failure to warn players of the link between repeated concussions and chronic traumatic encephalopathy (CTE), a degenerative brain disease. The retired players ultimately reached a settlement agreement with the NFL, which utilized the long-standing practice of race-norming in the calculation of individual damage awards. Two retired Black NFL players, who were denied awards, challenged the use of these race-based actuarial models on the basis that the practice had violated their rights. This paper posits that the use of race-norming in assessing tort damages in the NFL concussion settlement is not only an unreliable indicator of lost earning capacity as a component of a compensatory damage award, but is also a discriminatory practice.

I. FUMBLING THE BALL: *IN RE: NATIONAL FOOTBALL LEAGUE PLAYERS' CONCUSSION INJURY LITIGATION*

In 2019, a federal judge denied the claims of two retired Black NFL players, Kevin Henry and Najeh Davenport, who argued that they would have received awards had the practice of race-norming not been utilized during their neurocognitive examinations.[1] The players alleged that the NFL "explicitly and deliberately" discriminated against Black players that had submitted dementia claims, thereby making it more difficult for retired Black players to be eligible for payouts worth up to three million.[2]

---

[1] *See* Maryclaire Dale, *Lawyers: NFL Concussion Awards Discriminate Against Blacks*, PHILADELPHIA TRIB. (Aug. 26, 2020), https://www.phillytrib.com/sports/football/lawyers-nfl-concussion-awards-discriminate-against-blacks/article_6e6165e9-05da-538c-8c7d-10e5cb57612d.html (stating that the denial of awards for Henry and Davenport was "'based on a discriminatory testing regime' that weigh[ed] demographic factors including race"). Generally, race-norming is the practice of converting individual test scores into percentages or standard scores within one's racial group. *See generally* Paul S. Greenlaw & Sanne S. Jenson, *Race-Norming and the Civil Rights Act of 1991*, 25 PUB. PERS. MGMT. 13 (1996).

[2] Ken Belson, *Black Former N.F.L. Players Say Racial Bias Skews Concussion Payouts*, N.Y. TIMES (Aug. 25, 2020), https://www.nytimes.com/2020/08/25/sports/football/nfl-concussion-racial-bias.html. Under the present

On August 25, 2020, Davenport and Henry filed lawsuits requesting that the court prohibit race-based benchmarks from being used to examine dementia claims.[3] Generally, dementia tests utilize racially based scales that employ two scoring curves or baseline standards—one for Black players and another for white.[4] The benchmark average scores or "norms" are lower for Black individuals, a practice that Davenport and Henry argued is untenable.[5] The plaintiffs asserted that the NFL's use of race-norming scales impedes the ability of Black players to demonstrate sufficient cognitive impairment to be awarded damages, in spite of the fact that Black athletes comprise seventy percent of the NFL's current workforce.[6] On March 8, 2021, a federal judge dismissed the lawsuit, instructing the parties to resolve the dispute through mediation.[7] Davenport and Henry have since moved to intervene in the proceedings, claiming that plaintiffs' class counsel cannot adequately represent their concerns.[8]

II. CALL UNDER REVIEW: THE USE OF RACE-NORMING IN TORT LAW & DAMAGE AWARD CALCULATIONS

Courts have long embraced the practice of reliance upon race-based tables to assess damage awards in tort law.[9] These statistical tools purportedly further the overarching goal of tort actions—

model for allotting dementia awards out of the settlement fund, former players can receive up to three million for a moderate dementia finding. Dale, *supra* note 1. To date, the average pay-out for early and moderate dementia claims, however, is just below six hundred thousand dollars. *Id.*

[3] Belson, *supra* note 2.

[4] *Id.*

[5] Dale, *supra* note 1.

[6] Belson, *supra* note 2; *see also* Ken Belson, *As Trump Rekindles N.F.L. Fight, Goodell Sides With Players*, N.Y. TIMES (June 5, 2020), https://www.nytimes.com/2020/06/05/sports/football/trump-anthem-kneeling-kaepernick.html (noting that the NFL has struggled more than any other major sports league with matters of race, the underrepresentation of people of color in leadership positions, and players' rights to protest social injustices on the field).

[7] Zachary Zagger, *Suit Over 'Race-Norming' in NFL Concussion Deal Gets Nixed*, LAW360 (Mar. 8, 2021), https://www.law360.com/articles/1362416/suit-over-race-norming-in-nfl-concussion-deal-gets-nixed.

[8] Zachary Zagger, *Ex-Steelers Want Voices Heard on 'Race-Norming,'* LAW360 (Mar. 15, 2021), https://www.law360.com/articles/1364999?e_id=ae1d2f0d-23ec-48ca-ae24-555a2bfb4981&utm_source=engagement-alerts&utm_medium=email&utm_campaign=case_updates.

[9] Ronen Avraham & Kimberly Yuracko, *Torts & Discrimination*, 78 OHIO ST. L.J. 661, 669 (2017).

to make victims "whole."[10] In the United States, there are no federal laws that prohibit the use of such models in damage award calculations.[11] Only a handful of courts have considered the constitutionality of race-norming, primarily because complainants tacitly have accepted race-based actuarial tables.[12] Even though these models work to the detriment of minority plaintiffs, race-norming has become so customary that plaintiffs themselves rely upon this data in their own expert testimony.[13] The unintended result is the systemic devaluation of Black individuals' tort claims.[14]

In the NFL concussion litigation, the settlement agreement contemplates the use of race-norming statistical modeling in the form of neuropsychological exams, known as the Heaton Norms.[15] These exams, named after neuropsychologist Robert Heaton, are intended to remedy racial or ethnic discrepancies in responses, and account for other variables, such as age, education, and sex.[16] Physicians select different tables for different races in order to decipher the results of neurocognitive examinations.[17] The practice of race-norming has been supported by historical trends, which reveal that Black individuals, on average, have lower average cognitive test scores than white individuals.[18] As such, these norms arguably aim to avoid overdiagnoses of cognitive

[10] LAWYERS' COMM. FOR CIV. RTS. UNDER L., HOW RACE, ETHNICITY, AND GENDER IMPACT YOUR LIFE'S WORTH: DISCRIMINATION IN CIVIL DAMAGE AWARDS 2 (2018), https://lawyerscommittee.org/wp-content/uploads/2018/07/LC_Life27s-Worth_FINAL.pdf.

[11] Jesse Schwab, *The Problem with Defining Tort Damages in Terms of Race and Gender*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Nov. 25, 2019), https://harvardcrcl.org/the-problem-with-defining-tort-harms-in-terms-of-race-and-gender/.

[12] Helen E. White, Note, *Making Black Lives Matter: Properly Valuing the Rights of the Marginalized in Constitutional Torts*, 128 YALE L. J. 1742, 1748–49 (2019).

[13] *Id.* at 1748.

[14] *See* Jennifer Wriggins, *Tort, Race, and the Value of Injury, 1900-1949*, 49 HOW. L.J. 99, 101 (2005) (documenting the historical discrimination of Black plaintiffs by U.S. courts, and arguing that the tort claims of Blacks were largely devalued in the early twentieth century, compared to those of white plaintiffs).

[15] Belson, *supra* note 2.

[16] *Id.*

[17] Matt Ventresca & Kathryn Henne, *NFL Concussion Lawsuit Payouts Reveal How Racial Bias in Science Continues*, THE CONVERSATION (Sept. 17, 2020), https://theconversation.com/nfl-concussion-lawsuit-payouts-reveal-how-racial-bias-in-science-continues-145987.

[18] *Id.*

impairment in the Black community.[19] Although there is evidence that race-norming neutralizes implicit racial biases within cognitive testing, it does not eradicate them.[20] Rather, this methodology fails to take into account the diversity of experiences and, in turn, can perpetuate false perceptions about inherent distinctions among racial groups.[21]

III. CALLING AN AUDIBLE: THE IMPLICATIONS OF USING RACE-NORMING IN BENEFITS CALCULATIONS

Within tort law, there is a tension between the belief that liability and damages should be evaluated on a case-by-case basis, and the competing belief that comparable injuries should be treated uniformly.[22] Underlying this conflict is a struggle between principles of equality and individualized claim resolution.[23] The question therefore arises as to whether reliance on race-based statistical tables adequately satisfies the objectives of equality and individualized assessment, and, if not, what standards should courts apply in calculating damages for tortious injuries.

A. Race-Based Actuarial Tables: Objective or Subjective?

Proponents of race-norming argue that expert economists' reliance on race-based statistical modeling is justifiable because the data is obtained from accurate, "neutral" figures.[24] Theoretically, race-based tables are inherently objective in that experts simply look to determine what *is* the present reality for racial groups, rather than what that reality *should* be.[25]

---

[19] *Id.*

[20] *See* Jennifer J. Manly, *Advantages and Disadvantages of Separate Norms for African Americans*, 31 THE CLINICAL NEUROPSYCHOLOGIST 270, 270 (2007) (describing the delicate balance between recognizing that racial classifications are critical to studies on cognition and neuropsychological test performance, while also understanding the potential for misinterpretation and misuse of these classifications).

[21] Ventresca & Henne, *supra* note 17.

[22] Wriggins, *supra* note 14, at 101.

[23] *See id.* at 101–02 (stating that the entanglement of race and tort law reflects an enduring tension within tort law, namely how to *fairly* assess liability).

[24] Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 114 (1994).

[25] *Id.*

Critics, however, dispute these claims, asserting that race-based actuarial tables are largely subjective in their application, leading to disparate damage assessments for similar injuries.[26] The choice of factors to incorporate in a damage calculation presents a nuanced determination.[27] Too few variables will lead to poor accuracy, whereas the inclusion of too many variables will "overfit" the information.[28] In both cases, the end result is the same—a lack of predictive value—which cuts against the perception that these models are in fact "accurate" tools of measurement.[29]

The disparities within racial statistical modeling are the product of years of intentional economic suppression of certain racial groups.[30] As such, race-norming promulgates the discriminatory policies and barriers that certain minorities have experienced, as opposed to providing a true evaluation of the innate earning capacity of any particular claimant.[31] Scholars have noted the grave danger in relying upon race-based actuarial tables, explaining that doing so "assumes that the current . . . racial pay gap will continue into the future, despite ongoing legal and institutional efforts to make the workplace more diverse and less discriminatory."[32] Therefore, by presuming that current inequality gaps will go unchanged, the legal system continues to award lower monetary tort damages to certain minorities, based upon these race-based tables.[33] Consequently, race-norming has the troubling, discriminatory effect of widening power disparities

[26] Edward K. Cheng, *A Practical Solution to the Reference Class Problem*, 109 COLUM. L. REV. 2081, 2085 (2009); White, *supra* note 12, at 1749; Loren D. Goodman, Note, *For What It's Worth: The Role of Race- and Gender-Based Data in Civil Damages Awards*, 70 VAND. L. REV. 1353, 1374 (2017).

[27] Cheng, *supra* note 26, at 2093.

[28] *Id.*

[29] *Id.*; *see* Chamallas, *supra* note 24, at 115 ("Moreover, it is far from clear that reliance on race-based data generates the most accurate estimation of future earning capacity.").

[30] Schwab, *supra* note 11.

[31] *Id.*

[32] Chamallas, *supra* note 24, at 75.

[33] *Id.* at 115–16.

among different racial groups, thereby thwarting efforts to dismantle institutionalized racism in our judicial system.[34]

B. Race-Based Actuarial Tables: Individualized or Aggregative?

Although damage awards may vary, judges and juries are duty-bound to honor each individual injury and plaintiff as unique.[35] The application of race-based actuarial models, in which experts formulate generalizations about segments of the population, therefore undermines this goal.[36]

The use of race-norming has the effect of subjecting each person within a racial group to the average achievement of their entire racial class.[37] This approach is particularly disconcerting within the context of debilitating injuries, in which the plaintiff already has lost the ability to achieve beyond what racial statistics would predict.[38] The unreliability of race-based models is further underscored by the lack of genetic variation among racial groups, and the fact that individuals may identify with multiple racial categories.[39] Therefore, although the concept of using group-based modeling and categorical generalizations to assess damage awards may seem equalizing, the process frustrates tort principles of individualized claim resolution. This practice also presumes that the current status quo will remain unchanged by projecting group-based historical data indefinitely into the future and, in doing so, perpetuates institutionalized racism and the subjugation of minorities.

---

[34] *See* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007–10 (1986).

[35] Wriggins, *supra* note 14, at 102–03.

[36] *See* Goodman, *supra* note 26, at 1383, 1389 (arguing that experts should replace race and gender statistical data with more individualized considerations, such as education history and socioeconomic status, because these latter factors offer an equally qualified proxy for reliable predictions while avoiding constitutional and social problems).

[37] Schwab, *supra* note 11.

[38] *Id.*

[39] *See* G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 250 (E.D.N.Y. 2015).

IV. GOING FOR THE TOUCHDOWN: PROHIBITING RACE-NORMING IN THE NFL CONCUSSION SETTLEMENT

The noted inefficiencies in race-norming practices impact the determination of NFL dementia claims, which use race-based benchmarks in the evaluation of players' neurocognitive functioning. In September 2020, the American Association for the Advancement of Science (AAAS) wrote a letter to the U.S. National Institute of Health, formally challenging the notion that racial groups can serve as accurate, technical indicators of inherent racial differences.[40] The organization explained that the custom of using race as the only determinative factor was unsound because it failed to recognize the true causes of poorer health in Black and minority communities, such as environmental, social, and structural inequalities.[41] As such, the employment of race-based scoring metrics for evaluating retired NFL players' neurocognitive impairments creates an inaccurate representation of the variances among different groups of players.[42] The AAAS referred to this phenomenon as "biosocial determinism," wherein statistical results misrepresent the manner in which societal conditions influence differences in cognitive functioning.[43] The NFL concussion award valuations, therefore, demonstrate that science can reinforce deceivingly simple biological explanations and minimize the impact of systemic inequalities.[44]

In addition to these scientific arguments made against the use of race-based benchmarks for determining whether former NFL players should receive benefits, legal experts have contested the NFL's defense of the practice, averring that it is "fundamentally unlawful."[45] Some opponents criticize the reliability and aggregative effect of these racial statistics, explaining that the averages

[40] *See* Ventresca & Henne, *supra* note 17 (noting that by concentrating solely on race, experts fail to understand how racism interacts with other variations).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Belson, *supra* note 2 (quoting Professor Thomas Berg as stating that "[i]f a racial factor is being used against a historically disadvantaged group to deny benefits that they would otherwise receive, that is illegal").

stem from the general population, as opposed to a controlled group of NFL players, nearly all of whom have attained college degrees.[46] As a result, retired Black players must demonstrate that they suffer from more severe neurocognitive deterioration that white players, in order to receive a payout.[47] Furthermore, legal scholars have questioned the constitutionality of race-norming, arguing that the practice violates the Fifth and Fourteenth Amendments of the Constitution because racial classifications are proper only upon a demonstration of compelling state interest.[48] Legal scholars have raised concerns about the use of race-based statistics in calculating damages in tort cases, particularly because the practice has been shown to foster racial subordination with no proof of a compelling government interest in doing so.[49]

The reliance by the NFL upon race-based benchmark scores to prohibit retired Black players from receiving benefits is particularly indefensible, given the league's infamous disregard for the benchmarks, such as the Wonderlic test. In 1936, the NFL began using the Wonderlic, a fifty question multiple-choice exam, to assess college football players for draft eligibility.[50] Despite its persistent use, experts have found that Wonderlic scores do not operate as a bar to participation in the league and are largely unrelated to a player's draft position.[51] Generally, the league appears to consider these scores when drafting offensive positions, such as quarterbacks and offensive linemen—positions commonly filled by white players—which also report the highest Wonderlic scores.[52] On the other hand, the typically lower Wonderlic scores of defensive players—positions that are disproportionately held by Black athletes—have not been raised as an

[46] *Id.* Moreover, those who have investigated the neuropsychological testing of Black individuals find that the datasets do not account for individuals that are biracial, nor do they address the diversity among individuals that identify as Black. *Id.*

[47] *Id.*

[48] Chamallas, *supra* note 24, at 75; *see* Korematsu v. United States, 323 U.S. 214, 223 (1944).

[49] Chamallas, *supra* note 24, at 124.

[50] Andrew Gill & Victor Brajer, *Wonderlic, Race, and the NFL* Draft, 13 J. SPORTS ECON. 642, 644 (2012).

[51] *Id.* at 644.

[52] *Id.* at 648.

issue by the NFL when drafting these players.[53] The NFL uses cognitive testing in this way, as a tool to its advantage, thereby perpetuating race-norming. When a Black player begins his professional career, the NFL does not use cognitive testing as a bar to participation, but the league *does* use cognitive testing as an attempt to bar recovery for Black players' brain injury claims. For this reason, the NFL's use of race-based norms as an offensive sword to prevent retired Black players from collecting damages is wholly indefensible.

V. CONCLUSION

The use of race-based actuarial tables to evaluate tortious injury claims that reduce monetary compensation awards for minorities should come to an end. By prohibiting race-based classifications, experts will be better equipped to make individualized assessments that rely upon the specific characteristics of the plaintiff in question, without the influence of potentially biased considerations. When individualized assessments of a plaintiff's loss of future earning capacity are not ascertainable, courts and experts should look to inclusive, race-neutral statistical models. In doing so, experts finally will ensure that tort goals of accuracy, objectivity, and individualized claim resolution are at the center of all tortious damage awards assessments.

Although the practice of using race-based statistical data in tort litigation historically has been widely accepted among courts, current trends appear to favor prohibiting their use altogether. In September 2019, California signed into law Senate Bill (S.B.) 41, making it the first state to prohibit the reduction of damage awards for lost future earnings in personal injury and wrongful death cases when those reductions are based on race, gender, or ethnicity.[54] California's enactment of S.B. 41 may very well encourage other jurisdictions to enact similar legislation. In the

[53] *Id.* Black athletes, on average, are selected earlier in the draft, even though they score approximately eight points lower than white players on the Wonderlic. *Id.* at 647–48.

[54] Schwab, *supra* note 11; *see* S.B. 41, Reg. Sess. (Ca. 2019).

meantime, plaintiff's attorneys should not be beholden to the customary practice of using race-based actuarial tables in tort damage calculations and, instead, should challenge the validity of such models. By engaging a strong offense against the practice of race-norming, minority plaintiffs no longer will be on the defensive. Instead, minority tort plaintiffs can lead the charge to dismantle institutionalized discrimination within our judicial system, throwing the flag down on this play permanently.