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Article abstract

This commentary assesses the ethical implications of a fair innings inspired approach to healthcare through the lens of the equality guarantee contained in the *Canadian Charter of Rights and Freedoms*.

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Fair Innings: Equality and Children's Healthcare

COMMENTAIRE CRITIQUE / CRITICAL COMMENTARY (RÉVISION PAR LES PAIRS / PEER-REVIEWED)

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Résumé

Ce commentaire évalue les implications éthiques en soins de santé d'une approche axée sur le "fair innings" à travers la loupe de la garantie d'égalité inscrite dans la Charte canadienne des droits et libertés.

Mots clés

fair innings, égalité, justice, allocation de ressources, soins de santé, enfants, Canada

Summary

This commentary assesses the ethical implications of a fair innings inspired approach to healthcare through the lens of the equality guarantee contained in the *Canadian Charter of Rights and Freedoms*.

Keywords

fair innings, equality, justice, resource allocation, healthcare, children, Canada

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Introduction

The allocation of resources continues to raise significant ethical and policy issues for all involved in healthcare. Theories of distributive justice that focus on *fair innings* argue that healthcare resources should be allocated to optimize each person's chance at receiving a fair share of life [1]. This paper critically evaluates the ethical implications of applying a fair innings framework to children's healthcare through the lens of the *Canadian Charter of Rights and Freedoms* [2]. The *Charter* protects each person's right to equality and to be free from state imposed discrimination. Discrimination is conceptualized as the arbitrary disadvantaging of a historically marginalized group. Fair innings programs intentionally redirect healthcare resources away from particular groups. The seeming arbitrariness of this exclusion raises questions regarding the ethical feasibility of fair innings inspired programs. Moreover, if fair innings policies do create arbitrary disadvantage for specific age groups, they may nevertheless be ethically justified as an affirmative action program.

Universality and Canadian Healthcare

The *Canada Health Act* establishes publicly funded access to healthcare for all qualified Canadian residents. For a provincial healthcare program to receive federal funding it must be universal, servicing 100% of insured persons, and it must be comprehensive [3]. This legislation reflects the view that healthcare is a basic entitlement that should not be denied based on a person's particular economic circumstances [4]. Instead, the provision of healthcare and the allocation of healthcare resources should be based on need, wherever possible [5]. However, the reality of federal budgeting and provincial healthcare funding means that despite the legislative promise of universality and comprehensiveness, the needs of certain groups are not being adequately met [4,6]. This raises ethical questions of how the relative prioritization of certain groups in law and policy can increase the equity of the Canadian healthcare system.

The Fair Innings Thesis and Children's Health

The fair innings thesis suggests that healthcare resource allocation should aim to allow each individual their "fair innings," an average number of years lived in good health. Formulations of this thesis differ regarding when age based considerations should be applied [7]. John Harris, who developed the fair innings thesis, suggested that it should be limited to the context of life-saving treatment. Others suggest that age-weighting can serve as a mechanism for equalization in the healthcare system more broadly [1]. While fair innings discussions generally focus on age-weighting as between younger and older adults, this paper will centre on the potential application of the fair innings thesis to children's healthcare.

Proponents of the fair innings thesis draw primarily on equity-based arguments. Accepting that justice or fairness can be applied to quantities of life, prioritizing individuals based on age can be morally justified on the ground that those who experience fewer years of life are worse off [8]. The relevant consideration is whether a person has enjoyed a reasonable number of years in good health. Thus, justice requires that resources be diverted towards an individual or group who has not yet lived a reasonable number of years, to the disadvantage of someone who has already had their fair inning [1 at 179]. In this way, fair innings can be viewed as a distinct, freestanding demand of justice that exists regardless of any pre-existing wrongs.

The most controversial aspect of the fair innings thesis, however, is its ostensibly discriminatory nature. A fair innings approach to healthcare openly distinguishes on the basis of age, potentially circumscribing access to healthcare for those who have had their "fair innings". Examining the fair innings thesis through the *Charter* raises the question of whether the redirection of healthcare resources is in fact arbitrary, and therefore discriminatory and ethically unjustifiable.

Discrimination and the Charter

Section 15(1) of the *Charter* protects the right to equality. This right does not guarantee identical treatment. Instead, it protects substantive equality, which "recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages" [9 at para 17]. The overriding purpose of the equality guarantee is protection against discrimination [10 at para 24].

State action breaches a person's equality rights when it creates a distinction that perpetuates discrimination on the basis of an enumerated or analogous ground. The Supreme Court in *Taypotat* defines discrimination as the presence of arbitrary disadvantage marked by a failure to respond to the needs of the claimant group in question that perpetuates their disadvantage [9 at para 20]. In this way, although substantive equality is a free-standing right of each individual, the presence of equality is measured by the costs and benefits imposed on specific groups. To assess fair innings through an

equality lens under the *Charter* therefore requires one to look not simply to fair innings as an independent right, but through the benefits and disadvantages it imposes on various groups in society.

A distinction that arbitrarily perpetuates disadvantage does not violate the equality guarantee if the distinction is drawn in order to ameliorate the position of a historically disadvantaged group under section 15(2) of the *Charter*. This provision operates harmoniously with section 15(1) to empower governments to combat discrimination and work towards substantive equality through ameliorative action programs [10 at para 16].

To pass constitutional scrutiny, an allegedly ameliorative program must have an ameliorative purpose targeted at a disadvantaged group [10 at paras 48, 49]. Further, the distinction drawn by the law must serve and be necessary to that purpose [11 at para 45]. The government is not required to show that the state action will have an ameliorative effect; the analysis is limited to the government's purpose. As a result, if fair innings act as an affirmative action program, it may not violate the demands of the *Charter's* equality provision, regardless of whether it imposes a disadvantage on elderly segments of the Canadian community.

Fair Innings: A Question of Arbitrary Disadvantage

Although Canadians often view healthcare as a basic right of citizenship, there is no free-standing right to healthcare in Canada [12,13]. Moreover, given the finite nature of public resources, the complete provision of healthcare treatment and therapies for all persons is impossible [14]. Current allocation models, which incorporate both needs-based triage elements and first-come first-serve, are subject to discrepancies based on who initially presented for treatment and the disparity of access to healthcare across geographic regions [15 at 240-244]. Fair innings may therefore provide a less arbitrary, and therefore less discriminatory, means of allocating resources. This raises two central issues: the implications of the universality of aging to the discrimination analysis, and the link between age and positive outcomes in healthcare.

First, proponents of fair innings argue that it does not perpetuate arbitrary disadvantage, because adults, whose healthcare descends in priority compared to children, already enjoyed healthcare prioritization during their youth [1]. This argument highlights the unique nature of age discrimination. Whereas grounds such as race and sex act as a permanent identity marker, the vast majority of persons will pass through many stages of life, and therefore experience numerous ages. As a result, "age weighting does not discriminate between individual lives, only between periods within lives" [1 at 175]. For this reason, no single individual is truly excluded under a healthcare policy that distinguishes on the basis of age under the fair innings theory. Each individual will have access to the benefit of the fair innings policy if they live long enough.

Second, whether fair innings can be judged as arbitrary directly correlates with the relationship between age and healthcare outcomes. At face value, a fair innings framework recognizes the reality that as individuals age, the likelihood of achieving a successful outcome through medical intervention diminishes. Healthcare programs that target children often maximize the number of years saved through treatment. This fact reflects the reality that age, unlike other grounds of discrimination, often correlates with a person's capacities and needs. As Judge LaForest noted in *McKinney v University of Guelph*, "there is nothing inherent in most of the specified grounds of discrimination...that supports any general correlation between those characteristics and ability. But that is not the case with age" [16]. Whereas channelling resources based on race, gender or sexual orientation would be arbitrary, allocating resources based on age largely reflects the reality that children may have better healthcare outcomes.

Despite general links between age and capacity, concerns remain that fair innings policies do not adequately reflect the reality of aging patients. Significantly, fair innings does not account for prognosis [15]. Moreover, although younger people in general have a longer life expectancy, there may be cases where a child's life expectancy is extremely short due to a terminal illness or disease. Diverting resources away from the elderly and towards the young in this context ignores the fact that the elderly likely have a significantly better long-term outcome. By ignoring prognosis, fair innings overlooks one of the most relevant factors in determining a patient's health outcomes, which goes to the core of arbitrariness.

Fair Innings as Ameliorative Action

The intention to remedy systemic disadvantage provides a possible ethical justification for the implementation of a program that creates a disadvantage for a particular segment of society. Under a *Charter* framework, if the government, in implementing a fair innings inspired approach to healthcare, actively purports to benefit children, the primary question is whether the program serves and is necessary to that purpose [11]. The equality analysis does not take the effects of the program into account. This reflects the importance of allowing the government wide latitude in implementing policies designed to benefit groups that have experienced disadvantage. However, it gives rise to the issue of whether it is possible to remedy children's disadvantage while ignoring the needs of other segments of the population. Further, it poses the ethical difficulty of whether it is justifiable to benefit one disadvantaged group at the expense of another.

The Supreme Court has repeatedly recognized children as a historically disadvantaged and vulnerable group [17]. Children's historic disadvantage manifests in society's failure to acknowledge their personhood. In *Canadian Foundation for Children and Youth*, Justice Deschamps noted, "[h]istorically, [children's] vulnerability was entrenched by the traditional legal treatment of children as the property or chattel of their parents or guardians." [18]

Children continue to experience unique vulnerability in the healthcare context. Children who do not have the capacity to make medical decisions under the law may be vulnerable to having their interests and needs overlooked. Further, children outside of urban centres may lack access to specialized paediatric care, and may be required to travel significant distances to access treatment. For many groups, such as Indigenous communities, this disadvantage has compounded other forms of discrimination to create a specific and complex experience of marginalization [19].

There is disagreement as to whether the fair innings framework would ultimately remedy children's disadvantage, or even create a net benefit for children. First, some suggest that priority should be given to children's caregivers [7 at 118], since any deterioration in the caregiver's health would be markedly detrimental for the child. Second, prioritizing the development of healthcare resources that disproportionately benefit children might penalize youth who suffer from diseases that affect different age groups. For example, arthritis primarily affects the elderly, but certain forms may affect youth. Refusing to fund arthritis research on the basis that such research would primarily benefit those who had already received their 'fair inning' might ultimately disadvantage certain groups of children [20]. Moreover, conceptualizing a fair innings inspired healthcare policy as affirmative action raises questions of whether under-inclusive programs truly benefit disadvantaged groups, or further entrench inequality. Like children, the elderly may have difficulty accessing specialized care. Further, they may be vulnerable to exploitation by their family members and caregivers. However, in *Cunningham*, the Supreme Court suggests that a policy can exclude certain groups from a targeted benefit without compromising the ultimate aim of equality [11 at para 40]. In the context of fair innings, this perspective indicates that the exclusion of the elderly from a benefit designed for children may not negate the overall equality promoting nature of the scheme.

Conclusions

In the face of a shortfall of healthcare resources, absolute universality and comprehensiveness in the allocation of healthcare resources is not an option. The fair innings thesis provides a possible avenue for improving availability of healthcare for children. At first glance, this program appears discriminatory on the basis of age. However, applying a *Charter* perspective highlights the ethical and equitable complexity of a fair innings inspired policy. Analyzing fair innings through the lens of the right to equality engages multifaceted questions of age discrimination, and the nature of arbitrary disadvantage under a potential system that distinguishes based on age. It raises the ethical question of whether it is justifiable to intentionally benefit one group at the expense of another in order to remedy historic disadvantage.

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