Excessive Stay Applications in Litigating Experimental Treatment Decisions: The Case of Charlie Gard

*Griffith Cheng**

Legal and public discourse was recently rocked by the case of Charlie Gard, a terminally ill infant whose aggrieved parents were locked in a widely publicized legal struggle against his treating hospital. A series of trial and appellate judgments from British courts supported the treating hospital's application for the withdrawal of life support in consideration of the lack of proven viable treatments. This case comment does not dispute this conclusion, but rather critiques the legal process by which it was reached on the basis that far too much time elapsed during the process at the expense of Charlie's welfare. Consideration of timelines is relevant in ascertaining the best interests of the patient, especially in the case of pediatric patients or those with substitute decision makers. This comment seeks to answer one key question: to what extent should the necessity of exhausting appeal processes, in pursuit of a just legal outcome, be tempered by concerns for a patient's quality of life in terminal cases requiring imminent decision-making? The author argues that a stronger push for procedural efficiency is warranted

Les discours public et juridique ont été récemment bouleversés par le cas de Charlie Gard, un enfant en phase terminal dont les parents lésés ont été pris dans un débat juridique hautement publicisé contre l'hôpital où leur enfant était traité. Une série de jugements de première instance et d'appel de différents tribunaux britanniques ont accueilli la demande de l'hôpital pour le retrait des équipements de survie en raison du manque de traitements viables et reconnus. Ce commentaire d'arrêt ne remet pas en question les conclusions des tribunaux, mais critique la procédure juridique pour obtenir de telles conclusions étant donné que beaucoup trop de temps s'est écoulé au détriment du bien-être de Charlie. Les considérations de temps sont pertinentes dans l'évaluation du meilleur intérêt du patient, particulièrement dans le cas des patients mineurs ou avec un mandataire spécial. Ce commentaire cherche à répondre à une question clé : dans quelle mesure la nécessité d'épuiser les processus d'appel, dans la recherche d'un résultat juridique juste, devrait être tempérée par les préoccupa-

* LLB (The University of Hong Kong), PCLL (The University of Hong Kong), LLM (The London School of Economics). Judicial assistant for the Hong Kong Court of Final Appeal.

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in situations involving terminally ill patients whose legal guardians and treating physicians disagree about treatment.

tions pour la qualité de vie d'un patient en phase terminal nécessitant une prise de décision immédiate? L'auteur défend qu'une pression plus forte pour une efficacité procédurale est justifiée dans les situations impliquant un patient en phase terminal dont les tuteurs légaux et les médecins sont en désaccord sur les traitements.

INTRODUCTION

The case of Charlie Gard made headlines around the globe in 2017. Charlie was an infant who suffered from an inherited mitochondrial disorder. His parents, Chris Gard and Constance Yates, wanted to pursue treatment despite doctors' opinions to the contrary. Pursuant to an application by London's Great Ormond Street Hospital (GOSH) to end life-sustaining support for Charlie, GOSH engaged in a four-and-a-half-month legal battle with Charlie's parents, who hoped to explore experimental therapy in the United States. Despite their efforts, the English courts and the European Court of Human Rights (ECtHR) unanimously approved an order permitting the withdrawal of artificial ventilation in favour of palliative care. Charlie's parents abandoned legal proceedings on 24 July 2017 and Charlie passed away shortly thereafter. This case comment broadly agrees with the courts' decision but aims to comment on the extent to which they entertained stay applications in Charlie's case. It reflects on the broader ramifications of this case for terminally ill patients who are under supervision by legal guardians. In order to mitigate conflicts between procedural integrity and substantive relief, it argues for the introduction of more effective guiding questions in order to screen out unmeritorious cases.

Parts I and II provide a summary of the case and its judicial history from the court of first instance up to the ECtHR, outlining the primary contentious issues. Part III highlights the overwhelming factual findings in favour of GOSH and addresses how the courts could have better approached this case by taking advantage of finality provisions against appeal. In supplementation of the existing regime, the author introduces a new approach for screening out urgent medical cases that do not meet the required standard for extensive appellate reassessment. Part III ends with recommendations on case management, bearing in mind the need to balance the effective resolution of legal disputes with the potential for harm to well-being where time costs can be excruciating. The case comment concludes by underscoring parallels between English and Canadian civil procedure in order to draw out lessons that could usefully inform current processes for litigating treatment decisions in Canada.

I. THE FACTUAL BACKGROUND

Charlie Gard, born 4 August 2016, was diagnosed shortly after birth with a rare genetic disorder called infantile onset encephalomyopathic mitochondrial DNA depletion syndrome (MDDS), caused by a mutation in the RRM2B gene. It left Charlie with severely depleted amounts of mitochon-

drial DNA in his tissue which affected organ function and resulted in severe brain, muscle, and respiratory dysfunctions, as well as congenital deafness and severe epilepsy, among other ailments.[1]

The professional opinion of Charlie's pediatric intensivist at GOSH and four world leading authorities was that Charlie's "quality of life was so poor that he should not be subject to long term ventilation," that there was "no reasonable prospect for recovery," and that life sustaining treatment should be withdrawn.[2] Charlie's parents, however, came across a treatment offered in the United States called nucleoside therapy. This therapy had not yet been tested on either mice or humans with RRM2B mutations; existing hypotheticals were extrapolated from scant data.[3] After Charlie suffered a series of severe and persistent seizures, doctors from GOSH unanimously concluded that nucleoside treatment "would be futile and would only prolong Charlie's suffering."[4]

One American doctor supporting nucleoside therapy was the only expert who encouraged this treatment. He was of the opinion that, despite the lack of direct evidence, a three month trial would be sufficient to show the effects of treatment on a patient's brain.[5] However, after gaining full access to Charlie's medical records and examining one of Charlie's electroencephalograms, the doctor concluded that Charlie's brain damage was more severe than expected and that Charlie was in the terminal stages of his illness.[6] The doctor "conceded that to a large extent, if not altogether, the damage was irreversible."[7]

Charlie's parents claimed that his condition was not as severe as doctors at GOSH suggested, given that he still displayed signs of activity and reac-

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1 See *Great Ormond Street Hospital v Yates*, [2017] EWHC 972 (Fam) at paras 52–53 [*GOSH v Yates*].

2 *Ibid* at paras 59–66.

3 See *ibid* at para 74.

4 *Ibid* at para 83.

5 *Ibid* at para 76.

6 See *ibid* at para 104.

7 *Ibid* at para 105.

tion to some forms of stimuli.[8] They wanted Charlie to attempt nucleoside therapy so as to have a fighting chance before letting go.[9] At this stage, it was uncertain whether Charlie could feel pain.[10] One expert witness opined that Charlie was "likely to have the conscious experience of pain" and that his suffering "outweigh[ed] the tiny theoretical chance … of effective treatment."[11] The conflicting views of Charlie's parents and his medical team were at the heart of the litigation to come.

II. JUDICIAL HISTORY

A. High Court of Justice

The initial proceedings before the High Court centered around evidentiary questions of (1) the prospect of nucleoside therapy improving Charlie's welfare; and (2) whether Charlie's condition could be improved by further treatment. Justice Francis emphasized that a "judge must decide what is in the child's best interests" and look to the child's welfare as paramount in the decision-making process.[12] Best interests include "medical, emotional, and all other welfare issues."[13] While there is a presumption in favour of actions that may prolong life, it is not irrefutable.[14] Drawing on *An NHS Trust v MB*, Justice Francis acknowledged that he was required to take an objective approach which could ultimately lead to a finding that prolonging treatment was not in the child's best interests.[15] He further clarified that "the focus is

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8 See *ibid* at paras 108–09.

9 See *ibid* at paras 110–11.

10 See *ibid* at para 113.

11 *Ibid* at para 114.

12 *Ibid* at para 13, citing *Wyatt v Portsmouth Hospital NHS Trust*, [2005] EWCA Civ 1181 at para 87.

13 *Ibid.*

14 See *ibid.*

15 See *GOSH v Yates*, *supra* note 1 at para 39, citing *An NHS Trust v MB*, [2006] EWCH 507 (Fam) at para 16 [*NHS Trust v MB*].

on whether it is in the patient's best interests to *give* the treatment, rather than on whether it is in his best interests *to withhold or withdraw* it."[16]

Justice Francis allowed GOSH's application, observing that "there is a consensus across the board, including from his parents, that Charlie's current quality of life is not one that should be sustained without hope of improvement."[17] He emphasized that there was also "a consensus from all consultants and doctors who had examined Charlie that nucleoside treatment is futile," noting the complete lack of direct evidence on the effectiveness of nucleoside therapy.[18]

B. Court of Appeal

Charlie's parents appealed the High Court judgment on five separate grounds. On appeal, Charlie was represented by a court-appointed guardian. Lord Justice McFarlane granted permission to appeal on the jurisdictional issues and the issue of the correct legal approach to take when confronted with two viable treatment options. His Lordship further granted permission to appeal on arguments relevant to Articles 2, 5 and 8 of the European Convention on Human Rights (ECHR) insofar as they supplemented the first two grounds of appeal.[19] The Court of Appeal unanimously affirmed Justice Francis' decision.

On the question of the appropriate legal approach for scenarios with two viable treatment options, the appellants argued that the courts could not prevent Charlie from receiving overseas medical treatment where there was no risk of that treatment causing *significant harm*.[20] The appellants submitted that the best interests test as applied by Justice Francis was the wrong test to apply, since *Re King* had introduced a new "significant harm" test which would apply in scenarios involving two viable treatment options.[21]

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16 *GOSH v Yates, supra* note 1 at para 41 citing *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67 at para 22 [emphasis added].

17 *GOSH v Yates, supra* note 1 at para 126.

18 *Ibid* at para 126.

19 See *ibid* at para 37.

20 See *ibid* at para 54.

21 See *ibid* at paras 60–61. See also *Portsmouth City Council v King*, [2014]

In response to the appellant's submissions, counsel for the hospital argued that (1) an offer for treatment in the US did not alter the best interests approach; (2) if the law were to develop as the appellants suggested it should, far more cases with jurisdictional issues would need to be resolved by courts; and (3) *Re King* was "an unusual case in that all of the issues had all been agreed" and the judge had no intention of departing from previous authorities in the decision.[22] Further, the paragraph the appellant's cited from *Re King* related entirely to the limited context of acts by a local authority exercising statutory powers of intervention.[23] Even if *Re King* had intended to extend the "significant harm" test to pediatric medical treatment, the specific citation in support of counsel's argument was brief, unsupported by precedent or principle, and plainly in error.[24] Further, based on the factual findings of the lower court, there was no viable alternative treatment.[25]

Lord Justice McFarlane agreed with these observations and dismissed the appellant's argument. He emphasized that the court need not consider the reasonableness of the parent's case in order to ascertain the best interests of the child.[26] While one particular option may be favoured by the parents, the judge is ultimately the one who must decide on the best course of treatment for the child. The judge is at liberty to reject a particular treatment – such as nucleoside therapy – when faced with clear evidence that such treatment would be futile and cause greater suffering.[27]

On the issue of jurisdiction, the appellants contended that GOSH's application to prevent another person or entity from administering nucleoside therapy was outside GOSH's power as a public authority, given that an American team was able to provide treatment.[28] The appellants argued that Justice Francis' declaration constituted an injunction to prevent the parents

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EWHC 2964 (Fam) [*Re King*].

22 *Ibid* at paras 72, 77.

23 See *ibid* at paras 100–01.

24 See *ibid* at paras 104–05.

25 See *ibid* at para 113.

26 See *ibid* at para 94.

27 See *ibid* at para 96–97.

28 See *ibid* at paras 84–85.

from making decisions in exercise of their parental responsibility, given that GOSH had no legal standing to interfere.[29]

Lord Justice McFarlane summarily dismissed this ground. Charlie's parents had presented the nucleoside therapy option to GOSH, thereby prompting the hospital to bring proceedings before the court seeking a declaration to withdraw life support without needing to consider this alternative treatment.[30] Under such circumstances, it falls to the judge to decide the issue under a child-focused, court-led evaluation *de bene esse*; Justice Francis did just that.[31] Given that the Court of Appeal rejected the above grounds, arguments arising under the ECHR were dismissed together with the entirety of Charlie's parents' appeal.[32]

C. Supreme Court of the United Kingdom

In an oral judgment delivered by Lady Hale on 8 June, the Supreme Court declined to grant permission to appeal and ordered a stay of the High Court's order until the ECtHR could determine the appellant's request.[33] Speaking for the panel, her Ladyship endorsed the lower courts' dismissal of the parents' arguments. Lady Hale affirmed that the best interests test as applied by Justice Francis was the correct legal test, and dismissed the concept of "significant harm." She added that it was in any event likely that Charlie would suffer significant harm if his life were prolonged in such a manner.[34]

Shortly after, on 19 June, the Supreme Court handed down a second brief judgment in reply to the UK government's query on whether a further stay of the High Court's order could be granted.[35] Lady Hale, Lord Kerr, and

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29 See *ibid* at para 87.

30 See *ibid.*

31 See *ibid* at paras 117–18.

32 See *ibid* at para 118.

33 See *In the matter of Charlie Gard*, leave to appeal to UKSC refused (8 June 2017).

34 See *ibid.*

35 See *Latest judgment in the matter of Charlie Gard*, UKSC, (19 June 2017).

Lord Wilson, speaking for the Court, observed that since 11 April 2017, "the stays have obliged the hospital to take a course which, as is now clear beyond doubt or challenge, is not in the best interests of Charlie."[36] Charlie's guardian shared this view.[37] The Court went so far as to proclaim that "[w]e three members of this court find ourselves in a situation which, so far as we can recall, we have never previously experienced," and that in "granting a stay, even of short duration, we would in some sense be complicit in directing a course of action which is contrary to Charlie's best interests."[38] In spite of this, and in response to the appellant's submissions that the ECtHR had not yet considered the application and that the Court had granted two previous stays with this in mind, the Supreme Court granted a stay for a further three weeks.[39]

D. European Court of Human Rights

In a written judgment on 3 July, the majority of the ECtHR accepted the approach adopted by the Courts of England and Wales and declared Charlie's parents' application inadmissible.[40] The majority began by analyzing the applicants' arguments under Article 2 of the ECHR in relation to the right to life. The Court emphasized that:

> in this sphere concerning the end of life, as in that concerning the beginning of life, States must be afforded *a margin of appreciation*, not just as to whether or not to permit the withdrawal of artificial life-sustaining treatment and the detailed arrangements governing such withdrawal, but also as regards the means of striking a balance between the protection of patients' right to life and the protection of their right to respect for their private life and their personal autonomy…[41]

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36 *Ibid* at para 15.

37 See *ibid* at para 16.

38 *Ibid* at para 17.

39 See *ibid* at paras 18–20.

40 See *Gard v United Kingdom*, No 39793/17, [2017] 65 EHRR SE9.

41 *Ibid* at para 84 [emphasis added].

The Court observed that the UK government had already put in place a regulatory framework in the form of an Ethics Committee to govern access to experimental medication.[42] It further accepted that Charlie's views had been adequately expressed and represented via his guardian, considered in tandem with a generous range of professional opinions and medical evidence.[43] The Court held that GOSH had appropriately sought guidance from domestic courts and engaged "the inherent jurisdiction of that court to obtain a legal decision as to the appropriate way forward."[44] The applicant's complaint under Article 2 was therefore held to be "manifestly ill-founded."[45]

The Court refused to consider the applicants' arguments under Article 5 of the ECHR due to lack of clarity in their submissions.[46] The Court further dismissed as inapplicable the applicant's analogy to procedural safeguards in detention cases.[47] Considering Articles 6 and 8 of the ECHR together in relation to the parents' individual rights, the ECtHR accepted that "as acknowledged by the domestic courts, the facts of the present case are exceptional and the Court does not have examples in the case law which address the approach to be taken in resolving such conflicts."[48]

The Court reaffirmed the existence and proper functioning of the legal regulatory framework in the UK. It held that the state's interference here plainly pursued a legitimate aim and was necessary in a democratic society. The judgment emphasized the need to provide "relevant and sufficient" justifications for any measures complained of while reaffirming that decisions from domestic courts are typically given greater weight since they are made with "the benefit of direct contact with all of the persons concerned […]."[49] Crucially, the Court noted that:

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42 See *ibid* at para 86.

43 See *ibid* at paras 92–95.

44 *Ibid* at para 96.

45 *Ibid* at para 98.

46 See *ibid* at para 100.

47 See *ibid* at paras 101–03.

48 *Ibid* at para 107.

49 *Ibid* at paras 113–16, 118–21.

> where there is *no consensus* within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin of appreciation of the domestic authorities will be wider…. in respect of the lack of consensus on access to experimental medical treatment for the terminally ill, *the margin of appreciation is wide*.[50]

As no arbitrary action by public authorities were made out and thus the essential object of Article 8 remained unperturbed, the ECtHR dismissed the application.[51]

Shortly after, on 10 July, Charlie's parents returned to the High Court and asked that it consider fresh evidence.[52] American neurologist Dr. Michio Hirano travelled to London to examine Charlie on 17 July and, upon seeing Charlie's MRI scan, concluded that parts of his body had no muscle at all.[53] Charlie's parents ended their legal fight for his treatment on 24 July and, on 27 July, Justice Francis confirmed his original ruling that it was in Charlie's best interests to be allowed to die.[54]

III. COMMENTARY

The case of Charlie Gard exposed the impact of protracted legal battles on the well-being of terminally ill patients. The delays in Charlie's case were lamentable and should be avoided in similar cases affecting terminally ill patients. In this Part, the recurring theme is the perceived tension between due process and the effective protection of a patient's quality of life. It questions to what extent the appeals process, sometimes necessary to ensure a fair legal outcome, should be constrained by concerns about a terminally ill patient's quality of life when imminent decision-making is required.

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50 *Ibid* at para 122 [emphasis added].

51 See *ibid* at paras 123–24.

52 See *Great Ormond Street Hospital v Yates*, [2017] EWHC 1909 (Fam).

53 See *ibid* at paras 12–13.

54 See *ibid* at para 14.

In this discussion, it is important to acknowledge the efforts and dedication of Charlie's parents in engaging with successive levels of judicial authority. In the face of immense emotional stress, they exhibited bravery and were dedicated to protecting what they sincerely believed to be Charlie's best interests. Nonetheless, the courts made it clear that they were not, in fact, operating in Charlie's best interest. In order to safeguard the well-being of terminally ill patients, the effective exercise of judicial functions must prevail.

A. Appellate conduct in reponse to clear high court findings

The High Court made clear that Charlie should have been taken off life support. In a two-step analysis, Justice Francis relied on professional opinion, along with Gard and Yates' reluctant concession, and found that as a matter of fact, Charlie's standard of life at the time was not worth sustaining and no tested and accessible treatment would discernibly improve Charlie's condition. The facts of the case pointed towards prioritizing palliative treatment over experimental therapy, even after considering the court's general preference for treatment that safeguards the sanctity of life and defers to parental authority. This is of crucial importance given that, for policy reasons, comprehensive factual findings are rarely challenged in appellate courts.[55]

In light of the limits on factual re-examination in appellate litigation, it is unusual that Justice Francis' clear findings were followed by three-and-a-half months of unnecessary proceedings, during which time Charlie's fate was held in perpetual uncertainty. The responsibility for this protracted litigation does not rest solely on the applicants. In various ways, the appellate courts were complicit in creating this state of affairs. The Court of Appeal, the Supreme Court, and the ECtHR permitted leave for appeal, heard submissions, and ordered multiple stays for a claim that was determined to be unsupported by evidence. While there is inherent value in exhaustive deliberations prior to establishing definitive conclusions, excessive judicial intervention should be avoided in order to mitigate delays and excessive costs.

Furthermore, despite the sensitive facts of the case, the judicial outcome was hardly surprising. The overarching best interests test confers the powers of intervention and final determination onto English courts, as reflected

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[55] See generally *McGraddie v McGraddie* [2013] UKSC 58 at paras 3–6 (for an exploration of the limits of factual re-examination).

in the literature concerning parental refusals of medical treatment.[56] Determining the best interests of the child is always a holistic assessment, with emphasis on weighing benefits against harms; parental opinion on medical treatments are not absolute.[57] Whether a parent wishes to subject a child to unconventional or experimental treatment or refuse treatment altogether, the best interests test and its underlying principles are equally applicable.[58] In short, Charlie's case was not so novel as to provoke the consideration of new principles and therefore new legal tests. An order for palliative care is a subset of the court's general authority to intervene in a child's best interests. Though there may be value in affirming the existence of such a power, in Charlie's case, this affirmation came at the expense of his welfare.

With this in mind, future authorities ought to consider stricter and quicker case management strategies when dealing with similar cases. The Court of Appeal and the Supreme Court disposed of the matter in little more than a month and the ECtHR handed down judgment one week after written submissions. This timeline is indeed efficient vis-à-vis typical time required for judgment.[59] Nonetheless, for each appellate institution, there is room for improvement if future patient's urgent interests for palliative care in lieu of prolonged life-sustaining maintenance are to be properly realized. The fol-

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[56] See e.g. Douglas S Diekema, "Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention" (2004) 25:4 Theor Med Bioeth 243 at 245–49. See also Committee on Bioethics, "Informed Consent, Parental Permission, and Assent in Pediatric Practice" (1995) 95:2 Pediatrics 314 at 315; Hope Davidson & Jennifer Schweppe, "Time for Legislative Clarity on Consent to Medical Treatment: Children, Young People and the 'Mature Minor'" (2015) 21:2 Medico-Legal J Ireland 65; *Children's University Hospital, Temple Street v CD and EF*, [2011] UEHC 1.

[57] See Diekema, *supra* note 57 at 246–49; Davidson & Schweppe, *supra* note 57 at 66–69; Loretta M Kopelman, "The Best Interests Standard for Incompetent or Incapacitated Persons of All Ages" (2007) 35:1 JL Med & Ethics 187 at 188–89.

[58] For a similar American perspective, see Robert M Veatch & Carol Mason Spicer, "Medically Futile Care: The Role of the Physician in Setting Limits" (1992) 18 AJL & Med 15 at 33–34.

[59] For a general overview of data on timelines for trial and judgment see Ministry of Justice, *Civil Justice Statistics Quarterly, England and Wales (Incorporating The Royal Courts of Justice 2015)*, (2 June 2016), online: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/527018/civil-justice-statistics-january-march-2016.pdf>.

lowing sub-parts outline four particular issues raised by Charlie's case and offer corresponding proposals for improvement.

1. Adhere to principles of finality

The appeals courts should have dismissed the applications for leave to appeal based on the urgent need for palliative care and relied on statutory limiting provisions to put an end to the matter. Principles on finality reveal the benefits of timely and definitive resolution of legal disputes. The concept of *res judicata* underscores the importance of limiting abusive and duplicative litigation. It is comprised of multiple legal principles which serve to limit repetitive claims, such as cause of action estoppel, issue estoppel, and the doctrine of merger, all of which share a common goal of preventing abuse of process.[60] English courts have emphasized the need to avoid "a multiplicity of litigation" as well as to remain attentive towards "wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings…"[61] The principle of finality is likewise aimed at limiting unnecessary and frivolous appeals.[62]

Charlie's case does not fit into any of the categories comprising *res judicata* as outlined above. Nevertheless, there is a direct intersection between the policy objectives powering the *res judicata* maxim and those pertaining to Charlie's welfare: that of timely settlement of legal disputes and its underlying goal of safeguarding the substantive interests of members of society. In sum, principles of finality should have played a stronger role in guiding the court's disposition of Charlie's case.

2. Limit permission to appeal

Charlie's well-being could also have been better protected by a stricter application of rules of appellate procedure. On first appeal, whether to the High Court or the Court of Appeal, the application must demonstrate a real prospect of success in order to be granted leave. On second appeal to the

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60 See *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*, [2013] UKSC 46 at paras 17–25.

61 *Divine-Bortey v Brent LBC*, [1998] ICR 886 at 898.

62 See e.g. *Lane v Esdaile*, [1891] AC 210.

Court of Appeal, permission is normally only granted where the application has a real prospect of success *and* raises an important point of principle or practice.[63] The requirement to establish a real prospect of success is a low hurdle to surmount; it merely means that there is more than a fanciful prospect of success.[64] More particularly, the claim must have a realistic prospect of success in that it carries some degree of conviction beyond one that is "merely arguable."[65] In Charlie's case, no legitimate attempt was made to dispute the lower court's factual findings, which rendered the appellants' claims unrealistic and fanciful.[66]

The appellants also presented the Court of Appeal with questions of law which were either inapplicable to the specific facts of the case or contrived from a wholly different set of statutory rules. There were not two treatment options for *de facto* comparison, nor was there a statutory authority involved in the plans to remove Charlie from his parents' care. While the "significant harm" test was not introduced until the appeal stage, it was unsupported by persuasive authority and was an unwarranted rejection of the established best interests approach. It is unfortunate that the upper courts opted to grant leave to appeal to entertain these strained arguments.

3. Limit applications to hear fresh evidence

The High Court should have refused to entertain the appellant's application to hear fresh evidence. For clarity, fresh evidence is not new evidence, but rather unused information that already existed at the time of trial. The foundation of entertaining fresh evidence is judicial discretion.[67] In civil appeals such as this one, it is generally against established principles to admit

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63 See *Tribunals, Courts and Enforcement Act 2007,* (UK), c 15, s 13.

64 See e.g. *Patel v National Westminster Bank PLC*, [2015] EWCA Civ 332 at para 23; *Ochiemhen v United Kingdom (Secretary of State for the Home Department)*, [2016] CSOH 20 at para 23; *Mellor v Partridge,* [2013] EWCA Civ 447 at para 3.

65 *ED & F Man Liquid Products Ltd v Patel*, [2003] EWCA Civ 472 at para 8.

66 The separate issues of jurisdiction and the relevant legal test that were also raised on appeal will be discussed in the following sub-part.

67 See e.g. *Mulholland v Mitchell*, [1971] 1 AC 666 at 676.

fresh evidence.[68] Prior to the Civil Procedures Rules 1998/3132, new evidence could only be introduced where it could not have been obtained with reasonable diligence for the original hearing.[69] This rule was subsequently relaxed, allowing information which *could* have been obtained with due diligence but was only subsequently discovered to be successfully used on appeal.[70]

On the substantive merits of the evidence itself, courts will only use their discretion to entertain fresh evidence if it would have "resulted in the judge deciding the relevant question differently," [71] or where it has "important influence on the result of the case."[72] Where fresh evidence is not groundbreaking or fails to provide an equally material counter-narrative to original findings of the High Court, it ought not be entertained. Holding otherwise would create a backdoor method for repeated fact finding and thereby constitute an abuse of court process.

Charlie's case did not warrant leniency to entertain fresh evidence. While the consideration of fresh evidence involves an exercise of judicial discretion, Justice Francis clarified that the proceedings were not *novus*. Extensive fact finding had already occurred and considerable time had elapsed since the action was initiated. What is more significant is the nature of information. As indicated above, an assessment of whether to entertain fresh evidence must take into consideration both the topical and substantive merit of the information the parties sought to introduce. Charlie's parents appeared before Justice Francis and requested an opportunity for Dr. Hirano to examine Charlie in person. It was neither evidence already obtained nor authoritative published research on the prospects of nucleoside therapy. The applicants were essentially asking the Court for additional time in order to confirm Charlie's prospects, which had already been irreversibly decreasing as time wore on, by means of a treatment that had yet received any form of material validation. The conclusion here should have been that this form of fresh evidence in no way met the required threshold to be entertained.

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68 See *Hamilton v Al-Fayed*, [2001] EMLR 15 at para 11.

69 See *Gillingham v Gillingham*, [2001] EWCA Civ 906 at paras 19–21.

70 See *ibid* at paras 19–21.

71 *DRAB v District Court of Kielce, Poland*, [2016] EWHC 3755 (Admin) at para 15.

72 *The Szombathely City Court v Fenyvesi*, [2009] EWHC 231 (Admin) at para 10.

Entertaining fresh evidence in future similar situations would be advancing poor precedent. It could conceivably impact cases where treatment directions would be unnecessarily frozen by the false promise of untested therapies. It could also encourage doctors to push experimental treatment on unsuited patients. It would effectively transform ancillary court processes into mini-trials on affidavits.[73] In essence, Justice Francis allowed for an opportunity to find evidence potentially indicative of merit, rather than entertaining evidence indicating merit. This is a slippery slope with many uncertain consequences. The one certain consequence is that the threshold for allowing fresh evidence would become ambiguous. This lack of clarity could potentially release a flood of future applications whereby desperate family members and legal guardians would apply for courts to consider various dubious treatment methods.

It also bears noting that in widely publicized cases such as Charlie's, public uproar and scrutiny over court judgments should in no way influence the decision to entertain further facts or grant applications for appeal. Nothing suggests that Justice Francis was so impacted in his decision. In fact, he explicitly noted that he would not relent to public perception of bias and recuse himself from the trial. But in light of intense media reporting and vocal dismay from the public and celebrity personalities, it is worthwhile to reflect on the influence of the environment and public discourse on the decision-making of individual justices.[74] Especially in sensitive, high-profile cases, courts must be cautious about exercising discretion to entertain fresh evidence.

4. Expedite appellate court decision-making

Charlie's case illustrates that the UK Supreme Court and the ECtHR can play a role in recognizing the importance of expedient decision-making. The Supreme Court's extension of a stay of application pending a decision from the ECtHR was problematic. In consideration of ongoing deliberations

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[73] See e.g. Jeffrey Pinsler, "Adducing Evidence by Affidavits and Witness Statements: A Comparison of the Singapore and English Processes" (1993) 12 CJQ 92 at 92.

[74] See generally Lawrence Baum, "Judges and Their Audiences" in Lee Epstein & Stefanie A Lindquist, eds *The Oxford Handbook of US Judicial Behaviour* (Oxford: Oxford University Press, 2017) 343 (for a discussion of the influence public audiences have on the judicial mind in the American context).

before the ECtHR, this may have been a reasonable decision. However, the phrasing of the judgment appeared to entertain the appellant counsel's point that, since two stays had already been ordered, there was no harm in granting a third. This was a lost opportunity for the Supreme Court to elaborate on what length and number of stays would be considered "within reason," or to at least provide guiding principles for future cases of a similar cross-jurisdictional nature.

The ECtHR can also take steps to expedite decision-making in cases involving treatment decisions for terminally ill patients. Given the time-sensitive nature of Charlie's case, the Court could have provided a decision at the conclusion of hearing and offered written reasons at a later date. It is admittedly challenging for the ECtHR to expedite decisions, considering the difficulties inherent in ruling on complex areas of law.[75] To that end, emergency in-chambers meeting for members of the bench post hearing might render timely verdicts more practicable. Such measures could be seen as a continuation of procedural reforms such as Protocol 14 which allows for single judges to strike out inadmissible applications, among other things. Further, where a non-interventionist approach is adopted, the lack of a comprehensive written judgment is not nearly as problematic as the counterfactual, where the ECtHR decides to overturn an entire line of authorities. Finally, the ECtHR's pilot judgment procedure to screen out structural problems underlying repetitive cases at the national level may also be applicable here. The ECtHR could use this procedure to mandate that national governments adopt screening mechanisms or enact statutory regulations to better address urgent medical cases.

B. An alternative screening approach for appellate courts

Moving forward, appellate courts should adopt a mechanism to screen out arguments for clear lack of merit in cases involving treatment decisions for terminally ill patients. This Part outlines a method for doing so, which requires that appellate courts more closely consider (1) a patient's wellbeing and (2) jurisdictional issues before granting leave to appeal.

First, as alluded to in the preceding discussion on permission to appeal, the most immediate and significant question for appellate courts is

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[75] See e.g. Elisabeth Lambert Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* (Strasbourg: Council of Europe Publishing, 2008) at 5–8.

whether the factual findings of the lower courts were in legitimate dispute. More specifically, appellate courts must ask whether there realistic grounds to oppose the trial judge's assessment of the patient's well-being. The aim of this query is to confirm that the patient has no treatment alternatives, the accuracy of which constitutes the gravamen of the appellant's complaint. Borrowed from summary judgment principles,[76] this question compels the court to make a preliminary review of the merits of challenges against the trial judges' findings on the patient's state of life and likelihood of recovery or improvement. If there is no material challenge to those particular findings, it must automatically be the end of the matter.[77]

Second, appellate courts may also need to consider jurisdictional challenges, as they did in Charlie's case. Without proper jurisdiction, a lower court's findings would not have been established *imprimis*. Nonetheless, in order to prevent unmeritorious arguments from being raised on appeal, it is important to have an additional screening mechanism before fully entertaining appeals on jurisdictional grounds. While the jurisdictional challenges were rightly raised on appeal in Charlie's case, the courts may still establish threshold rules in order to limit meritless jurisdictional challenges.

The second question is thus whether the jurisdictional challenge is a genuine claim. A genuine claim is one which is pursued on account of its merits either wholly or dominantly. In substance, this involves a fact-finding exercise regarding the existence of (1) any ulterior purpose or (2) "a [willful] act in the use of the process not proper in the regular conduct of the proceeding."[78]

This analysis is borrowed in part from stay applications for abuse of process in judicial review suits.[79] While abuse of process is a doctrine more commonly used in the prosecutorial context and is often directed against government authorities, its underlying objective – to prevent unjustifiable

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[76] See e.g. *Maxted v Investec Bank Plc*, [2017] EWHC 1997 (Ch) at para 11.

[77] See e.g. *Fouladi v Darout Ltd*, [2018] EWHC 3501 at para 116.

[78] *Huggins v Winn-Dixie Greenville Inc*, 153 SE 2d 693 at 694.

[79] See *London Borough of Wandsworth v Rashid*, [2009] EWHC 1844 (Admin) at para 32. The court opined that an abuse must be plainly shown before a court should intervene. In exercise of this power, the court adheres to an overriding duty to promote justice as well as prevent injustice and may exercise its inherent power to stay proceedings.

misuse of court process – remains relevant to the factual matrices this analysis is concerned with.[80] In *Hunter v Chief Constable of the West Midlands Police*, Lord Diplock made clear that:

> [abuse of process] concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.[81]

This power is meant to be exercised in varying circumstances; fixed categories are rigorously discouraged.[82] By way of illustration, "an attempt to re-litigate in another action issues which have been fully investigated and decided in a former action may constitute an abuse of process, quite apart from any question of *res judicata* or issue estoppel on the ground that the parties or their privies are the same."[83] The raison d'être behind the posited question is likewise to prevent appellants from putting the cart before the horse by artificially fitting arguments into claims in order to continue their legal fight.[84] This needlessly strains court resources and forestalls the patient's pressing need to have a clear treatment directive.

This restriction falls short of actively preventing parents from challenging the state in allowing a child to die. Legal guardians and decision-makers can still legitimately challenge a hospital or trial judge's decision to allow palliative care so long as their application raises genuine evidentiary

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80 See e.g. *Michael Wilson & Partners Ltd v Sinclair*, [2017] EWCA Civ 3 at paras 67–68.

81 [1982] AC 529 at 536.

82 See *ibid.*

83 *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd*, [1982] EWCA Civ J0430-1 at 11.

84 For an American perspective against "cause of action shopping" in a business context, see Benjamin Liu, "No-Action Clause in Bond Trust" (2014) 25 JBFLP 3 at 7, 9, 13. For a British perspective on claim-shopping in the context of trusts, see Lusina Ho, "Equitable Compensation on the Road to Damascus?" (2015) 131 Law Q Rev 213 at 217.

matters or material flaws in legal reasoning.[85] The proper administration of justice requires balancing a guardian's right to a second opinion with the patient's own well-being.

Thus, at the preliminary review stage, courts must ascertain the "intention" of a jurisdictional challenge before giving a prima facie assessment of its merits. Should the ascertained intentions fail to qualify as a genuine claim based on evidence of ulterior motive or willful misuse of court process, the entire ground must be summarily be dismissed. This legal consequence is proportionate because it is distinct from the common result of a permanent stay of proceedings in abuse of process cases.[86] Associated problems on burden of proof are likewise surmountable given that the preliminary hurdle to decide on permission to appeal carries a lower threshold than that required to establish an abuse of process,[87] it should not be difficult to discharge this burden in cases of genuine merit,[88] and the respondents still bear the substantive burden to prove the lack of genuine intention on the part of the appellants.

To a large extent, such an intention-seeking exercise relies on the prima facie merits of the claim itself.[89] Where a claim is plainly without merit, it is easy for the courts to infer that it is not a genuine claim. In contrast, a strong jurisdictional claim would be tolerated even if there is also a collateral intention to stall legal proceedings or advance claims in a shotgun

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85 See *Yates EWCA*, *supra* note 20 at paras 49–51. The Court of Appeal observed that the trial judge's factual finding on the futility of treatment were key. Since they were unchallenged on appeal, much of the appellant's challenges had to fail.

86 See generally *Chief Executive of the Hong Kong Special Administrative Region v President of the Legislative Council*, [2017] 4 HKLRD 115 (for an example of an application for a permanent stay).

87 See generally Keith N Hylton, "When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards" (2008) 16 Sup Ct Econ Rev 39 at 54 (for a detailed exposition on the predictive approaches towards summary judgment screening).

88 See *ibid* at 41.

89 See generally Christopher Essert, "Legal Obligation and Reasons" (2013) 19 Leg Theory 63 at 75 (for a discussion of the interplay between intentions and merits).

approach.[90] While critics may argue that this hyperextends procedural devices and is far too removed from the practical workings of court processes, there are important effects in adopting such an approach. First, this added safeguard enables the court to take into account extraneous evidence, such as transcripts and affidavits, that can illuminate parties' obvious intentions, with the usual constructive rules on remoteness and relevance still applicable.[91] Second, this allows courts to efficiently dismiss claims with a series of jurisdictional challenges where no genuine claims can be derived, preferably without the need to specifically address each sub-ground in depth.[92] Third, building upon the foundations of summary judgments, this rule guards against further attempts to badger the court with hollow claims.[93] All of the above empowers appellate courts to consider a broad array of factors and come to a timely initial conclusion for the benefit of patients in the midst of time consuming and unmeritorious actions. The two screening questions are well suited as supplementary devices at the initial permission to appeal stage. These exercises need not be seen as ironclad tests to be applied, but rather important rules to bear in mind by the courts and to be codified over time into case law.

Concerns may be raised about the perceived tension between the proposed screening approach and the UK appellate framework: does the introduction of such questions undermine the function of finality provisions and their underlying statutory intent? In reality, questions of fact and intentions complement finality provisions. While finality provisions ensure that appeals are adequately but flexibly assessed, the guiding questions proposed here seek to dismiss particularly ill-conceived applications. The questions posed do not by themselves replace the function of finality provisions where applications have proper merit.

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90 See generally Stavros S Makris, "Applying Normative Theories in EU Competition Law: Exploring Article 102 TFEU" (2014) 3 UCL JL & J 30 at 54 (for a discussion of ulterior intention as subservient to the substantive merits of a claim in the context of EU jurisprudence and the "test of intent").

91 See generally BC Cairns, "Discretionary Litigation Processes and Rules of Court" (2011) 30:4 CJQ 445 (further analysis of the courts' case management flexibilities).

92 See *ibid* at 453–55.

93 See generally Martin B Louis, "Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment and Rule 11 Sanctions Under the Federal Rules of Civil Procedure" (1989) 67 NCL Rev 1023 at 1061–62 (for further discussion of the effects of summary judgment).

C. Case management considerations

Even with good intentions and proper policy, the legal system periodically falls short of providing timely care to terminally ill patients. This is manifested when procedural delays have the substantive effect of depriving terminally ill patients of dignity at the end of their lives. Specific case management strategies can be employed to address this injustice. There is much to be said for entertaining expedited hearings, limiting consideration to written submissions, and expanding the role of summary judgments in anticipation of future scenarios of a similar nature.[94] Strict or extraordinary milestone dates and off-hour trial sessions may also be appropriate for cases concerning severe medical emergencies. While other measures such as advance directives and their propagation may not have had much relevance in Charlie's case, they could be of use for other patients in similar situations.[95]

Importantly, pursuing strategies to reduce procedural timelines does not undermine the principle of due process. Rather, it is the greatest expression of the best interests test for a court to recognize that time is a resource for pediatric patients like Charlie. As summarized by Justice Francis, the best interests test is meant to be interpreted in its widest sense, requiring a balancing of all relevant considerations without mathematical calculation.[96] The non-exhaustive list of factors canvasses "medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations."[97] In the case of terminally ill patients who lack capacity, sensory considerations ought to be amplified as a weighing factor under a "broad best interests test" that takes into account the patient's social and

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[94] See generally Sonja Kerr, "Special Education Due Process Hearings" (25 September 2000), *Harbour House Law Press*, online: <http://harborhouselaw.com/articles/dp.kerr.pdf> (on the benefits of expedited hearings in the context of education disputes); Mark R Kravitz, "Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on their History, Function and Future" (2009) 10:2 J App Pr & Pro 247 at 252–62, 270; William W Schwarzer, "Summary Judgment and Case Management" (1987) 56 Antitrust LJ 213 at 214–18, 220–21, 228.

[95] See Karen Steinhauser et al, "Preparing for the End of Life: Preferences of Patients, Families, Physicians, and Other Care Providers" (2001) 22:3 J Pain & Symptom Management 727.

[96] See *GOSH v Yates*, *supra* note 1 at para 39, citing *NHS Trust v MB*, *supra* note 16 at para 16.

[97] *Ibid*.

psychological welfare.[98] The length of pending legal action ought to be considered under this category, given that the more time it takes to resolve a legal dispute, the longer the patient's suffering will last. The issue of timetabling and expected hearing length in a trial judge's balancing exercise is significant, given that it has a direct impact on a terminally ill patient's standard of living in their final stages of life. Due process is meaningless if there is no possibility of meaningful substantive relief.

With this in mind, the question first posed in this Part – to what extent the appeals process, sometimes necessary to ensure a fair legal outcome, should be constrained by concerns about a terminally ill patient's quality of life when imminent decision-making is required – could be reframed as a clash between substantive justice and procedural justice. For present purposes, substantive justice refers to the role of the law in providing a fair application of legal principles. Procedural or formal justice is concerned with the certainty of and obedience to formal legal rules in that like cases are treated alike and unalike cases treated unalike.[99] While the former is more tailored and susceptible to variance, the latter is rigid and codified. The broader arguments surrounding the compromise between these two facets of justice are reflected in the debate between John Rawls and Robert Nozick.[100] David Lewis Schaefer analyzed the interplay between their accounts of distributive and procedural justice, opining that both views on procedural political justice fail to simultaneously address social inequity while providing society with an effective moral underpinning.[101] This conclusion urges us to reject absolutes. Instead, practical justice can only be achieved through

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98 See John Lombard, "Navigating the Decision-making Framework for Patients in a Minimally Conscious State" (2016) 22:2 Med Leg J Ireland 78 at 80; *Aintree University Hospitals NHS Foundation Trust v James*, [2013] UKSC 67 at paras 21–23, 28.

99 See Thomas A Francis, "Substantive Justice vs. Formal Justice" (30 October 2015), Thomas A Francis (blog), online: <https://thomasafrancis.com/2015/10/30/substantive-justice-vs-formal-justice/>.

100 See John Rawls, *A Theory of Justice*, revised ed (Cambridge: The Belknap Press of Harvard University Press, 1999) at 74, 76–78, 86–89, 226, 228, 235; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 149, 185–86, 193–95, 198–99.

101 See David Lewis Schaefer, "Procedural versus Substantive Justice: Rawls and Nozick" (2007) 24:1 Soc Phil & Pol'y 164.

a synthesis of procedural and substantive justice, relying on factual knowledge of specific circumstances to inform and develop idealistic norms.[102]

Furthermore, this framework of comparison presupposes that the two are diametrically opposed, when in reality, substantive justice informs procedural justice and vice versa. Legal presumptions operate together with burdens of proof to ensure that parties are appropriately constrained or empowered based on the initial merits of their cases. Summary judgments enable swift and painless compensation. Expedited hearings and urgent in-chambers processes safeguard parties' identities and procure timely redress for private and debilitative familial conflicts. Procedures for amending statements of claim, defenses, and counterclaims operate to ensure parties' arguments can evolve with court directions in search of an effective and fair resolution of legal disagreements. A holistic assessment of the law and the justice it preserves and administers would reveal that practical and procedural justice work together, adjusting and influencing each other to ensure that any resulting conflicts do not uproot the integrity of legal instruments.

It is impossible to deny that procedural justice and substantive justice overlap.[103] Accordingly, giving full effect to the best interests test entails considering the cost of lengthy legal processes that impact the continued welfare of the individual. This must be distinguished from the usual sense of urgency in all legal disputes. In Charlie's case, and in all cases involving terminally ill patients, timing has an incredible impact on quality of life and well-being. It must also be emphasized that accelerated processes do not generally lower the quality of judicial assessments, as various summary procedures have already been refined and successfully implemented. Even if they posed a slight impediment to thorough and comprehensive assessment of available evidence, it is a reasonable price to pay, and one that courts have accepted as part of balance between flawless and efficient justice.[104]

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102 See Cristina Lafont, "Procedural Justice? Implications of the Rawls-Habermas Debate for Discourse Ethics" (2003) 29:2 Philosophy & Social Criticism 163.

103 See Peter J Rubin, "Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights" (2003) 103 Colum L Rev 833 at 833–41.

104 See Bill Bogart, "Summary Judgment: A Comparative and Critical Analysis" (1981) 19:4 Osgoode Hall L J 552 at 598–601.

CONCLUSION: APPLICABILITY TO THE CANADIAN COMMON LAW CONTEXT

The need to consider the prospects of substantive relief and accordingly accelerate the judicial process is applicable in the Canadian context. The meticulous distinctions between the various constituent principles of *res judicata* made by Canadian courts mirror those used in English decisions. In *Enmax Energy Corp v TransAlta Generation Partnership*, for example, the Alberta Court of Appeal expanded and affirmed principles of finality in respect to arbitration proceedings.[105] In upholding issue estoppel as a legal *genus* of *res judicata*, they favourably cited a long line of English decisions. While contemplating the nuances of *res judicata* in *Erschbamer v Wallster*, the British Columbia Court of Appeal clarified to a great extent the intent, scope, and operation of cause of action estoppel.[106] The interpretation of this longstanding common law maxim seamlessly converges across English and Canadian jurisdictions.

In light of this similarity, the conclusions that this case comment has drawn regarding abuse of process in Charlie's case are relevant in the Canadian context. In *Behn v Moulton Contracting Ltd*, the Supreme Court of Canada affirmed an expansion of the abuse of process doctrine.[107] In an overarching review of the doctrine, the Court likewise affirmed that abuse of process is unlike *res judicata* or action estoppel: where the latter are constrained by specific requirements, the former is part of the inherent and residual discretion of judges, to be flexibly applied so as to prevent abuse.[108] Affirming *Canam Enterprises Inc v Coles*, the Court observed that at the heart of the doctrine lies the administration of justice and fairness.[109] This again mirrors the approach taken by English courts, thus rendering the preceding analysis on intention and proper use of court process especially germane for Canadian courts.

Finally, on the matter of fresh evidence, parallels between the two jurisdictions are most pronounced. The definition of fresh evidence is virtually

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105 2015 ABCA 383 at paras 35, 40, 30 Alta LR (6th) 34.

106 2013 BCCA 76 at paras 12–31, 41 BCLR (5th) 160.

107 2013 SCC 26, [2013] 2 RCS 227 [*Behn v Moulton*].

108 See *ibid* at paras 39–41.

109 See *ibid* at paras 55–56, citing *Canam Enterprises Inc v Coles,* 2002 SCC 63 at paras 40–41, [2002] 3 RCS 307.

identical.[110] The threshold for assessing fresh evidence is likewise reminiscent of the English approach, with Canadian Supreme Court guidance furnishing phrases such as "bears upon a decisive or potentially decisive issue in the trial"; "credible in the sense that it is reasonably capable of belief"; and "be expected to have affected the result."[111] Suffice to say that Gard and Yate's fresh evidence application should not and would not have been successful if it were presented before Canadian Courts that were assiduously attentive to the requirements for permissibility. These existing high standards should be maintained.

This case comment has critiqued the issues that arose in Charlie Gard's case across successive levels of court, with a focus on how the courts could have omitted irrelevant considerations to expedite the decision-making process. The courts should have relied on finality provisions and more stringently assessed requests to appeal in order to conclude the matter. Failing that, the High Court should not have prolonged the dispute by agreeing to hear fresh evidence. Moving forward, more efficient processes are needed to resolve legal disputes in instances where terminally ill patients are suffering in the interim under the care of substitute decision makers. Soft case management improvements have the potential to significantly shorten timelines. With respect to the procedural solutions proffered in this case comment, there is a great degree of convergence between English and Canadian authorities. It remains to be seen how English court practices will evolve in reaction to the unusual and unfortunate case of Charlie Gard, as well as how other jurisdictions, such as Canada, will draw on this case in shaping their respective regimes for dealing with terminally ill patients in similar situations. Charlie's case has underscored the urgency with which courts must address the time-sensitive needs of terminally ill patients who are caught up in situations of disagreement between their legal guardians and treating physicians.

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[110] See *Jens v Jens*, 2008 BCCA 392 at paras 23, 27, 84 BCLR (4th) 250 (where the Court defines fresh evidence as "evidence that existed at the time of the trial, but for various reasons could not be put before the court…").

[111] *Palmer v The Queen*, [1980] 1 SCR 759 at 760, 106 DLR (3d) 212. The standard for civil cases is similar. See *Air Canada v Canadian Union of Public Employees, Airline Division (DiGiuliu Grievance)* [1995] CLAD 2012 at para 39.