**REES v THE ATTORNEY-GENERAL (1974) ZR 115 (HC)**

HIGH COURT 25

DOYLE CJ

1st APRIL 1974

(1971/HP/986)

**Flynote**

**Tort - Negligence - Negligent driving - What constitutes.**

**Tort - Defence - Volenti non fit injuria - Whether applicable when the**30 **plaintiff did not anticipate danger and did not voluntarily accept the risk.**

**Tort - Damages - Whether plaintiff entitled to damages for injuries not proved to be the result of accident on probabilities.**

**Headnote**

In an action for damages alleged to have arisen from the negligent driving of a motor vehicle it was pleaded, *inter alia*, on behalf of the 35 defendant, that the vehicle driven by the defendant's servant went off the road because of "inevitable accident" in that the site of the accident deceptively appeared firm, but in fact turned out to be soft and slippery and as a result the vehicle unavoidably became uncontrollable and rolled over on its roof. It was further contended that the plaintiff was negligent 40 in that she had freely and voluntarily embarked on the vehicle with the knowledge that it had only just been stuck in the road because of the poor condition of the road and that, with full knowledge, she allowed herself to be driven thereafter on the road, the condition of which was poor throughout. 45

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*Held:*

   (i)   It is negligence on the part of a driver to drive a vehicle too fast when he appreciated the danger involved and knew of the possibility of skidding of the vehicle.

     (ii)   A 5 person cannot be said to have given his consent to suffer an injury when he did not anticipate the danger and did not voluntarily accept the risk.

   (iii)   In a tort action damages can be granted only for injuries proved to have been suffered as a direct result of the accident through 10 negligence but not for those not proved on probabilities; while assessing damages decrease in money value must be kept in mind.

*J A  Hadden, Ellis & Co*., for the plaintiff.

*M  S  Joseph, Assistant Senior State Advocate,* for the defendant.

**Judgment**

**Doyle CJ:** This is an action for damages alleged to arise from 15 negligence in the driving of a motor vehicle. The accident took place on 7th December, 1968, on a track leading from the Silwana Plains to Senanga. The plaintiff is an ecologist employed by the Government and was at the time being driven in a Land - Rover from a ranch on the Silwana Plains, where she had spent about a fortnight on work, to Senanga in 20 order to catch an aeroplane. The vehicle, a Land - Rover, was being driven by a Mr Vernon, also a Government servant. The allegation of negligence is as follows:

   "The said accident was caused by the negligent driving of the said Richard Vernon.

   PARTICULARS OF NEGLIGENCE  25

   The said Richard Vernon was negligent in that he:

   *(a)*   drove at a speed that was excessive in the circumstances;

   *(b)*   failed to steer and control the said vehicle so as to prevent it from leaving the road 30

   *(c)*   failed to exercise reasonable care in the management and control of the said vehicle on the road which was wet and slippery at the time."

The plaintiff claims that as a result of this accident she suffered certain injuries to her right wrist and elbow and to her right eye. Now 35 here defendant denies negligence and then pleads specifically as follows:

   "The Defendant further states that the Landrover GRZ 2682, owned by the Government and driven by the Defendant's servant at the material time, went off the road because of 'Inevitable Accident', in that the site of the accident deceptively appeared 40 firm, but in fact turned out to be soft and slippery; the reason being, as was subsequently learnt, that the site was an alluvial drainage area and consequently high in clay, silt, and/or humus; the vehicle therefore unavoidably became uncontrollable and rolled over on to its roof.

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   The Defendant denies the allegation of the Plaintiff in paragraph four of the Statement of Claim that the accident was caused by his negligent driving and also denies items *(a)* to *(c)* of the Particulars of Negligence; but admits that he was unwise in that he did not refrain from driving a vehicle at all on the road in 5 question at the material time, having regard to the nature and condition of the road, the kind of weather at all material time of year, and all the surrounding circumstances.

   The Defendant advances in his Defence that the doctrine of '*volenti non fit injuria*' precludes the Plaintiff from recovering any 10 damages, in that the Plaintiff voluntarily and freely with full knowledge of the nature of the risk she ran, impliedly agreed to incur it.

   The Defendant states that the Plaintiff was also negligent in that she freely and voluntarily embarked on a Landrover with full 15 knowledge that it had just fastened (sic) in the road because of the very poor condition of the road, and with full knowledge that the journey was being resumed and that she would be driven to the intended destination of the occupants, including herself, along the road, the condition of which, because of condition of the time of 20 year, was very poor throughout; in this the Plaintiff is caught in Contributory Negligence as regards her own safety, and the Defendant also denies that the injuries were caused by the accident."

The plaintiff's evidence was that about 3.30 in the morning they left 25 the ranch to go to Senanga. Having travelled about ten miles the Land -  Rover got stuck in the road and they had to wait until daylight until they were pulled out of the mud and set off on their journey again. She was in the front of the vehicle, which was being driven by Mr Vernon. As she felt sleepy she dozed and woke up to find herself near the ground 30 and the Land - Rover upside down. The time was then approximately 9 a.m. She managed to get out of the Land - Rover feeling dazed and shaken, and saw that the Land - Rover was on its roof. At that place the track turned left and the vehicle had not turned the bend but had gone straight on and was upside down some 30 to 40 ft from the track. She 35 wished to take photographs but Mr Vernon forbade her. At the place where the accident took place the track was through black cotton soil, a notoriously treacherous surface when wet. After some time help came and the vehicle was put on its wheels again. Vernon asked her to drive as he was shaken. She did so for some miles and then he took over. 40

They missed the plane at Senanga and went on to Mongu where they went to Vernon's house. There Vernon drove away the two other passengers in the vehicle in his personal Land - Rover. He told plaintiff and the others that he did not wish the accident to be known as he already had a case about driving, and he also asked them not to report to a 45 Government hospital.

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The plaintiff spent the night at Senanga and eventually returned to Lusaka on the 9th by air. On the 10th she saw Dr Oliver because she was feeling dizzy and shaken. She was unable to recollect a specific injury though clearly a person who is thrown upside down will receive some 5 blow. Dr Oliver examined her and sent her for  X - ray to the diagnostic centre, where her head and cervical region were X - rayed.

She later sent the bills for this to Mr Vernon and he paid them, although his letter, in which he agreed to do so, clearly is an indignant repudiation of blame. The plaintiff stated she sent them to him because 10 he had asked her not to go to Government doctors.

She again saw Dr Oliver in February, but cannot remember for what purpose. Some months prior to 3rd September, 1969, she had found that the action of her wrist and right arm were getting progressively worse and she went to Dr Oliver on the 3rd and Dr Oliver gave her treatment. 15 She was subsequently referred to Dr Stewart and to various other doctors during 1970. None of the treatment she got was doing her much good. She went on leave at the end of 1970 and on her return she again saw Dr Stewart and in February, 1972, she saw Mr Gold and Dr Chuke and Mr Phillips. She was also referred to Mr Standish - White, whom she had tried 20 to see just after she returned from leave and had failed. She went to Salisbury for an operation on her elbow in September, 1972, by Mr Standish - White. On 4th March, 1974, she saw Dr Gawish and also in 1974 she saw Doctors Lal and Azer. She received numbers of accounts for all these things which she paid.

For 25 some months before she saw Dr Oliver in 1969 her wrist and elbow had been getting increasingly painful, but she first noticed that she had an eye defect in September, 1969, when Dr Oliver pointed it out to her. She experienced pain in her eye some time in the middle of 1971. Since the accident she had received no physical shock or injury which 30 could have caused the injury.

As a result of her injuries she was unable to play tennis, although she had been a keen tennis player since the age of eight. She had never suffered from tennis elbow at any time during her career.

She agreed in cross - examination that she was perfectly satisfied with 35 Vernon's driving when he had driven her to the ranch and that she had been driving round the tracks around the ranch. She also alleged that Mr Vernon had been up very late the night before; the implication being that he might have been sleepy when driving. She stated that she was no longer able to play tennis or badminton and when she tried her arm 40 was weak. She could drive a car but not for long periods. She denied that she had gone for treatment for a tennis elbow.

Another passenger in the car, a Mr Musapelo, gave evidence of being in the vehicle at the time of the accident. They had left the ranch at about 3 o'clock and stuck at about 6 o'clock, when they were pulled out. They 45 continued on the journey about 9 a.m. As they were late they were hurrying a bit. They came to a slight corner which was slippery and the vehicle failed to take the corner and turned over. He estimated the

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vehicle was about 2 m from the edge of the road and in his opinion it was travelling too fast for the nature of the road. He thought Mr Vernon had gone to bed about midnight.

He agreed that he had made a statement previously to the provincial agricultural officer, requested by the Attorney-General. He agreed he had 5 not stated in that statement that the vehicle was rushing. He in fact gave no details as he was not asked for any. The statement which was exhibited is in fact mainly a statement that the accident happened, the driver was Mr Vernon and the passengers were plaintiff, himself and another person.

In answer to questions by the court he could not remember Mr 10 Vernon changing Land - Rovers, nor did he hear Mr Vernon saying anything about an accident. But he agreed that plaintiff was driving when she left the scene of the accident. She drove to the pontoon where Mr Vernon again took over.

The defendant called Mr Richard Vernon, the driver of the vehicle. 15 He denied that they had been to bed late the night before. They got up early for the purpose of reaching their destination. They stuck some perhaps five miles from the ranch, in what he called a "mulepo", which is a large mud patch extending across the road. He was pulled out in the morning and they continued on their journey. On the way he encountered 20 another mulepo. He slowed down in order to see if it was feasible to negotiate it. In order to negotiate a mulepo one has to stick to the road as usually the mulepo extends, as this one did, 100 - 50 m across. He started across the mulepo and some way across the vehicle skidded, the rear wheels went to the left and the vehicle went to the right and turned over 25 landing on its roof. He had successfully negotiated dozens of mulepos before then. After the accident they all got out and nobody was hurt. Help came Old they continued on their journey.

He alleged the plaintiff did not appear to be hurt. He did not ask her to drive, and she did not drive from the scene, but she did drive at 30 her request after about twenty miles. He did not forbid plaintiff to take photographs. They reached Mongu about 6 p.m. He denied ever telling the plaintiff about another accident, or asking her not to go to a Government doctor. He had paid the doctor's bill because, although he did not consider it his responsibility, he did not want to argue about the matter. 35 He denied that he was in any hurry. He denied that it was in any way unwise to drive the vehicle that day. He stated that when he approached the scene of the accident he was going not more than thirty miles an hour and probably, when he slowed down, he did so to about 5 - 10 miles an hour. He stated that one had to accelerate to get through the mud which 40 constitutes a mulepo.

On the question of negligence I have to bear in mind that this accident happened some six years ago and that the memories of the people are clouded by this fact and by a natural prejudice which arises. I doubt very much whether the plaintiff was prevented from taking photographs 45 or was forced to drive. She does not appear to be the sort of person who would be easily cowed. I am satisfied, however, that she has been, and

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her witness has been, telling the truth as to what they consider happened, as indeed I think Mr Vernon also has. I have no doubt that the roads and tracks in the area were in a bad condition, that one had to take care on them, that mud patches were frequently encountered, and that, 5 particularly, where there was black cotton soil, the surface was extremely treacherous. No doubt it is necessary to proceed through mud at some speed, but it does not seem to me that it is necessary to travel at such a speed that there is a risk of turning over. It seems to me likely that Mr Vernon was hurrying. If he had to leave at 3 or 3.30 a.m. in order to arrive 10 at his destination, the loss of some three or more hours would clearly have given some sense of urgency. I am satisfied that he appreciated the danger of this mulepo; that he knew there was a possibility of skidding and he took a chance. I am satisfied that he drove too fast, and I am also satisfied that he was negligent in so doing. I do not consider that his 15 degree of negligence was very high, but it certainly was sufficient to sustain this action.

No evidence whatever was given which could support the defence of unavoidable accident, which was based on the allegation that the road looked perfectly good but turned out to be soft and slippery. Quite looked plainly 20 the road at the time looked what it was, a treacherous patch of mud. This defence was, after some argument, abandoned.

It is alleged that the plaintiff accepted all risk from the state of the road and from any driving on it because of its uncertain danger. In my opinion there is no evidence whatever to support that allegation. The 25 plaintiff had been driven perfectly safely and no doubt carefully around these roads and tracks for a fortnight. Mr Vernon, and no doubt numerous other people, had been using the roads and tracks without mishap. Plaintiff clearly did not anticipate danger and did not voluntarily accept the risk of overturning and injury. Indeed, the defence involves suggesting 30 that every person, both inside and outside Government service, was voluntarily accepting a risk by travelling on these Government roads and tracks. This seems preposterous - so much so that the defence was abandoned. Equally it seems to me preposterous to suggest that by reentering the vehicle and continuing her journey after it had stuck in the 35 mud the plaintiff was negligent.

I have no doubt that none of the defences put forward can succeed. I am fully satisfied that the plaintiff was not negligent in travelling with Mr Vernon that day, and Mr Vernon's own evidence does not suggest this. It might well be argued that on the pleadings the plaintiff must succeed 40 as, contrary to the facts, the defendant has admitted negligence in being on the road at all. However, as I have said, I find negligence in any event and upon this issue the plaintiff in my opinion succeeds.

The question then arises, were her injuries a result of the accident, and if so what is the nature of those injuries, and the extent of the damage?  45

On this question, originally, the action was being fought on an agreed bundle of documents, in the sense that the documents were accepted as being made and reflecting the opinions of the makers - all the actual

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witnesses being absent from the territory. This in itself made the task of the court a difficult one, and it is very unfortunate that it has taken so long to bring this action to trial. I do, of course, bear in mind that the injuries did not appear at first and were progressive. During the trial, however, counsel for the defendant resiled from accepting the bundle 5 and objected to a number of the documents. Eventually, however, all the documents were admitted or proved except numbers l and 8.

The defendant also called Dr Azer, a Government consultant surgeon, who was taken through the documents and explained the meaning of a number of them from a medical point of view. There had been reference 10 to a tennis elbow in a number of documents and Dr Azer explained that this was merely a term for a particular ailment which could be caused in a number of ways. It could be caused by any job or sport which necessitated frequent stretching of the elbow and flexing of the wrists. Although tennis had given its name to the ailment, tennis playing caused only a 15 minority of this ailment. It could not be caused by an injury, but had to be caused by over - stretching, usually over a period. It could not be caused by nervous tension. It is in fact caused by over - work of the elbow. He did not consider that a trauma or fall could cause a tennis elbow.

He agreed that if the trouble were caused by a dislocation, the 20 symptoms might not occur for a considerable time after the accident. He did not consider it extraordinary that the eye symptoms had occurred three or four months after it. If there was a click in the elbow, it would not be a tennis elbow, but would be due to a dislocation which could be the result of a fall. He referred to the operation performed by Dr Standish - White 25 which appeared to be for a tennis elbow, but agreed that if in fact there had been dislocation the surgeon might not necessarily see it. He could not really give any opinion on the eye complaint. He also stated that the click might be caused by other matters than an incomplete dislocation, for instance rheumatoid arthritis, tuberculosis, osteomyelitis or 30 some foreign body might cause the condition. He also agreed that if there had been a dislocation at the time of the accident, it would not have necessarily caused pain at the time.

It is in the light of this evidence that I must examine the documents which constitute the factual medical evidence in the case. It seems clear 35 from the plaintiff's evidence that although she only complained of dizziness she was X - rayed in the neck area some short time after the event of the accident. Again it is clear that, although she was getting pain perhaps five or six months after the accident, she did not go to a doctor for this until September, 1969. She was then seen by Dr Oliver and Dr Stewart 40 and the latter's report is at pages 5 and 6 of the agreed bundle. In this report, after referring to the Land - Rover turning over, and the possible head injury following knock - out for a moment, he refers to a wrist injury and to pain in the wrist. He also refers to elbow pain and in relation to this makes a note of tennis elbow. He refers to the pupil of one eye being 45 larger than the other.

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On the 25th February, 1971, page 9 of the bundle, a Dr Urquart from London refers to the plaintiff having a right tennis elbow which was injected with some drug, and states that pain has disappeared, and if there is any relapse it should be again treated.

Mr 5 Gold examined the plaintiff on the 1st February, 1972 (page 14 of the bundle), when he refers to pain in the right elbow which appeared to be on extension. When the patient wakened the elbow was stiff. He found a clicking at the head of the radius which caused pain when the elbow was pronated. He also refers to the eye injury and to the right 10 wrist and referred the patient to Dr Chuke. He, Mr Gold, refers to treatment given, which does not appear to have been very successful. On the 14th February (page 14 of the bundle), he refers to a subluxation of the head of the right radius. I understand subluxation to be some form of dislocation, and I take this to be a diagnosis of this condition.

There 15 is then, on page 18 of the bundle, a hospital case history sheet in which reference is made to the condition of the eye.

On page 19 of the bundle Mr Gold makes a report to the plaintiff's solicitors. He begins that report with what is plainly a misapprehension, in that he states as a fact that the plaintiff received the following injuries 20 in the accident, severe blow to the right wrist and pain and swelling in the right wrist and elbow joint. This was clearly not correct as the plaintiff did not recollect that she had received the injury at the time, though she assumed she had later. He then referred to the history of the X - rays and treatment in plaster and the dilatation in the eye and the performance of 25 an angiogram to ascertain the cause of the eye damage. He refers to the fact that this proved negative and stated that, after consultation with Dr Chuke and Dr Lall, it was decided that the eye lesion was a traumatic mydriasis. It seems clear to me that this opinion was based on the assumption that the accident had caused a head injury.

He 30 then referred to the injuries to the right wrist and elbow and referred to the click and gave as his opinion that, in the accident, Miss Rees had suffered the eye injury and the subluxation or dislocation of the right radius. He assessed permanent damage at about 3 *per cent* of the elbow, but he was not qualified to give any opinion on the eye. He recommended 35 that if the symptoms got worse it might require an operation.

At page 22, Mr Malcolm Phillips gave an opinion in which he stated, incorrectly as it happens, that Dr Oliver had noted the change in the colour of the right eye when he had first examined the plaintiff immediately after the accident, and this had been confirmed a year later. In 40 fact the evidence shows that Dr Oliver did not notice this condition until a very considerable time after the accident. Mr Phillips expressed an opinion that the eye disability was permanent.

At page 44, Mr Standish - White has a report on the whole matter, in which he sets out the history, that she had been involved in a road 45 accident in December, 1968, and had received a blow on the head. This is, I think, correct as an inference, but not as a stated fact, as it is obvious that, if plaintiff was thrown upside down in the Land - Rover, she must

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have received some sort of blow on the head. He then refers to the fact that about a year later she notices the pain in the right elbow and wrist. The period here is incorrect, as plaintiff's evidence, which I accept, is that she noticed it several months before she saw Dr Oliver in September, 1969. He sets out the various treatments for the symptoms which were 5 occurring, describes the operation and states that, at the date of that report, 6th September, 1972, she had a 1 *per cent* disability in the right wrist and a 10 *per cent* disability in the right elbow, but it could be expected that the disability in the wrist would become nil and the disability in the elbow would become between 2 and 5 per cent. He expressed 10 no opinion as to whether her injuries had any direct connection with the accident, but merely noted that there was a one - year gap between the accident and the onset. He also noted that the type of tendonitis which he diagnosed had many causes, but that plaintiff could recall nothing particular occurring during the year after the road accident and before 15 the onset of the symptoms.

At page 48 of the bundle, Dr Gawlish gives his opinion. In his opinion there was no neurological cause for the elbow injury. He recommended an orthopaedic examination. He was of the opinion that, because a dilatation of the right pupil was first noticed about two years after the 20 accident, it could not be the result of the accident. This period of two years is incorrect. It was about ten months. In his opinion this dilatation could be caused by a number of causes, including trauma, but, if it had been trauma, the condition would manifest itself immediately and would not be delayed.

I 25 have to try to arrive at a decision upon the evidence before me. As to the eye injury, this was first noticed by the plaintiff some time on or after the 18th September, 1969, when she saw Dr Oliver and he pointed it out to her. That is about ten months after the accident. The evidence on the eye is mainly that of Dr Lall, Mr Phillips and Mr Gawlish. Dr Lall's 30 report at page 50 of the bundle is mainly a factual statement of the condition found and that it could be caused either by trauma or other causes. It is true that in Mr Gold's report at page 19 he is stated to have agreed that the eye injury was a traumatic mydriasis, but it was not clear whether he was aware that the symptoms had only occurred ten 35 months after the accident. It may be that he was but I cannot be sure. Mr Phillips was under the impression that Dr Oliver had noticed the change in colour and dilatation immediately after the accident. He therefore gave no opinion as to whether a traumatic cause of this would manifest itself immediately. His opinion is therefore neutral on the 40 question of whether such condition can manifest itself after a year or so. On the other hand, Dr Gawlish quite clearly expresses the opinion that if the condition were caused by trauma, it must manifest itself immediately. Clearly it follows that if it only manifested itself ten months afterwards, in his opinion it cannot have been caused by the accident. 45 On this medical evidence it seems to me impossible to hold that it has been proved on the probabilities that the eye condition was a result of the accident. It may be that if other medical opinion could have been

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called this could have been proved, but on the evidence here it is not. Accordingly, I must hold that the plaintiff is not entitled to any damages in relation to the injury to the eye.

As to the injury to the elbow, it seems to me that while many of the doctors were treating this as a tennis elbow, it does not necessarily follow that it was in fact a tennis elbow. Mr Gold's evidence that he found a click, which was some dislocation of the elbow, is not contradicted by the various diagnoses of tennis elbow. I accept Mr Gold's evidence on this. The plaintiff's evidence, which I accept, that she suffered no injury after 10 the accident which would account for a dislocated elbow, seems to me to indicate that this dislocation was a result of the accident. It is agreed by Dr Azer that this could have manifested itself some months afterwards. I consider that the history of the injury developing after 4, 5 or 6 months does not exclude it from having been caused by the accident. I also 15 accept plaintiff's evidence that she never had any tennis elbow condition before the accident.

I am satisfied that on the probabilities plaintiff has shown that she did suffer in the accident an injury to her elbow which produced pain and which has been a cause of this permanent pain in her elbow. The fact 20 that she had no symptoms of tennis elbow throughout a long tennis career before the accident seems to me to support this. That she should only have started having tennis elbow after the accident would be very coincidental. Moreover, even if there were some sort of tennis elbow developing after the accident, I am satisfied on the probabilities that it 25 was stimulated or aggravated by the accident. However, I find as a fact that the former condition is more likely.

I am satisfied that the plaintiff has proved her case that the accident was the cause of her elbow and wrist injuries.

On the question of damages the plaintiff suffered some minor 30 discomfort immediately after the accident. She is no longer able to indulge in tennis and other sports requiring agility of elbow movement. She cannot drive a car for prolonged periods. She now has some pain or at least discomfort which may be permanent. It does not seem to me, however, that this is of high degree, and there is no loss of earnings or disability 35 from her work other perhaps than may be occasioned by the driving disability. It is of course almost impossible to find an identical case for the purpose of assessing damages. One can only find general guidance. The 3rd Edition of Kemp & Kemp has amongst the cases at page 449 *Reffell v Surrey CC* an unauthenticated award in 1964 of £850 40 and at page 450 *Dane v F J Hill* an unauthenticated award of £600 in 1961. The injuries are not exactly the same but the result is much as in this case. I would say *Reffell*'s case involving a younger person was rather more serious and Dane's case rather less serious. One must also bear in mind that money has greatly decreased in value since 1961 and 1964. 45 Making the best estimate I can I assess general damages at K2,000. On the question of special damages I am satisfied that the sums referred to were incurred by reason of treatment relating to the accident. There is a sum of K10.50 payable to Dr Phillips which must be deducted leaving

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a sum of K400.54. It seems to me that the remainder almost entirely relates to the elbow and wrist injury but there may be some part of it attributable to the eye injury. I deduct 10 *per cent* on this account and find special damages at K360. There will be judgment for the plaintiff for K2,110 costs. 5

*Judgment for plaintiff*

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