E.C.H.R. REMEDIES FROM A COMMON LAW PERSPECTIVE

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INTRODUCTION

IN this paper, I shall attempt to take a practical view of some of the issues which the common law courts will be facing in the coming months, in granting remedies under the Human Rights Act 1998. I shall be looking at these issues from the viewpoint of a judge, sitting regularly in judicial review cases, and also as Chairman of the Law Commission, which has for many years taken full account of the Convention in its law reform proposals. Notwithstanding the width of the title, I shall concentrate on remedies in damages, since that is the area to which the Law Commission's work has been mainly directed in recent times. I shall be referring to the recent LCD Consultation Paper on proposed rules under the Act.[1] I shall steer clear of the difficult subject of the "declaration of incompatibility", which has been fairly described as "not a legal remedy but a species of booby prize ...".[2]

DAMAGES IN THE STRASBOURG COURT

A GOOD starting point is the introduction to Dinah Shelton's great work ("Remedies in International Human Rights Law"[3]). She observes:

> It is rare to find a reasoned decision articulating the principles on which a remedy is afforded. One former judge of the European Court of Human Rights privately states: "We have no principles". Another judge responds, "We have principles, we just do not apply them".

Other commentators say the same thing in different words:

> The student of the Court's practice is left wondering whether the process by which the Court arrives at its judgments is anything more sophisticated than sticking a finger in the air or tossing a coin.[4]

Having recently participated in a case in which the Strasbourg court made an award on an "equitable basis", I should attempt some defence.

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1. Human Rights Act: Rules—Consultation Paper (Lord Chancellor's Dept CP/5/00 March 2000).
2. Geoffrey Marshall, [1999] P.L. 382.
3. Oxford (1999).
4. Grosz, Beatson and Duffy: Human Rights Act 1998, p.145.

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First, it is necessary to distinguish awards for pecuniary and non-pecuniary loss. When the Court is dealing with pecuniary loss, it has generally tried to base its awards on evaluation of specific evidence of loss, where that is available. The problem normally has been one of practicality. The structure of the Court is not well adapted to resolution of conflicting valuation evidence. This will not be a problem for the English courts when considering similar issues under the HRA, since the techniques will be those normally applied to the assessment of damages.

Non-pecuniary loss (such as pain and suffering) is more problematic. My case[5] concerned the automatic refusal of bail by an English magistrate's court under the strict rules introduced under the last administration, and since modified. A Grand Chamber of 17 judges had been assembled to consider the important issues of principle raised by the case, but in the event the Government conceded liability shortly before the hearing, and so the only outstanding issue was "just satisfaction" (if any).

In most such cases, the Court has refused any financial remedy, because the applicant has been unable to show any significant loss—often because the extra time spent in prison has been taken into account in the ultimate sentence. This case was unusual, in that the applicant was able to show on the undisputed evidence that he would have had a good chance of being released on bail if the Convention had been applied. Further, since he was a relatively old man who ultimately received a life sentence, the period in question could well have represented his last days of liberty. The unanimous judgment notes these facts and goes on:

> The court awards the applicant, on an equitable basis, £1,000 compensation for non-pecuniary damage.

Without breaking my duty of confidentiality, I can, I think, reveal that no one stuck a finger in the air; and no one tossed a coin. But I cannot pretend that the stated reasoning is as full as might be desirable.

On the other hand, I am not sure that it compares *so* badly with our own Courts in relation to non-pecuniary loss. It is true that in recent times the English courts have been moving towards a more principled approach to the assessment of damages, in the context of guidance to juries. *Thompson* v. *Commissioner of Police* [1997][6] is the obvious example, where the Court of Appeal laid down very specific guidelines as to the levels of award which were appropriate for false imprisonment or malicious prosecution by police, even to the extent of suggesting figures for each extra day of detention. *John* v. *MGN* [1996][7] contained a similar exercise in relation to guidance to juries on damages for libel.

5. *Caballero* v. *UK* Case 32819/96 Judgment 8.2.00.
6. [1997] 2 All E.R. 762.
7. [1996] 2 All E.R. 35.

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However, when the court is making the award itself, a different philosophy seems to prevail. The *Brockhill Prison* case[8] is an interesting example. That concerned an action by one of the many prisoners, whose release dates were delayed by what was found to be a mistaken view as to how time spent on remand should be taken into account. There is an interesting issue, presently before the House of Lords, as to whether liability should fall on the unfortunate Governor, who made the miscalculation relying on what was thought to be sound High Court authority. However, in the present context, it is the Court's assessment of damages which is of interest. *Thompson* was referred to, but rejected as a comparison because the facts were different. Counsel for the applicant had suggested that the Court might indicate a daily or weekly amount as a guide for the many other cases in the same category. The Court declined to do so because "no two cases are the same". Nonetheless, the judge's award of £2,000 was increased to £5,000. The reasoning was simply expressed. Lord Woolf said merely that the award was "well below the appropriate figure for 59 extra days of imprisonment .... We increase the award to £5,000". The other two members of the Court agreed without further explanation.

By that comparison we did not do too badly in *Caballero*—particularly if one bears in mind the different nature of the court. The Court of Appeal consists of three judges with enormous combined experience of assessing damages in the English context (and speaking the same language). In *Caballero* we were a court of 17 judges, from a range of judicial, ministerial and academic backgrounds, and from diverse countries, in which views of appropriate levels of compensation may differ widely. For example, the Court included judges from such countries as Sweden, Spain, Lithuania, Ukraine and Andorra. A number probably had limited judicial experience of assessing damages, even in their own countries. In a court of that size and diversity, the assessment of non-pecuniary damages is inevitably something of a jury exercise.

LAW COMMISSION REPORT ON NON-PECUNIARY LOSS

THE problem of assessing non-pecuniary loss has in fact been the subject of detailed consideration by the Law Commission, as part of its comprehensive review (completed last year under Andrew Burrows) of the law of damages for personal injuries. Part of that work was an attempt to find a principled basis for the assessment of awards for non-pecuniary loss, such as pain and suffering.[9] Our final report on the specific subject of Damage for Non-pecuniary Loss was published last year, and proposed that in general such awards should be increased by 50 per cent to 100 per

8. *R.* v. *Governor of Brockhill Prison, ex p. Evans (No. 2)* [1998] 4 All E.R. 993.
9. Damages for Non-pecuniary Loss (LC No. 257, 1999).

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cent, and that this should be done by guidelines from the Court of Appeal. This has recently been considered by a special five-judge Court of Appeal, which agreed with many of our conclusions, but adopted a smaller increase of one third.[10]

A recurring theme in the responses to our consultation was that "the views of Society as whole" should be taken into account in determining the level of damages for non-pecuniary loss. It was less obvious how those views should be ascertained. The whole damages project, which extended over five years, started with a detailed survey by Professor Hazel Genn ("Personal Injury Compensation: How much is enough?"[11]), designed to ascertain the experiences and views of *victims* of personal injury who had received compensation. A later survey, directed specifically to non-pecuniary loss, aimed to find out the views of a random sample of *the general public* as to appropriate levels of compensation for different types of injury.[12] The idea, in effect, was to reproduce, in a more structured way, the kind of consideration that might be given by a jury.

The role of juries in assessing damages has been commended by the higher courts, both in Scotland (where some personal injury cases are still heard by juries)[13] and in Northern Ireland.[14] In the latter Lord Lowry attributed the fact that awards in England had tended to fall behind those in Northern Ireland to the fact that jury trials of damages had ceased in England in 1934, whereas in Northern Ireland they continued until 1987. He clearly thought that juries were better in tune with the times. As he perceptively observed:

> ... the age of judges ranges from middle-age to elderly and ... elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing values, even though at the same time they may remain intellectually able and alert ....

We also referred to comparative studies of similar damages in other European countries,[15] but concluded that the degree of divergence made comparisons doubtful. Indeed, different respondents had used the same study to show that the levels of awards in the UK were too low and too high.

All this seems to show that the search for a wholly principled way of assessing damages for non-pecuniary loss is bound to fail. Although the

10. *Heil* v. *Rankin* 23.3.00 (unreported).
11. LC No. 225, 1994.
12. LC No. 257, App B.
13. *Girvan* v. *Inverness Farmers' Dairy* [1998] S.L.T. 21.
14. *Simpson* v. *Harland and Woolf* [1988] N.I. 432.
15. Mackintosh and Holmes: Personal Injury Awards EU and EFTA countries (2nd Edition 1994).

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English courts are enjoined to take account of any principles ascertainable from the Strasbourg jurisprudence, they are likely to find more help in practice from the precedents of our own courts. If anything I suspect the tendency, once the English courts get their teeth into the Act, will be for English awards to be used as guidance by the Strasbourg Court.

DAMAGES FOR JUDICIAL ACTS

IN many areas of the law, it will be unnecessary for the English courts to look to Strasbourg to supplement existing common law remedies. For example, the subject matter of Article 5 is for most purposes co-extensive with the English law of false imprisonment. There is no reason why the ordinary award under the *Thompson* principles should not be treated as providing "just satisfaction" for a breach of the Convention arising out of the same circumstances. The Strasbourg jurisprudence does not support the award of any additional sum by way of "constitutional damages", or even "exemplary" damages.

Of more interest are those cases where Convention law provides a claim for damages where none currently exists in English law. One such is the potential claim by a person imprisoned by a court order in breach of Article 5. At present all levels of the judicial hierarchy enjoy immunity for acts done in good faith. However, Article 5(5) requires there to be an enforceable right to compensation for detention in breach of the Article, even if pursuant to a court order. This is given effect by s.9(3)—although happily awards will be against the LCD rather than the Court.

This is not quite as far-reaching as it sounds. In practice, the HRA will have the unexpected effect of resurrecting a difficult body of law, which ceased to be of contemporary relevance here in 1990. Until the Courts and Legal Services Act of that year, magistrates, unlike other levels of the judiciary, were potentially liable for damages if they acted "in excess of jurisdiction". In a Northern Irish case in 1985,[16] the House of Lords held that "excess of jurisdiction" in this context had a narrower and more specialised meaning than in judicial review generally. There could be excess of jurisdiction in three circumstances: first where the tribunal had no jurisdiction to enter on the inquiry in question ("the narrow and original sense"); secondly, where there was "a gross and obvious irregularity" in procedure; and thirdly where there was a failure to observe a statutory condition precedent necessary to give the justices jurisdiction.

In that case, it was held that the magistrates' breach of a statutory requirement to inform a minor of his right to legal representation before imposing a sentence of imprisonment involved an excess of jurisdiction rather than a mere procedural irregularity. The same approach was

16. *McC* [1985] A.C. 528.

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applied by the Court of Appeal in a case in 1989,[17] where the magistrates had committed the applicant for failure to pay rates without carrying the required statutory inquiry into his means. In 1990 the law was changed so as to provide immunity from damages claims to magistrates acting in good faith, even where they acted in excess of jurisdiction.[18]

Since then there have been two relevant cases in the Strasbourg court—*Benham*[19] (Grand Chamber) and *Perks*[20] (seven judge Chamber)—both concerning applicants imprisoned by magistrates for non-payment of community charge. Although the magistrates' orders had been quashed on judicial review, the Strasbourg court found no breach of Article 5. Article 5 requires any order of detention to be "lawful" and "in accordance with a procedure prescribed by law". But Strasbourg jurisprudence acknowledges that an order of a court may be "lawful" even though it is subsequently reversed by a higher court for error of law; to be "unlawful" in this sense, it must be made "without jurisdiction".

In *Benham* the Court held that the distinction between the two is primarily an issue for the national court applying national law. It accepted that the appropriate tests under national law were those derived from *McC*; and in particular that unreasonableness in the *Wednesbury* sense was not in itself sufficient to make the order unlawful under Article 5. This was followed in *Perks*, but, on the particular cases, the conclusion in favour of the government was somewhat tentative:

> It cannot be said with any degree of certainty that the judgments of the national courts quashing the magistrates' imprisonment orders were to the effect that the magistrates had acted in excess of jurisdiction within the meaning of English law.

This caution was understandable. It is not surprising that the Court found no real help in the judgments of the Crown Office judges, because they were not in any way concerned with the *McC* tests. Furthermore, a close reading of the Court's reasoning in *Benham*, repeated in *Perks*, suggests that the Court relied on a supposedly clear-cut distinction in English law between void and voidable orders:

> It was agreed by those appearing before the Court that the principles of English law which ... distinguished between acts of a magistrates' court which were within its jurisdiction and those which were in excess of jurisdiction. The former were valid and effective unless and until they were overturned by a superior court, whereas the latter were null and void from the outset.[21]

17. *R.* v. *Manchester City Magistrates, ex p. Davies* [1989] Q.B. 631.
18. Courts and Legal Services Act 1990, s.108.
19. *Benham* v. *UK* (1996) 22 E.H.R.R. 293.
20. *Perks and others* v. *UK* Case 25277/94 Judgment 12.10.99.
21. *Benham supra* at para.43.

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This is of course a very murky area of administrative law. The distinction seems to have been drawn from a passage in Wade's 6th Edition[22]:

> "Void" or "voidable" is a distinction which applies naturally and without difficulty to the basic distinction between action which is ultra vires and action which is liable to be quashed for error on the face of the record. Action which is ultra vires is ... null and void and of no legal effect .... An order which is merely voidable, on the other hand, has legal effect up to the time when it is quashed.

This was cited in earlier submissions by the parties to the Commission, prepared when that edition was still current.[23] But the same passage is heavily qualified in the 1994 7th Edition.[24] "Void or voidable" is described as a distinction which "could formerly be applied without difficulty," but which "no longer survives since the House of Lords declared all error of law to be ultra vires".[25]

By the time the case got to the Full Court, this point seems not to have featured in the argument, since everyone seems to have agreed that the *McC* principles would apply. The Court can be forgiven, therefore, for not having shown much inclination to grapple with this esoteric and rapidly developing aspect of English administrative law.

ARTICLE 5(5) IN THE ENGLISH COURTS

FROM October, under the proposed Rules and Practice Directions, the Crown Office judges will have to grapple with this issue. Where an Article 5(5) issue is raised, the Court will now be required to make a finding whether the detention was "lawful" in the Convention sense. Although the Act requires us to have regard to the Strasbourg case law, that (in *Benham*) tells us that unlawfulness is primarily a matter of national law. Technically, therefore, it would be open to the English courts to review the Strasbourg Court's understanding of national law.

So how will the English courts approach the problem? In practical terms, I expect that we will end up in the same position as the Strasbourg Court, and adopt the *McC* criteria as the best guide, possibly with some refinement. They tie in reasonably well with Privy Council authority on "due process of law" in constitutional guarantees of liberties in Commonwealth Bills of Rights.[26] The only real area of difficulty is in relation to the

22. Wade: Adminstrative Law, 6th Ed., p.349.
23. Applicant's observations to the Commission 13.5.93.
24. Wade and Forsyth: Administrative Law, 7th Ed. (1994) p.340.
25. The footnote to this passage refers to the discussion earlier in the book ("All error of law now reviewable"), which examines the "radical conclusions" drawn by Lord Diplock from the *Anisminic* case [1969] 2 A.C. 147, and recently adopted by the full House of Lords in *R.* v. *Hull University, ex p. Page* [1993] A.C. 682.
26. See *Maharaj* v. *A.-G. of Trinidad and Tobago (No. 2)* [1979] A.C. 385.

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third category. Here the *McC* tests are difficult to apply. There is only a very fine distinction between the case (as in the *Manchester* case) where the magistrates have made no inquiry at all into his means, and one where they have made some sort of inquiry, but made such a botched job of it that it is categorised as irrational. It may be that neither involves an "excess of jurisdiction" in the sense that Strasbourg intended. In any event, it is likely that some refinement of the principles will be needed.

DAMAGES IN *PERKS*

INCIDENTALLY, the judgment in *Perks* provides some anecdotal illustration of the cross-fertilisation of ideas on damages between English courts and Strasbourg. The Court was concerned with an applicant, who had been subject to imprisonment for non-payment of community charge. He had spent six days in custody before release on bail. His case failed under Article 5 (for the reasons considered above), but succeeded under Article 6, because the Magistrates' Order was made without him having had any legal advice or representation. The court accepted that, if he had been properly represented, his special health problems would have been drawn to the attention of the Court and it was unlikely that he would have been committed. The Court awarded him £5,500 in respect of non-pecuniary damage—said to be "on an equitable basis".

Although there is no other explanation of the figure in the judgment, the Court had before it a graph submitted by counsel on behalf of the applicants,[27] showing a tariff of levels of compensation related to days in detention. I understand that this was derived from the Court of Appeal guidance in *Thompson*[28] and another Court of Appeal case (relating to imprisonment for non-payment of rates)—*Lunt* v. *Liverpool City Justices*.[29] On this graph, six days' detention comes out at exactly £5,500. There is nothing particularly surprising about that apparent coincidence. In reaching an "equitable" view of the appropriate level of damages for non-pecuniary loss, one would expect the Strasbourg Court to be guided by such evidence as is available as to the level of awards in the relevant jurisdiction. This tendency is likely to increase as there becomes available a body of authority from the English courts on damages under the Convention.

CHILD CARE

ANOTHER important area, in which the Strasbourg jurisprudence is likely to have a profound influence, is that of remedies in welfare law, particularly relating to children. Recently, of course, we have been

27. Ben Emmerson, who has provided this information.
28. See above.
29. (1991) CA Transcript 158.

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struggling to sort out our own law of negligence in the context of duties of public authorities.[30] Strasbourg has added its own twist to the wheel, in the notorious case of *Osman*.[31] And seven of their Lordships are currently grappling with the problem in the case of *Phelps* v. *Hillingdon BC*.[32] The tendency hitherto has been to treat the sensitivities of the Local Authorities' responsibilities in such matters as justifying a very limited role for the law of tort.[33]

Strasbourg has not been so squeamish. For example in *H* v. *UK*[34] the Court awarded £12,000 to a mother on "an equitable assessment", for unreasonable delay in child-care proceedings, as a result of which she suffered "some loss of real opportunities, warranting monetary compensation"; and in *Eriksson* v. *Sweden*,[35] the applicant was awarded about £19,000, because she was unable to challenge an order keeping her daughter in a foster home and restricting their contact. In such cases the Court seems more willing than usual to presume loss—as in *H* v. *UK*, reflecting the mother's "loss of her relationship with her daughter and the deprivation of the latter's love companionship and support". The award was made even though the Court acknowledged that the same result might have been arrived at if the proceedings had been terminated more expeditiously.

It is too early to speculate as to how this strand of authority will be applied in English law, in particular how the sensitivities of the local authority's role will be given effect. The wording of the HRA, with its emphasis on remedies that are "just and appropriate" gives some scope for taking account of the public interest considerations that played such a large part in *X* v. *Bedfordshire*. We must await further enlightenment from the Strasbourg Court in that case (renamed confusingly *Z* v. *UK*), and the House of Lords in *Phelps*.

It is however worth considering for a moment the procedural aspects. A claim for damages for unreasonable delay, as in *H* v. *UK*, is a novel form of claim. As the law stands, the only legal remedy for such delay would be by judicial review and an order of mandamus. There would be no remedy in damages, and the only prospect of compensation would be through the Ombudsman. From October, there will be a distinct remedy in damages, under the HRA. As envisaged by the recent Consultation Paper, the rules will allow such a claim to be brought through the ordinary civil courts, subject to the normal jurisdictional limits. Presumably, a civil court faced with such a claim following prolonged delay could also make a coercive

30. See especially *Barrett* v. *Enfield LBC* [1999] 3 All E.R. 193.
31. *The Times*, 5.11.98.
32. [1999] 1 W.L.R. 500, CA.
33. See *X* v. *Bedfordshire CC* [1995] 2 A.C. 633.
34. (1988) 30 E.H.R.R. 449.
35. (1990) 12 E.H.R.R. 183.

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order of some kind to force the authority to make a decision—in practice having the same effect as mandamus.

If that is right, then it seems yet a further nail in the coffin of the procedural divide—between civil proceedings and judicial review—in *O'Reilly* v. *Mackman*.[36] It will also make it increasingly difficult to maintain the traditional common law position that breach of a public law right by itself gives rise to no claim for damages. A claim for damages under the HRA is a species of "public" or "constitutional" right,[37] but procedurally it will progress like any private law action against a public authority.

In many cases, the boundaries will be very difficult to draw. Take the recent case of *R* v. *North Devon HA, ex p. Coughlan*,[38] in which the Court of Appeal held that the HA was bound by its promise that the applicant would have a home for life at their nursing home. That was put primarily on the basis of legitimate expectation or abuse of power. But it was also held that to move her, without the offer of an equivalent alternative, would be a breach of her rights under Article 8. What would have happened if the authority had already closed the home before the case came to Court, without such an offer? The doctrine of abuse of power would have given her no claim to damages for the suffering and anxiety so caused, but Article 8 and the HRA might well fill the gap.

I think these anomalies are going to be very difficult to resolve through the ordinary case-by-case approach in the courts. I have written elsewhere on the need for a more structured framework for the legal liabilities of public authorities under UK law.[39] That was in the specific context of remedies for breach of the Homeless Persons legislation. It took the Courts 20 years, and two visits to the House of Lords, to decide finally that there was no remedy in damages for breaches of duty by housing authorities under the Act.[40] (Whether Article 8 has a role to play in that context remains to be seen.)

Six years ago, the Law Commission recommended that the time was ripe for a review of the remedies in damages for unlawful administrative action.[41] The recommendations of that report are currently under consideration in the Bowman committee's review of the Crown Office,[42] but that is unlikely to touch on substantive matters. I hope, however, that

36. [1983] 2 A.C. 237.
37. See *Maharaj, supra.*
38. [2000] 2 W.L.R. 622.
39. "The *Thornton* heresy exposed; Financial remedies for breach of public duties"; [1998] Public Law 407.
40. See *O'Rourke* v. *Camden LBC* [1997] 3 W.L.R. 86.
41. Administrative Law: Judicial Review and Statutory Appeals; LC No. 226 (1994) para 2.32.
42. See Hansard (HL) 22.3.99 WA124.

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during my time at the Commission we will be able to carry that particular recommendation forward.

JUDICIAL CONFIDENCE

FINALLY, may I make a plea for judicial confidence? We have lost a lot of ground, and we must regain the initiative. One of the regrets of my professional life as a public lawyer, both as advocate and judge, has been that the Convention has never been part of my armoury. If the HRA had been passed in 1965, at the same time as the UK accepted the right of individual petition to Strasbourg, the Convention would have become one of the working tools in the development of modern administrative law in this country (the rebirth of which dates from about that time). In turn, English judges and lawyers would have been able to influence much more directly the development of Convention law in Strasbourg. Instead, we have been forced to watch from the sidelines.

Lord Denning, uncharacteristically, got this completely wrong. He opposed incorporation, because he thought the provisions of the Convention rights would tie the hands of the judges:

> Let the judges accept or reject—or qualify them—as they think fit, so as to suit our circumstances here . . . Do not let us be bound by decisions of judges who do not know our way of life—nor anything of our common law.[43]

But the truth was just the opposite. It was only by some form of incorporation that the UK judges could have played a full part in the development of Convention principles. Indeed the Strasbourg court has often acknowledged that the national authorities are better placed than the Court to appreciate what is in the "public interest".[44] What has happened is precisely what Lord Denning feared. We have become bound by decisions of the Strasbourg court without any contribution from judges here. The chance was missed to achieve a fusion of the Convention with common law principles—in which the Convention is after all rooted. Lord Denning himself could have done more than anyone to advance that process. So, we have much catching up to do.

43. Lord Denning: *What next in the law?* (Butterworths, London, 1982).
44. See e.g. *James* v. *UK* (1986) 8 E.H.R.R. 123, para.46.

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