

CANADA / JUDGMENT

Jackson v. Bayes

2001 BCSC 1351

COURT

Supreme Court of British Columbia

DECIDED

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Registry: Nelson

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEBBIE JACKSON

PLAINTIFF

AND:

CATHERINE ALICE BAYES, NAOME WILLIAMSON

(a.k.a. NAOMI WILLIAMSON AND NAOMI MARLANE BACKUS)

AND PETER WILLIAM OSTRIKOFF

DEFENDANTS

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE T.M. McEWAN

Counsel for the Plaintiff: S. Kurtz

Counsel for the Defendant

N.M. Backus:

In Person

Date and Place of Hearing/Trial: September 11-13, 2001

Nelson, BC

- [1] On the evening of December 4, 1997, the plaintiff's motor vehicle struck a horse on Highway 6 near Crescent Valley, British Columbia. Her car was written off and the horse had to be put down. Ms. Jackson was injured. She claims that the owner of the horse, Naomi Backus, was negligent in allowing it to escape her control, causing the collision and the injuries she suffered. Ms. Backus denies that this is so, and pleads that Ms. Jackson has herself to blame for the collision due to the negligent manner in which she operated her motor vehicle.
- [2] I make the following material findings of fact respecting the escape of the horse:
- (a) On December 4, 1997 the defendant lived at 1810 Highway 3 in Crescent Valley. The property is located on the highway.
 - (b) That afternoon, three horses escaped from the defendant's property. A woman named Barbara McClarty took the horses to her property a short distance north of the defendant's home, and placed them in a pen.
 - (c) The defendant was contacted and within an hour or so she arrived at the McClarty property to retrieve the horses. Ms. McClarty offered to assist the defendant but she said she could take the care of them herself.
 - (d) Ms. McClarty testified that the defendant told her she did not need lead ropes and that the horses would just follow her. She could not remember if she actually saw the defendant leading all three horses away. The defendant testified that she intended to lead one horse named "Romeo" out on a halter, leaving the other two in the pen, and that she thought she would come back for them one at a time. She testified that somehow these horses got out of the McClarty pen and were soon following her as she led "Romeo" toward her house. On the way, one of the horses, "Flyer", was "spooked" and ran away from her and across the highway.
 - (e) On this issue I prefer the evidence of Ms. McClarty. Although she did not actually see what happened, her strong impression, based on a conversation with the defendant, was that the defendant intended to lead "Romeo" away with the other two following. That is what, in any event, happened, and if the horses escaped the McClarty pen as the defendant suggested, they cannot have been adequately secured. That is something Ms. Backus should have ensured. There is no suggestion of intervening mischief at that point, or at any other point. There was evidence about earlier occasions on which the defendant's horses had escaped. I accept such evidence as relevant only to the extent that it negates any suggestion that the escape of the horses was unprecedented or could not have been anticipated. In any event, it is clear that the defendant elected, either when she arrived at the McClarty residence, or very soon afterward, to do the best she could with three horses, two of which were not secured in any way. When one of them broke away it created an obvious hazard.
- [3] The starting point on the law is the Livestock Act. Section 11(1) provides:

Subject to subsection (3), the owner of livestock is liable for damage caused by the livestock while the livestock is at large contrary to this Act or the regulations or any other enactment.

[4] This liability is not absolute (sec. 11(3)):

Subsection (1) does not apply if an owner establishes that

- (a) The owner's livestock was at large as a result of an act or omission of a person over whom the owner has no control, or
 - (b) The owner took reasonable care to ensure that the livestock was not capable of escaping and being at large contrary to this Act, the regulations or any other enactment.
- [5] Here, the horse was at large in circumstances where reasonable care was not taken to ensure that it would not escape. As such, Ms. Backus failed to discharge the duty imposed on her by law (see *Richert v. Boesterd*, [1984] B.C.J. No. 826, Vancouver Registry, C827060 and C830782 (B.C.S.C.)).
- [6] There are further circumstances that must be considered, however. Having taken the risk of moving the three horses at once, and having had one escape, the defendant made efforts to address the situation. She managed to secure the horse she was leading and one other, a horse named "Lady". She then set about recovering "Flyer". In this, she was assisted, as time went along, by a number of neighbours and others who apparently appreciated the urgency of getting the horse back under control.
- [7] The night was, by all accounts, very dark. While attempts were being made to catch the horse, vehicles were dispatched to positions some distance from the scene to warn oncoming traffic in both directions.
- [8] One of those was owned by a man named Benoit Aubin who had been travelling north on Highway 6. He saw a horse on the side of the road and turned around to report it at the nearest residence, which happened to be one "driveway" south of the defendant's home. He began walking north along the highway and encountered a woman looking for the horse and two young women who had also stopped to assist. He then moved his car to a position north of the defendant's property. He saw two cars approaching and flashed his headlights to warn them of the danger. Both cars went past him and moments later he heard a crash.
- [9] Mr. Aubin estimated that both cars were travelling at around the 90 kilometres per hour speed limit. He said neither of them appeared to react to his signal. He said they were the only cars that had gone by him between the time he signalled and the time the accident occurred.
- [10] The plaintiff's evidence is that as she proceeded south along Highway 6 on December 4, 1997 she was following another vehicle. She was close enough that she was not using her high beams. She says she saw flashing lights on the left side of the road. She estimated her speed at 80 kilometres per hour and says that when the car ahead of her slowed in reaction to the flashing lights she slowed to about 65 kilometres per hour. She said she speeded up when the

car ahead began to widen the gap and that she accelerated as she got past the flashing lights. She said it was hard to see and that she collided suddenly with an animal. She had no idea where the car ahead of her went. She said there was extensive damage to the front and the back of her Dodge Aries station wagon.

- [11] The defendant was called in the plaintiff's case. She said that she saw the vehicle that hit her horse coming fast and that it did not slow down. She said that there were two or three cars posted north and south to warn oncoming traffic. She said she thought about a dozen cars went through in the time those cars were in place.
- [12] Ian Thompson, another person on the scene who helped to look for the horse, was also in a position to observe the accident. He said that the plaintiff was going about the speed limit, that it was a "pitch black night", and that the plaintiff did not appear to slow down as she approached. He was unaware of any other vehicles.
- [13] Although the evidence conflicts in some particulars, there is a consistency to the reliable evidence that supports certain findings of fact. I accept the straightforward evidence of Mr. Aubin who says he signalled the two cars he saw coming from the north. I prefer his evidence to that of the plaintiff on the issue of whether she slowed down: that is to say that I find that she did not significantly alter her speed when she saw Mr. Aubin flash his lights. I accept that she was following another vehicle and find that she was the second vehicle Mr. Aubin saw.
- [14] While the plaintiff admits to seeing what were obviously Mr. Aubin's flashing headlights, her reaction was not that of a prudent driver in the circumstances. Although I do not accept the plaintiff's evidence that she slowed down, I think it clear that, even on her version of events, she did not give adequate consideration to the possibility that the flashing lights might be a signal of something further up the road. She apparently took her cue entirely from the vehicle ahead of her, and started accelerating just as she went past the vehicle that had been signalling. She made no attempt to ascertain what that apparently deliberate signal meant. She acknowledged, moreover, that it was a very dark night and that it was difficult to see. She acknowledged that she was unfamiliar with that particular road and acknowledged, more generally, that deer could be expected on roads in that area at that time of year. I think it obvious that a reasonable person in her position would have slowed down in response to such a signal and, at a minimum, would not have speeded up again until she had determined what the signal meant. There were, of course, a number of people at or near the highway in addition to the horse. In approaching the scene as she did, and in failing to respond to the signal or to make any independent personal assessment as to its meaning, or as to whether there was anything of concern beyond the lights, she failed in her clear duty to keep an adequate lookout and to react appropriately in the circumstances.

- [15] In making this finding I specifically reject counsel's suggestion that somehow the reasonable standard at that place and time and in those circumstances may be inferred from the behaviour of the driver ahead of Ms. Jackson. Nothing about that person is known. The plaintiff's duty in the circumstances was clearly to exercise her own judgment and not to, in effect, delegate her reactions to that unknown operator.
- [16] I have considered a number of cases involving collisions between horses and motor vehicles. They apportion liability variously depending on the particular circumstances of the case. Ordinarily, as I have said, where horses escape onto highways owing to the negligence of their keepers causing injury to others, the owners will be liable (see: *Bury v. Heier et al* (April 7, 1997), Chilliwack #S0003325, S.C.B.C. (Davies, J.); *McIntyre v. Collyer*; *Pongratz v. Collyer* (April 12, 1999), Nanaimo #S14863, S.C.B.C., Coultas, J.). Where, however, a driver can see that someone is having difficulty with a horse under his or her control and fails to react appropriately to avoid striking the animal and/or its rider, liability may fall entirely on the motor vehicle operator (see: *Boyes, V. Harris*, [2000] B.C.D. Civ 650.70.03 00-01, Vancouver Registry CA 025730, B.C.C.A.). A motor vehicle operator's opportunity to observe the danger posed by a horse, and the owner's attempt, or failure, to signal their presence to passing traffic will be important factors in assessing liability (see *Temple v. Clarke*, [1994] B.C.D. Civ 2880-01, Nanaimo Registry 01215, B.C.S.C., Shabbits, J.).
- [17] In *Birch v. Wilts*, [1992] B.C.D. Civ 3380-03 (June 29, 1992) Victoria Registry 90-0021, S.C.B.C. (Owen-Flood, J.), a rider was thrown from his horse onto a highway and rendered unconscious. A passing driver stopped and, concerned about moving the disabled man, parked his vehicle on the shoulder of the road with his emergency lights flashing. He then went for help. Another passer-by stopped at the scene while the first man was gone and parked his vehicle in a similar fashion, with his emergency lights flashing, but facing in the opposite direction. A third vehicle approaching the scene failed to react to the flashing lights or to the second passer-by waving frantically at him. The motorist, in fact, accelerated through the scene, striking the injured man and killing him. The court found that the waving man and the flashing lights were clearly visible for at least 1000 feet, and that, in the circumstances, the defendant motor vehicle operator was fully liable for the accident.
- [18] In the present case there is no doubt, as I have found, that the plaintiff was warned by the Aubin vehicle flashing its lights, and that she saw that signal. She was negligent in failing to react. Although I am unassisted in this case by reliable evidence as to the distance Mr. Aubin's lights could be seen, I am satisfied that the plaintiff had the opportunity to slow down and to avoid or reduce the possibility an accident. In *Birch*, it should be noted, the court found that the deceased's negligence had played no material part in what occurred. That distinguishes it, to some extent, from the present case.

- [19] Here, the defendant was, as I have found, negligent in attempting to move the horses as she did and when she did. That said, she took what steps she could with the help of others, given what had happened, to warn passing traffic of the danger she had created. The plaintiff ignored that warning. Liability must, in the circumstances, be divided. I am of the view that the larger part of the responsibility for this accident should fall, however, on the plaintiff. I apportion liability 2/3 to the plaintiff and 1/3 to the defendant.
- [20] The plaintiff makes a claim for injuries suffered in the accident. She was transported by ambulance from the scene to the hospital in Nelson. She remained there overnight and was discharged feeling as if she could "barely move". She returned and was admitted for two more days. On the second discharge she said she was unable to move her arm and that her chest was hurting. She had difficulty opening her mouth. She went to a physiotherapist for treatment of a TMJ problem she was experiencing. The jaw problem caused a root canal operation to be postponed for a number of months. She attended various therapeutic professionals numerous times. She found a course of chiropractic and massage treatments helpful.
- [21] Ms. Jackson's claim is complicated by pre-existing conditions. In 1987 she suffered an arm injury which required a number of operations. These were unsuccessful in restoring full function. On the basis of this nerve injury, Ms. Jackson was classified as permanently partially disabled and receives a disability pension. She has not been employed since that time.
- [22] In February 1995 Ms. Jackson suffered soft tissue injuries in a single motor vehicle accident. She continued treatment for pain in her neck and her head through 1997.
- [23] Ms. Jackson does not make past or prospective income loss claims. She seeks damages for pain and suffering and loss of enjoyment of life and costs of future care. For reasons it is unnecessary to discuss here, her claims for special damages and costs to date of trial have been adjourned at the request of counsel.
- [24] The issue is, bluntly, to what degree the injuries sustained in the December 4, 1997 accident aggravated her previous difficulties or added to them.
- [25] Ms. Jackson's condition was described in a January 5, 2001 letter from Dr. John le Nobel, a specialist in Physical and Rehabilitation Medicine, in these terms:

... Debbie Jackson had a significant injury to the left upper limb, as a consequence of the 1989 work incident. As described, she underwent treatment with medications, physiotherapy measures, and subsequently underwent 4 surgical procedures in an attempt to quell he [sic] symptoms and restore her left upper limb function. Regrettably, these treatments were only partially successful, and Debbie Jackson has, subsequent to January 1989, not returned to work.

The February 1995 motor vehicle accident led, by my understanding, to symptoms of right sided headache, and right cervical paraspinal pain, felt partially, but not fully resolved, through chiropractic treatments. As indicated, Debbie Jackson was still symptomatic with right sided headache, and right sided neck pain, by the time of her December 4, 1997 motor vehicle accident.

As a result of the December 1997 motor vehicle collision, Debbie Jackson has suffered from diffuse injuries affecting her head and neck, shoulder girdle, chest and mid-back. She has clinical features in keeping with cervical spine soft tissue injury, with development of soft tissue deconditioning, with development of post-traumatic degenerative changes. The findings are in keeping with cervical disc injury. She has, in addition, I believe, deconditioning in the cervical musculature with loss of muscle strength and endurance due to activity restriction because of pain from her soft tissue injuries.

Debbie Jackson has features compatible with a fracture of the left 2nd rib, or of the 2nd rib in its cartilaginous attachment to the breast bone. She has clinical features in keeping, as well, with an injury to the left sternoclavicular joint, with findings of ongoing pain and tenderness in these areas. She has had an injury to the left temporomandibular joint, requiring operative treatment, in spite of which she has ongoing temporomandibular problems. She still has postural abnormalities in the thoracic spine, with increased thoracic kyphosis, and a tendency for her shoulders to be drawn forward, leading to development of pain in the right shoulder girdle from subacromial impingement (pressure of the bony and ligamentous tissue and the soft tissue capsule of the shoulder joint). On account of these injuries, Debbie Jackson has suffered from ongoing pain, and limitation in her abilities in regard to looking after her self and her home, and return to some type of employment.

I believe that Debbie Jackson continues to suffer from the effects of these injuries, albeit despite significant lessening of her complaints of thoracic spinal pain. Given the persistence of her symptoms, and the lack of a clear cut diagnosis, and the limited progress made thus far, I regard Debbie Jackson's prognosis as guarded.

[26] In a letter dated September 3, 1998 Dr. Shawn McCann, another Physical Medicine and Rehabilitation Specialist, made the following observations:

PREVIOUS INJURY HISTORY

Reviewing her notes prior to the accident on December 4, 1997 it is obvious that she had significant left neck and left shoulder pain prior to the accident. Dr. Grey had seen her on January 24, 1995 and found that "she had a markedly reduced range of movements with pain on rotation to the right, limitation in flexion and extension of the cervical spine". Rotation to the left and lateral flexion to the left was slightly less painful. Review of a note dated December 28, 1995 by Roland Perrin revealed that she was involved in a chronic pain program at that time. A left stellate block was performed on October 31, 1995 by Dr. J.J. Lewis. Notes also indicate that Ms. Jackson was involved in a motor vehicle accident on February 17, 1995 resulting in a soft tissue injury to her neck. She was referred to the soft tissue recovery management program. At this

time she identified her major problems as constant headaches and neck pain which radiated into the left shoulder blade. Prior to these injuries she also suffered from a left-sided ulnar neuropathy. This is an injury that occurred at work. This left her with a significant reduction in elbow range of motion and hand function.

* * * * *

ASSESSMENT

This woman presents a complicated and difficult case with respect to management. Her current complaints in the left neck and shoulder have some aspects that are consistent with regional myofascial pain syndrome. However, there are no specific tender areas or trigger points that are classically described in a myofascial syndrome. Her tenderness is generalized in the neck and shoulder region. In testing, both the control and target muscles are equally as painful. On range of motion testing she has significant lack of range of motion in the neck region. Examination of her left upper extremity reveals significant atrophy most likely due to lack of use of the left arm. She has significant hypersensitivity in the region of the left elbow. She does have tenderness over the left anterior chest but again this is very hard to localize. Again she has pain with minimal touch in this area. I do not feel any significant subluxation or prominence of the ribs in this area. Her neurological exam shows muscle wasting in the left upper extremity and loss of sensation in an ulnar distribution. Otherwise there is no evidence to suggest a neural root tension in the left neck, shoulder or upper extremity. In addition to this she does present with significant pain behaviours. These include tenderness to light touch and pain with skin rolling. Distraction movement was greater than movement on formal testing.

In summary, it is difficult to say how much of her new neck and shoulder pain is related to her most recent motor vehicle accident. Review of her notes previous to the accident point to significant left sided neck and shoulder pain prior to the accident. In terms of therapy for her left neck and shoulder,

I would recommend an active therapy program. This would include a short-term supervised active program in the pool or gym, whatever she prefers. The idea would be for her to develop an active stretching program and strengthening program for her neck and shoulder over a period of 6 weeks. She would be responsible for taking an active role in this program and continuing these exercises on her own at a fitness center or pool. I do not currently believe that further passive treatment such as massage and chiropractic, will provide significant pain relief or return in function. She has been involved in a chronic pain program in the past and it does not appear that she has had significant benefit from this. Therefore, I do not feel a formal chronic pain program would provide her with significant pain relief or return of function.

[27] In a letter dated April 6, 1998, Dr. Frank Hainsworth, an orthopaedic surgeon, observed:

This girl presents several interesting facets in behaviour as a result of her compensable injuries. It is of interest that she suffered a fracture of the patella which appears to have healed without any difficulty whatsoever which was a non compensable condition. She appears to have had a

simple ulnar nerve compression problem related to an injury at work and the WCB were involved. This has gone on to a chronic problem and she now receives a permanent partial disability pension for this condition. It is extremely unusual for patients with ulnar nerve problems who require surgery to be disabled to this extent. There was a prior MVA when the neck was injured although this case was financially settled she continued to attend for treatment. It is apparent that prior to this last injury that she was having neck problems and also jaw problems. It is very difficult to say if one should regard the accident in December, 1997 as a condition causing exacerbation of a pre-existing condition or a new condition. Certainly her behaviour since her last accident has been unusual in that she is marked disabled at this stage. I could not find any evidence of any significant physical problems. I consider that she needs a psychiatric referral with regard to her condition. I feel that any further passive treatment from chiropractors, physiotherapists or any other laying on of hands people is useless as it does not resolve the problem. I advised her that I thought it was up to her to restore her conditioning to the pre-injury state and if she is not prepared to make any attempt to do this I regret that no physical rehabilitation would be of any value whatsoever.

[28] I should add that Dr. L. Nobel, commented on Dr. Hainsworth's conclusions in the following terms:

Letter of Dr. Frank Hainsworth, orthopedic surgeon, dated April 6, 1998, has been reviewed. I note under Examination, Pa2 2, bottom paragraph "there is virtually no motion in the neck. She will not allow abduction or flexion above 90 degrees in the left shoulder". Dr. Hainsworth later states on Page 4, paragraph 3 "I could not find any evidence of any significant physical problems" (my feeling is that Debbie Jackson's restriction of neck movement, and restriction of left shoulder movement are significant abnormalities.

It is not completely clear on the evidence whether this has any significance. The "finding" that the plaintiff had virtually no motion in the neck appears to be a recording of the plaintiff's subjective report, not a specific objective finding.

[29] The temporomandibular joint dysfunction was addressed by Dr. Gerald Wittenberg, an oral and maxillofacial surgeon, on January 16, 2001 in the following terms:

It is my impression that Debbie Jackson had chronic neck and shoulder, and arm pain related to previous injuries in advance of the December 19, 1997 motor vehicle accident. However, it is apparent that there were new references to temporomandibular joint/facial pain symptoms in a time subsequent to the December 1997 accident. I would agree with Dr. Dale's assessment that the patient had a pre-existing temporomandibular joint situation that was exacerbated with the motor vehicle trauma sustained on December 4, 1997. The prognosis for recovery, based upon my follow-up with the patient subsequent to her surgery is fair. Her history of chronic pain and continuing cervical-spinal signs and symptoms are suggestive of caution in arriving at a complete recovery decision. I would estimate her disability at 30% related to the temporomandibular joint region. She continues with a disc dislocation that is asymptomatic within the right temporomandibular joint. This indicates the fact that many patients can go on to a quiescent

status even with anatomic irregularity within the temporomandibular joint region.

I cannot provide you with a significant opinion regarding her root canal treatment, which was not able to be completed as a result of the motor vehicle accident. The fact that she had the diagnosis a few months in advance of the accident and subsequent "relief of pressure" by an "open and drain" procedure in January 1998 would suggest that she did receive some emergency care. I am not familiar with what has happened in the ensuing time frame related to this tooth. It is definitive to state that the actual motor vehicle accident was not the cause of the root canal treatment requirement. It also appears that she was treated in the early phase when she complained of some facial tissue swelling related to the upper right canine tooth.

- [30] A witness named Katalina Ahlstrom testified that the New Year's Eve following the accident (that is, less than one month later) the plaintiff appeared to be fine. A photograph of the event was entered showing the plaintiff at a party. The plaintiff, in reply, said that on that occasion she was, in fact, in pain.
- [31] A witness named Peter Ostrikoﬀ, who lives with the defendant and was, until recently, a defendant, testified that in the summer of 1998 he ran into the plaintiff at a beach on the Slocan River a number of times. He said that on one occasion he picked the plaintiff up and flipped her over after balancing her on his shoulders. He said she was laughing and did not appear to be in any pain. Such a manoeuvre is quite at odds with her reported degree of disability. She had testified that she is unable to participate in swimming or sports and that her chronic pain (which she described as 5-7 on a scale of 10 pre-accident) is at a constant level of 7 on a scale of 10. When questioned on the incident reported by Mr. Ostrikoﬀ, the plaintiff said she could not remember, but allowed that it could have happened. On that specific item of evidence, I do not hesitate to find as fact that the incident happened substantially as reported by Mr. Ostrikoﬀ.
- [32] The mechanism of injury is not entirely clear. Ms. Jackson's vehicle struck the horse across its front. There is no reliable evidence as to the use of a seatbelt. She was obviously shaken up in the accident and may have had contact with the interior surfaces of the car. The fact remains, however, that she suffered injuries rated as disabling before the accident and that she was symptomatic for injuries suffered in the 1995 accident at the time of the one in 1997. The temporomandibular joint dysfunction pre-existed the motor vehicle accident, but may have been aggravated by it. I say may have, because the medical opinions on this subject do not seem to me to clearly link the trauma of the accident to the jaw complaint, except that it became an issue after the accident occurred.
- [33] Doing the best I can with this, and bearing in mind the plaintiff's subjective estimate of the difference between her pre and post accident status to be that she is about 20% worse, I think the damages in this case are modest. I bear in mind as well that the reports of Dr. McCann and Dr. Hainsworth relative to the claims, apart from the TMJ issue, cast doubt upon the degree to which she is in fact injured, as well as the amount of such harm that can be attributed to the December 4, 1997 accident. I add that the evidence of the lay witnesses,

while not extensive, satisfies me that in settings where the plaintiff is not focussing on her injuries she is substantially better off than she reports herself to be.

- [34] I think the actual "orthopaedic" injuries rather modest. The TMJ problem I find, on a balance of probabilities, was aggravated by the accident or precipitated somewhat earlier than it might otherwise have been, although I am not satisfied that it was of such a nature that it was likely to be quiescent but for the accident. Taking this all in all, I assess the plaintiff's damages for pain and suffering and loss of enjoyment of life at \$18,000. This is, of course, subject to a 2/3 reduction in view of the finding on liability.
- [35] Counsel for the plaintiff has submitted that I should simply guess at an amount for future care based on the plaintiff's past use of same, projected for a period of time she further invites the court to estimate. Having reviewed all the medical reports, I am of the view that it is impossible to find that owing to the December 4, 1997 accident such future treatments are needed. On the whole of the evidence the burden of proof on that claim has not been established, and I make no allowance for cost of further treatments or care.
- [36] I have granted liberty to come back to court should it be necessary to establish special damages, there having been obvious problems with the nature of the proof the plaintiff attempted to tender on that regard.
- [37] No past or future income loss or loss of capacity claims were advanced.
- [38] There shall be liberty to address costs should that be necessary.

"T.M. McEwan, J."

The Honourable Mr. Justice T.M. McEwan

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