
CANADA / JUDGMENT

Luck v. Shack

2020 BCSC 1074

COURT

Supreme Court of British Columbia

DECIDED

22 July 2020

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2020 BCSC 1074 Luck v. Shack

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Luck v. Shack,

2020 BCSC 1074

Date: 20200722

Docket: M166204

Registry: Vancouver

Between:

Stacy Jane Luck

Plaintiff

And

Avrom Shack and

Beat Street Rumpus Styles Incorporated

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 66 on July 31, 2020.

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:

S.N. Collins

N.W. Peterson

Counsel for the Defendants:

T. Tsang

Place and Date of Hearing:

Vancouver, B.C.

March 6, 2020

Written Submissions Received:

May 26, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 22, 2020

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Overview

- [1] Recently, there have been many disputes before this Court regarding s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 [Act], and Part 7 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 [Regulation]. This decision focusses on the sufficiency of post-trial evidence.

- [2] On July 17, 2019, I awarded the plaintiff/respondent, Ms. Luck, damages as a result of a motor vehicle accident. My reasons for judgment are indexed at 2019 BCSC 1172 (the "Judgment"). I awarded \$85,000 for costs of future care, of which \$20,000 has been paid to Ms. Luck. The defendants apply pursuant to s. 83 of the Act to deduct \$65,000 from the costs of future care award to prevent double recovery. Ms. Luck argues there should be no deductions.
- [3] There were numerous issues before me. I comment upon most of the issues in the "Miscellaneous" section at the end of the judgment. I decided this case on the following issue: did the post-trial evidence establish, with certainty, that ICBC will reimburse Ms. Luck for the costs of her future treatments?
- [4] For the reasons that follow, I find the post-trial affidavit evidence is not sufficiently clear. It does not remove the uncertainties regarding ICBC's assurances that it will, in the future, reimburse Ms. Luck for the costs she has incurred for treatments. I deduct a nominal amount from the award where the defendants have established Ms. Luck is entitled to be reimbursed.

Background Facts and Parties' Positions

- [5] The facts are largely not in dispute. The parties appeared before me on January 7-9 and January 14-17, 2019. I issued the Judgment on July 17, 2019. Ms. Luck was awarded the following damages:
- non-pecuniary damages - \$75,000;
 - past wage loss - \$12,000 plus two days' wages;
 - loss of future earning capacity - \$200,000;
 - future care costs - \$85,000;
 - in-trust claim - \$3,500; and
 - special damages - \$6,071.
- [6] The future care costs were broken down as follows:
- [212] The kinesiology and massage therapy expenses should be reduced by the amount she would have incurred in any event. I accept that she is entitled to the costs for trigger point injections, occupational therapy, and at-home ergonomic equipment. Based on Mr. Benning's estimates, I award \$45,000 for those costs of future care.
- [7] I also awarded \$20,000 to allow Ms. Luck to attend a pain management program and \$20,000 for childcare services.
- [8] After the Judgment was issued, counsel agreed that the net past wage loss was \$11,000. The issue regarding the deduction of Part 7 benefits from the plaintiff's Judgment then arose.

- [9] The parties appeared before me on March 6, 2020. They did not finish their oral submissions. Before we could reschedule the courts were largely closed due to COVID-19. Consequently, the parties agreed to complete the matter by way of written submissions which I received on May 26, 2020.
- [10] There were very detailed submissions by both parties. I summarize the general arguments here but summarize the parties' specific positions under the appropriate issue.
- [11] The defendants argue the following costs claimed by Ms. Luck are benefits payable under ss. 88(1) and 88(2) of Part 7 of the Regulation:
- pain management clinic - \$120 per session with clinical counselors up to \$20,000;
 - kinesiology - \$78 per session;
 - massage therapy - \$80 per session;
 - trigger point injections;
 - occupational therapy - \$112 per session; and
 - at-home ergonomic equipment.
- [12] The defendants submit that \$65,000 should be deducted from the costs of future care portion of the Judgment pursuant to s. 83 of the Act and Part 7 of the Regulation. They argue the plaintiff can expect to receive up to \$65,000 under Part 7 of the Regulation. The balance of \$20,000 (child care services not covered by Part 7) has already been paid to Ms. Luck.
- [13] The defendants argue they are legislatively entitled to deduct the \$65,000 and shift the burden from the defendants to ICBC, who will pay the benefits as they are incurred. In the alternative, \$45,944 could be deducted, rather than the \$65,000, to adjust for the higher range of treatments Ms. Luck may need. This would ensure Ms. Luck is not out of pocket.
- [14] The plaintiff argues that no deductions should be made. Based on the cross-examination of Ms. Mandeep Uppal, the ICBC claims specialist handling Ms. Luck's claims, the plaintiff argues that ICBC is simply trying to reduce its payments to Ms. Luck. The plaintiff argues Ms. Uppal's viva voce and affidavit evidence does not establish, with certainty, that Ms. Luck will be reimbursed for her future treatments. In the alternative, if deductions are made, the plaintiff submits they should be limited to \$1,000 for at-home ergonomic equipment as set out in s. 88(2)(d.1) of the Regulation and \$198 for trigger point injections. This would result in a total of \$1,198 in deductions.
- [15] The defendants reply that ICBC is not trying to gain an advantage. It will pay the benefits, but on an incurred basis. The purpose of Ms. Uppal's affidavit evidence is to remove any uncertainty regarding the payment of future benefits by ICBC: *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 1174 [Sangha].

General Principles and Statutory Framework

- [16] ICBC is not a party to this application. It is the tort defendants, not ICBC, who seek these deductions. The legislative scheme is designed to remove the burden of future care from the tortfeasor and place it on the insurance provider, ICBC. The purpose of this post-trial hearing is to determine the appropriate deductions, if any, from the Judgment. This hearing is not to conclusively determine the legal obligations between Ms. Luck and ICBC.
- [17] Ms. Luck is an insured person. She is entitled to receive defined benefits under the Act and the Regulation to the extent that she meets certain requirements. The relevant provisions are s. 83 of the Act and s. 88 of the Regulation, which must be read together. Section 83 of the Act provides limited "no-fault" benefits to insured persons who have been injured in a motor vehicle accident.
- [18] The previous version of s. 83 of the Act applies to accidents before May 17, 2018. It is applicable in this case.[1] This section of the Act provides for the integration of Part 7 benefits with tort damage awards.
- [19] To determine whether Ms. Luck meets the requirements, it is important to keep the statutory objectives of the no-fault benefits in mind. The statutory objectives are to prevent the plaintiff from double recovery, and to permit the amount of benefits payable to the plaintiff in the future to be determined by provisions of the Act: *Fisher v. Wabischewich*, 1978 CanLII 359 (BCCA) at para. 4 [Fisher]; *Gurniak v. Nordquist*, 2003 SCC 59 at para. 48 [Gurniak].
- [20] Section 83(2) of the Act provides that a person who has a claim for damages and has received, or is entitled to receive, defined benefits respecting the claim for damages is deemed to have released the claim to the extent those benefits have or will be paid by ICBC.
- [21] Section 83(5) of the Act provides that after the plaintiff's damages have been assessed, the amount of Part 7 benefits paid or payable to the plaintiff must be disclosed to the court and taken into account. With some exceptions, the estimated amount of benefits must be deducted from the damages awarded to the plaintiff in the tort action. The plaintiff is entitled to judgment for the balance after the Part 7 benefits are deducted.
- [22] The Regulation was recently amended. Under the transitional provisions, the previous version applies to treatments received before April 1, 2019; the new version applies to treatments received after that date.
- [23] The Regulation outlines the benefits available to an eligible insured person regardless of who was at fault for the accident. Part 7 benefits include: (i) disability benefits for employed persons, and (ii) medical and rehabilitative benefits.

[24] Section 88(1) medical and rehabilitation benefits are mandatory. ICBC must provide these benefits if they fall within the statutory requirements. However, treatments received beyond those listed in Table 1, Schedule 3.1 are not covered unless ICBC is provided with written certification from either ICBC's medical advisor or the insured's medical practitioner. The same is true for treatments which occur more than 12 weeks after the motor vehicle accident. As set out in s. 88:

(1.01) For the purposes of subsection (1)(a), a treatment

- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident

is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.

[25] Section 88(2) rehabilitation benefits are discretionary. ICBC may provide these benefits where, in the opinion of ICBC's medical advisor, the treatment is likely to promote the rehabilitation of the insured: *Li v. Newson*, 2012 BCSC 675 at para. 14(h) [Li].

[26] There need not be a precise match between the heads of damages in the tort award and the categories of damages under the benefit recovery scheme: *Gurniak* at paras. 45-47.

[27] The defendants have the onus to establish which deductions should be made under s. 83. Some cases have considered the prior conduct of the insurer to be a relevant factor: *Cikojevic v. Timm*, 2012 BCSC 574 at para. 16; *Boota v. Dhaliwal*, 2009 BCCA 586 at para. 85.

[28] There must be strict compliance with the statute when determining what deductions, if any, should be made. Any "uncertainty as to whether a Part 7 benefit will be paid must be resolved in favour of the plaintiff": *Li* at para. 14(c); *Uhrovic v. Masjhuri*, 2007 BCSC 1096 at para. 10, *aff'd* 2008 BCCA 462. Further, any uncertainty created by the Regulation "may lead the court to conclude that only a nominal deduction is appropriate": *Li* at para. 14(i).

[29] When estimating an amount of benefits that has not yet been determined, the court is not to consider the likelihood the benefits will be unfairly adjusted in the future: *Ayles v. Talastasi*, 2000 BCCA 87 at para 33. This has been codified for claims arising after May 17, 2018: "In estimating, under subsection (5), an amount of benefits that has not been ascertained, the court may not consider the likelihood that the benefits will be paid or provided": Act, s. 83(5.1).

Admissible Evidence and Entitlement

Positions

- [30] The defendants argue that they are entitled to rely on affidavit evidence from Ms. Uppal, the ICBC claims specialist, to discharge their onus of showing that benefits will be paid to the available amount. Accordingly, they are entitled to deduct those amounts from the Judgment under s. 83 of the Act. Ms. Uppal waived the continued medical certification by accepting that the future care treatments outlined in the Judgment are necessary.
- [31] In compliance with the Judgment and the requirements under the legislation, the defendants argue Ms. Uppal's affidavit removes any uncertainty by ICBC "irrevocably, unequivocally and unconditionally" agreeing to pay. This eliminates the need for continued medical certification: *Wark v. Kang*, 2020 BCSC 196 [Wark].
- [32] It is the plaintiff's position that strict compliance with the requirements in the Act and Regulation is required, to ensure certainty, before any deduction for a future Part 7 benefit can be made. An order for deductions based on affidavit evidence, without consideration of the requirements to entitlement under the Act and Regulation, is contrary to the intended purpose of the legislation itself. Any uncertainty must be resolved in favour of Ms. Luck.

Legal Principles

- [33] *Schmitt v. Thomson* (1996), 18 B.C.L.R. (3d) 153 (C.A.) [Schmitt] is the leading case on what evidence can be considered to determine deductions under s. 83 of the Act. Schmitt was a decision of a five-judge panel of the Court of Appeal. This Court can rely on post-trial representations to reduce or eliminate any contingencies associated with its exercise of discretion. However, the defendants cannot rely on ICBC representations to broaden entitlement at the outset. I explained Schmitt and subsequent jurisprudence more fully in *Aarts-Chinyanta v. Harmony Premium Motors Ltd.*, 2020 BCSC 953 at paras. 78-80.
- [34] Recent cases have relied on ICBC's position regarding the plaintiff's eligibility for benefits under Part 7: *Stanikzai v. Bola*, 2012 BCSC 1904 at paras. 20-21; *Norris v. Burgess*, 2016 BCSC 1452 [Norris]; *Wiebe v. Wiebe*, 2018 BCSC 1062 at paras. 9-10. As stated by Justice Forth in *Wark*:
- [44] While any uncertainty as to whether a benefit will be paid must be resolved in favour of the plaintiff, this is not a case in which there is uncertainty about whether the Part 7 benefits will be paid as the amounts listed by the defendants are either mandatory benefits or ICBC has unequivocally and irrevocably promised to pay them. I am satisfied that these benefits should be deducted from the jury award to prevent double recovery.

- [35] Justice Riley recently agreed post-trial evidence is admissible since a commitment by ICBC to pay certain benefits carries considerable weight: Sangha at para. 15. However, Riley J. cautioned that the court must independently analyze the evidence and make its own findings concerning the Part 7 benefits: para. 16. This is especially the case where the "affidavit evidence addresses a discretionary benefit and is equivocal": Sangha at para. 13, citing *Dennstedt v. Lepine*, 2018 BCSC 220 at para. 86.

Uncertainty in the Payment of Benefits

Positions

- [36] As set out above, the defendants argue they are legislatively entitled to deduct the \$65,000 and shift the burden from the defendants to ICBC, who will pay the benefits as they are incurred.
- [37] The plaintiff argues that the defendants have not met the strict legislative requirements under the Act and the Regulation. There was no reassurance that more than \$1,000 will be paid for ergonomic equipment and there is no reference in Part 7 for funding for a private pain clinic.
- [38] The plaintiff submits s. 88(1.01) is a critical requirement of the legislation. The plaintiff argues that any treatments required more than 12 weeks after the accident are subject to medical certification. The plaintiff argues the affidavit evidence does not waive the need for medical certification in the future.
- [39] The plaintiff argues Ms. Luck's ongoing Part 7 treatments will occur well over 12 weeks from the day of the December 10, 2014 motor vehicle accident. Further, Ms. Luck has already received treatments in excess of the basic statutory entitlement for Part 7 benefits for massage and is very close to this for kinesiology (the "Pre-Authorized Treatments"). The plaintiff argues these benefits are therefore no longer mandatory.
- [40] The defendants respond that Ms. Uppal's affidavit replaces the insured's physician certification that the treatment is necessary for the insured. There is no need for medical certification because ICBC has acknowledged it has accepted the Judgment in the case at bar.
- [41] The defendants argue they have waived the requirement pursuant to s. 88(1.01) of the Regulation that ICBC's medical advisor or the plaintiff's doctor provide in writing that Ms. Luck requires the treatment set out in the Judgment. The adjuster for ICBC, Ms. Uppal, on behalf of the corporation, "irrevocably, unequivocally, and unconditionally" agreed to pay the plaintiff the items set out at paragraph 15 of her affidavit.

Legal Principles

- [42] The Regulation was recently amended. After April 1, 2019, the kinds of treatment included and the number of sessions allowed under Part 7 have expanded.
- [43] Schedule 3.1 of the Regulation provides fee limits for an assessment visit and report, as well as fee limits for standard treatments. ICBC cannot pay more than the prescribed fee limit: Regulation, s. 88(1.2).
- [44] Schedule 3.1 also sets out the number of pre-authorized treatments for acupuncture, chiropractic, counselling, kinesiology, massage therapy, physiotherapy, and psychology. Treatments received beyond those listed in Table 1, Schedule 3.1 are not covered unless ICBC is provided with written certification from either ICBC's medical advisor or the insured's medical practitioner. The same is true for treatments that occur more than 12 weeks after the motor vehicle accident. As set out in s. 88:

(1.01) For the purposes of subsection (1) (a), a treatment

- (a) that is in addition to the number of treatments listed in Column D of Table 1 of Schedule 3.1 corresponding to that health care service, or
- (b) that is provided more than 12 weeks after the date of the accident

is not a necessary health care service unless the corporation's medical advisor or the insured's physician certifies to the corporation in writing that, in the opinion of the medical advisor or physician, the treatment is necessary for the insured.

- [45] Similar to s. 88(1.01) benefits, s. 88(2) discretionary benefits are only paid if ICBC's medical advisor is of the opinion the treatments are likely to promote the rehabilitation of the insured. ICBC has residual discretion regarding whether to reimburse Ms. Luck for these benefits.

Analysis

- [46] I am tasked with establishing the value of future benefit payments. Estimating the value is difficult when there are many uncertainties that may affect payments in the future: Sovani at paras. 58 and 60. Estimates are particularly difficult when a jury does not delineate which benefits the damage award targets. This is not an issue here.
- [47] Uncertainty arises with respect to the discretionary benefits. Discretionary benefits are those set out in ss. 88(1.01) and 88(2) of the Regulation. They are those benefits for which ICBC has residual discretion regarding ongoing access to the benefits.

- [48] Occupational therapy is a mandatory benefit (Regulation, s. 88(1)(b)) and an amount for it should be deducted from the Judgment. Trigger point injections fall under medications and should also be deducted. Section 88(2)(d.1) of the Regulation provides reimbursement for health supplies and health care services up to \$1,000. Ms. Uppal agreed in her testimony that ICBC is bound by the \$1,000 limit in s. 88(2)(d.1) for health care supplies. Only the amount of \$1,000 should therefore be deducted.
- [49] The kinesiology and massage therapy sessions are mandatory benefits pursuant to s. 88(1) of the Regulation. However, pursuant to s. 88(1.01), any treatments sought more than 12 weeks after the accident must be medically approved. Consequently, I should not deduct these benefits, or only deduct a nominal amount, unless the defendants have introduced sufficient evidence from ICBC undertaking or promising to reimburse Ms. Luck for these treatments.
- [50] To answer whether I should deduct the amounts, I must turn to the sworn evidence of the ICBC claims specialist. As stated in Norris at para. 35: "The Court will not presume that the future conduct of ICBC will be other than honourable." However, Riley J. in Sangha stated that this Court must independently assess the affidavit evidence from the ICBC specialist. Even where an affidavit "irrevocably, unequivocally, and unconditionally" agrees to reimburse the plaintiff for the future benefits, I must analyze this commitment to ensure it is in compliance with the Act and Regulation: Schmitt; Sangha. In Sangha, this Court did not accept the ICBC specialist's evidence that ICBC would "irrevocably, unequivocally, and unconditionally" pay for certain benefits in the future.
- [51] Ms. Uppal deposed that ICBC accepts this Court's Judgment regarding Ms. Luck's treatment needs following the motor vehicle accident. Ms. Uppal deposed that ICBC will "irrevocably, unequivocally, and unconditionally agree to pay, under Part 7" the cost of the future care amounts specified in the Judgment,[2] "up to the amounts allowed pursuant to section 88(1.2) and schedule 3.1 of the Regulation".
- [52] Despite the above statement, I have concerns with the affidavit evidence because Ms. Uppal does not waive the need for continued medical certification in the Regulation. For example, mandatory and discretionary benefits are limited to the amounts set out in Schedule 3.1 of the Regulation. Ms. Uppal refers to this limitation in paragraph 15 of her affidavit:
15. I am authorized on behalf of ICBC to advise that ICBC will irrevocably, unequivocally, and unconditionally agree to pay, under Part 7, for the following items up to the amounts allowed pursuant to section 88(1.2) and schedule 3.1 of the Regulation, as incurred and submitted to ICBC by the Plaintiff for reimbursement, up to the amounts indicated in the table below [Emphasis added.]

- [53] Further, Ms. Uppal did not address the s. 88(1.01) treatments, over and above the number of mandatory pre-authorized treatments, that are provided more than 12 weeks after the date of the accident. Ms. Uppal did not refer to waiving the need for continued medical certification. The affidavits relied upon in Sangha and Wark both waived the need for future medical certification and referred to s. 88(1.01).
- [54] Importantly, Ms. Uppal testified that if there is any uncertainty as to what, if any, Part 7 benefits may be payable to the plaintiff she would look to the Act and Regulation. This statement was not qualified by any reference to her affidavit.
- [55] The plaintiff points out that funding for a pain management clinic is not provided for as a treatment modality under Part 7 and is not provided for in Schedule 3.1. The defendants argue ICBC will fund the clinical counselling aspect of the pain management treatment. Even accepting this argument, the counselling would take place more than 12 weeks after the accident. It is therefore a discretionary benefit and suffers from the same problem articulated above.
- [56] The defendants bear the onus to prove entitlement to ongoing benefits. Any uncertainty must be resolved in favour of the plaintiff. To prove ongoing reimbursement for benefits, the defendants' evidence must use precise language. Ms. Uppal's evidence was not sufficiently precise, especially when combined with her testimony. I adopt Riley J.'s comments in Sangha:
- [20(a)] Thus, while Ms. Sit says ICBC will "irrevocably, unequivocally, and unconditionally" agree to pay all of Ms. Sangha's previously incurred expenses under as Part 7 benefits, I foresee some difficulty in Ms. Sangha obtaining reimbursement. This is not a criticism of Ms. Sit's integrity as a duly authorized ICBC representative, but rather a recognition that an insured person may encounter resistance in obtaining benefits where there is apparent inconsistency between ICBC's presently-stated position and the requirements set out in the Regulations. The ambiguity on this particular point must be resolved in Ms. Sangha's favour. I would not deduct this amount.
- [57] Based on the above reasoning, Ms. Uppal's affidavit and testimony do not satisfy me that ICBC has waived the requirements in s. 88(1.01) of the Regulation and the need for ongoing medical certification. Uncertainty persists with respect to these discretionary benefits. I am not satisfied Ms. Uppal's commitment, especially when viewed in light of her qualifications in oral testimony, overcomes the ongoing conditions in the Regulation.
- [58] The deficiencies in the evidence create uncertainties regarding the future payment of benefits. Any uncertainties must be resolved in favour of Ms. Luck. I am therefore unable to deduct the full \$65,000 from the Judgment to avoid double recovery.
- [59] I will deduct an amount from the Judgment based on the benefits for which Ms. Luck can, with certainty, be reimbursed.

Miscellaneous

- [60] The plaintiff argues Ms. Luck is covered by two workplace insurance plans (hers and her spouse's). The plaintiff argues these are primary plans, meaning that Ms. Luck is only entitled to Part 7 benefits after these plans have been exhausted. As a result, most, if not all, of Ms. Luck's future care costs will be covered by her work insurance plans: *Gignac v. Rozylo*, 2011 BCSC 237.
- [61] Given my conclusion, I need not answer this question. However, as the defendants point out, the section of the Regulation concerning primary and secondary insurance providers has been amended since *Gignac*. The current Regulation directs ICBC to assume the role of primary payor of s. 88(1)(a) and (b) benefit payments to the plaintiff: s. 88(6).
- [62] The plaintiff argues Ms. Uppal is in a conflict of interest because she handles both the tort claim and the Part 7 benefits claim for Ms. Luck. I was taken to no authority concluding the dual role of ICBC adjusters constitutes a conflict of interest. Given my decision, I need not wade into this issue.
- [63] The plaintiff argued there is an abuse of power because the defendants took a different position on the s. 83 deductions than they took at trial. Again, based on my conclusion, I need not comment on the abuse of process argument raised by the plaintiff.
- [64] The plaintiff offered to settle the entirety of Ms. Luck's Part 7 claim with ICBC for \$65,000 as a lump sum, inclusive of costs and disbursements. ICBC did not accept the offer. Given my conclusion, I need not address whether ICBC should have accepted the offer. However, in *Sovani* at paras. 53-54, Justice Neilson rejected a similar argument regarding an offer to settle.
- [65] Lastly, the plaintiff made a number of other arguments regarding uncertainty of future payments. I only addressed those that were necessary to come to the conclusion that there remains uncertainty whether the benefits will be paid in the future.

Disposition

- [66] Based on the above reasoning, I deduct \$1,000 for ergonomic equipment, \$198 for trigger point injections, and \$560 for occupational therapy sessions. The total deduction from the Judgment is \$1,758.

"D. MacDonald J."

- [1] Section 31 of the Insurance (Vehicle) Amendment Act, 2018, S.B.C. 2018, c. 18, provides these changes "apply in relation to a bodily injury or death caused by a vehicle or the user or operation of a vehicle on or after the date this Act receives Royal Assent." The Insurance (Vehicle) Amendment Act, 2018 received Royal Assent on May 17, 2018.

- [2] Apart from the childcare expenses which are not eligible Part 7 benefits and which have already been paid to the plaintiff.
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