

“The impact of Europe on Criminal Justice in Scotland”

Criminal Law in Scotland post-Cadder: Are Human Rights Really Coming Home?

In an earlier time of some excitement and considerable promise, a newly elected Government offered up the prospect of a homecoming for human rights. That this was only 14 years ago staggers me, given the packed and often troubled history of human rights here since then. In particular, the track record of that particular Government adds an unwelcome element of irony to its orchestration of the homecoming. Instead of the open and welcoming arms of the father of the prodigal son, we soon started to see the bitterness of the prodigal's brother at the special treatment of his undeserving sibling. By 2011, and perhaps especially in Scotland, the homecoming had developed into the full-blown trial of Martin Guerre with a determination to expose the guest as an imposter who had deceived his way into our community.

As usual, when it comes to discussion of the treatment of human rights by Governments, politicians, the media and sometimes even the courts, I am starting to sound gloomy again. If human rights conferences can be equated to the BBC's Dad's Army, and in many ways, with no offence intended, I think they can, then I am a natural Private Fraser.

That this conference should take place in the immediate aftermath of the publication of Lord Carloway's Report has, however, caused me to pause. I am not yet sure whether to abandon gloom and embrace cheer. The timing of today's conference could certainly not be better and the Carloway report is a near-perfect book-end to my talk today, albeit one of such potentially huge significance that I may have to mention it even though I am still trying to take it all in. Along with the Cadder case and its fallout this report has such implications for the landscape of criminal justice in Scotland that we seem to have been unwitting victims of the Chinese curse about living in interesting times.

First, a very potted history of ECHR in Scots law.

HUMAN RIGHTS IN SCOTLAND PRE-SCOTLAND ACT

Human rights in Scotland came into sharp focus because of the way they were built into the constitutional framework in the Scotland Act. Things started promisingly.

This was undoubtedly easier because of the extremely unreceptive attitude towards ECHR pre-Scotland Act.

I am thinking, in particular, of what Lord Ross said in *Kaur v Lord Advocate* (1981 SLT 322)- that the Convention was irrelevant in legal proceedings unless and until its provisions had been incorporated or given effect to in legislation and therefore the court was not entitled to have regard to it either as an aid to construction or otherwise.

It might be thought that there has been more to this type of Scottish approach than just barely concealed hostility. I think it is possible on occasion over the passing years to detect an underlying superiority complex. As ever, it probably didn't help that the Convention was explicitly a European treaty.

The extreme view expressed in *Kaur* softened over time and, even before the Scotland Act, by 1999 the Convention was being expressly considered. On the civil side in 1996 we had *T Petitioner* 1997 SLT 724 (re gay adoption) where Lord Hope, then Lord President, appeared to depart from the earlier antipathetic approach, and on the criminal side we had *McLeod Petitioner* 1998 SCCR 77(a decision from late 1997 which is still the leading Scottish authority concerning disclosure) in which Lord Justice General Rodger said:

In seeking to formulate the approach of our law we may, however, look at the decisions of the Strasbourg court just as we look at the decisions of any other court of authority to see what persuasive effect they may have.

THE SCOTLAND ACT AND HUMAN RIGHTS – A GOOD START

The first bite of the Scotland Act came over 12 years ago on Law Officers Day. Indeed the very first human rights or devolution issue surfaced later that same day. On the criminal side this gave us an earlier exposure to devolution issues than in the civil courts where the HRA did not come into force until roughly 18 months later.

In relation to the article 6 right to a hearing within a reasonable time we had for a while in Scotland a situation where the courts enforced this with an interpretation which actually brought to an end prosecutions which failed to meet that requirement. On occasion our judges used it to do justice even more enthusiastically and it was possible to see them using ECHR to try to drive up standards, especially on the part of the police and the Crown.

There are many who think that the Scotland Act also allowed ECHR considerations to help our courts blow away some obstructive cobwebs which had developed over a number of years. In particular it was used as a significant tool for enforcing Crown

accountability. It helped us to move further away from the idea of sole reliance on the Crown as arbiters of almost everything. An example of this is *Burn Petitioner* 2000 SCCR 384 which considered a 1995 decision of Lord McCluskey and overruled it. The case concerned bail being opposed by the Crown on an unvouched assertion that further enquiries would be impeded if the accused were to be released. Lord McCluskey had said "*In my view the proper course for me to take is to accept the Crown's assertion without attempting any further enquiry*". This approach seemed rooted in another time and was wholly out of step with the idea of meaningful judicial scrutiny.

The Scotland Act quickly allowed that view to be challenged and, as a consequence Lord Rodger said –"*in future the Crown must provide sufficient general information relating to the particular case to allow the sheriff to consider the merits of their motion that the accused should be detained.*"

A similar approach was taken in relation to the scrutiny given to the grant of warrants.

One high-point for ECHR in Scottish courts came in the case of *Brown v Stott* 2000 S.C.C.R. 314 which dealt with section 172 of the RTA 1972 and the requirement to name the driver at the time of a suspected offence.

It was held that, as the appellant was subjected to compulsion to make an incriminating reply under threat of being found guilty of an offence and punished with a fine, and the Crown proposed to use the evidence of the answer given by her as a significant part of the prosecution case against her at her trial, the use the Crown proposed to make of her answer would offend her right not to incriminate herself, which was a constituent element of the basic principles of fair procedure under art.6(1).

In the High Court Lord Justice-General Rodger

The right of silence and the right against self-incrimination are not lately minted. In Scots law, for instance, a right against self-incrimination was recognised in 'capitall crymes' in the Claim of Right 1689.

You could almost sense the judicial pride in being able to point this out. This was the real Martin Guerre. Rights had indeed come home. How long they would be staying was perhaps another matter.

It is ironic, given recent complaints about its jurisdiction over Scots law, that it took the JCPC to uphold a Crown appeal and restore the position in Scotland, thereby ensuring the admissibility of the replies given to such RTA requirements.

WAIT A WEE MINUTE

And then the judges seemed to tire of this new tool. Bringing prosecutions to an end seemed like an excessive response in some cases. And, as a living instrument, the Convention was growing. The European Court was still developing its own jurisprudence. And our judges seemed to increasingly resent the suggestion that our system was lacking in any way.

Judicial impatience increased when it came to Devolution Issues and ECHR generally. That impatience has not really gone away.

Robertson and Gough v McFadyen 2008 SCCR 20

(This is the 5 judge case relating to contempt of court. Mr. Gough is more often referred to as the Naked Rambler).

Lord Justice Clerk Gill

Article 6 and the common law of Scotland

[64] Counsel for the petitioner and the complainer has based his submissions on article 6. He has made only passing reference to the common law. It seems at times that contemporary practitioners believe that the Convention introduced the principle of fair trial into Scottish criminal procedure. Scottish criminal procedure is founded on that principle. It is the duty of this court constantly to reassess what fairness requires and to re-examine the presuppositions on which existing rules and practices are based. Where it is recognised that an accepted aspect of procedure is unfair, this court puts the matter right...

Lord Johnston

[109] ...Continued references in this context to Article 6 to my mind are both meaningless and superfluous.

POOR PLEADERS

Since May 1999, many cases have involved Devolution Issues being lodged – certainly tens of thousands. Often the relevant minutes have not been lodged in accordance with the rather byzantine rules in the Act of Adjournal. This offers sceptical sheriffs and judges their first opportunity to decline to consider the merits of even sound arguments. On the other hand, and most unfortunately, many cases involve the use of devolution issue minutes as a prop for poor or non-existent arguments. ECHR implications have often not been properly understood and equally

often not properly argued. There is a recent example in the case of *King v PF, Dunoon* [2011] HCJAC 109 where Lord Bonomy said:

[22].... The very reference to article 10 in the context of this case is an example of the sort of thoughtless reliance upon the Convention that has brought it into disrepute in the minds of many.

Unless cases are pled better and with greater consistency we can expect similarly unimpressed Judges year on year. And even then we may continue to feel a backlash against outside interference, whether European or from London.

UK SUPREME COURT AND CADDER

Which brings us to the other side of the devolution issue equation - the Supreme Court. In particular it brings us to the *Cadder* case.

There is a question as to whether murmuring judges is still a criminal offence but, fortunately for some of our Ministers, even if it is, prosecutions no longer occur. Perhaps even more fortunately for them they murmured judges whose jurisdiction in Scottish criminal cases isn't terribly popular with some. Some of the comments have been offensive and personal, with a suggestion that the Court's knowledge of Scotland is based on attending the Edinburgh Festival. He may not remember it now but the First Minister suggested that the Scottish decisions of the Supreme Court are the work of Lord Hope alone who, he suggested, seemed intent on dismantling our distinctive characteristics while ignoring the views of the majority of Scottish Judges in the High Court - "*It boils down to the potential replacement of Scottish law by Lord Hope's law. I don't think that's a satisfactory situation.*"

The most sinister remark was the CSJ's suggestion of withdrawing Scottish funding for the UKSC – "*he who pays the piper calls the tune.*"

Unfortunately the contributions from our Government generated a blinding amount of heat, thereby masking the possibility of sensible discussion about improvements to the workings of this jurisdiction and the development of human rights through our courts. Things have calmed down quite a bit since then, although several opportunities for apologies have been ignored.

It was perhaps unfortunate for the UKSC that it had to consider the *Cadder* case. The court's decision saw Scotland brought into line with the rest of Europe in terms of solicitor access for suspects at police stations – something we didn't have as a right despite almost everyone else having it and there being no good reason to exempt us from its protection. A bench of 7 judges of the High Court in Scotland had

considered the ECHR case of *Salduz* and decided that it didn't apply to us because of 15 other safeguards here. In October 2010 the Supreme Court merely pointed out the inevitable, that we were not immune from such international developments, regardless of how fair we might be in other ways. Lord Hope said:

There is no doubt that a ruling that the assumption [i.e. that admissions made by a detainee without access to legal advice during his detention are admissible] was erroneous will have profound consequences. But there is no room, in the situation which confronts this court, for a decision that favours the status quo simply on grounds of expediency. The issue is one of law, as the court appreciated in McLean. It must be faced up to, whatever the consequences.

There have been many criticisms of the *Cadder* decision. I believe that they overlook the truly determinative effect on a whole prosecution of what might be said by a suspect at the outset, when he is probably at his most vulnerable.

There have been significant ripples from *Cadder*, but these could have been mitigated if matters had been approached differently before the case got to the UKSC. After *Cadder* the Government started jumping up and down again because of the UKSC decision in the *Fraser* case. If you look at the case you will see that some crucial evidence was not disclosed to the defence. Our High Court decided that it didn't matter. The Supreme Court said that the Crown's failure to disclose meant that the trial was unfair. Hardly startling you may think, but again it took the Supreme Court to point out what many in the legal profession thought to be obvious.

POST-CADDER

The *Cadder* decision was handed down on 25th October 2010. After thorough deliberation and detailed consultation the Criminal Procedure (Legal Assistance, Detention and Appeals)(Scotland) Act 2010 was passed 48 hours later on the 27th October and brought into force on 29th October. Sometimes emergency legislation is actually necessary. Many were unconvinced that this was such an occasion. Allowing access to a solicitor was clearly necessary although this was already being achieved through the Lord Advocate's Interim Guidelines which were introduced in the summer of 2010 in anticipation of the UKSC decision. Maximum detention times of 6 hours were immediately doubled with the possibility of 24 hours also allowed. Oddly to the minds of some, various general restrictions were introduced on the right of appeal. Perhaps most worrying of all, the Act introduced restrictions on how

miscarriage of justice cases were to be handled, giving the High Court a new power to simply refuse to accept referrals from the SCCRC. A few weeks later the CSJ announced a review under Lord Carloway of issues arising from *Cadder*. The SG chose the terms of reference. In some ways they were too wide, for example, in including the question of corroboration. In others, the review was too narrow, as it could not consider the whole of Scots criminal procedure and the peculiar alchemy of our various safeguards as a protection against miscarriages of justice. Many thought that a fuller review was needed over a longer period. Many still do. The Law Society of Scotland suggested that a full audit should be made of the compatibility of Scots criminal law with the European Convention on Human Rights, to ensure the mistakes that led to the *Cadder* case cannot easily recur. For all its length and the welcome approach to human rights in many respects, make no mistake, the Carloway Report is not such an audit.

Before turning to the Carloway Report it is worth mentioning other significant human rights developments stemming from *Cadder*.

Firstly, on 6th October, we got the Judgment of the UKSC in the so-called Sons of *Cadder* cases in which the Lord Advocate sought to establish the point in time when the right to legal assistance kicks in. The UKSC held that it was from the point of police questioning of a suspect who is in custody or is otherwise subject to a significant curtailment of his freedom of action.

In the case of *Jude and others* 2011 SCCR 300 the High Court considered the question of waiver of the right to legal assistance. In that decision the Court appeared to suggest that the right to legal assistance could not be waived without legal assistance. The Lord Advocate decided to take this point to the UK Supreme Court, particularly as the implications of such an approach would be enormous, not least in terms of resources in an already stretched justice system. Lord Carloway deals with this issue but we shall find out on Wednesday of next week what the UKSC made of the point.

There are other issues around the *Cadder* case which may require further judicial decision, for example, the extent to which the rules on solicitor access apply to interviews by agencies other than the police who also report cases to the Crown for prosecution.

STOOSHIE CONTINUES

Whatever the motivation, whether it related to a fear for Scottish legislation or was genuinely a misconceived concern for the integrity of Scots law, matters are now in the balance for the future of the UKSC as part of the system for ensuring

appropriate application of human rights law in Scotland. The question was debated very recently at Holyrood and the Scotland Bill Committee at Holyrood is presently considering gatekeeping arrangements for the UKSC. The other week the SG promised amendments to the Bill. This follows 2 consultations held by the AG which recommended no changes of any substance, and the McCluskey Review which told the SG a great deal of what it wanted to hear, albeit not everything. The reviews were predicated on misunderstanding and fuelled by panic-mongering. Among the leading panic-mongers was my old friend, Paul McBride QC. Assuming that Paul is about to join his 3rd major party in a short number of years, I am not sure why he should have any greater credibility in this area. The integrity of Scots law has not been under threat from the UKSC. Indeed, I consider that its integrity is under threat from a reactionary attitude to developments in procedures to fair hearings which are crossing Europe with considerable momentum. The UKSC is merely telling us what Strasbourg otherwise will. The wording of the HRA was chosen carefully by Parliament. A key aim of the Act was to "bring rights home". This meant rather than having to go to the European Court of Human Rights in Strasbourg, people in the UK could enforce their rights in domestic courts. And, just as importantly, UK judges could begin to develop their own case law on human rights and so not have to rely on Strasbourg and its partial understanding of UK social issues.

But surely the FM, CSJ and Paul McBride wouldn't make such a fuss if there wasn't really a problem?

THE FLOOD?

As at May, since the Human Rights Act and the Scotland Act came into force, the Judicial Committee of the Privy Council, and subsequently the Supreme Court, have only heard twenty two cases, of which five were brought by the Crown. This number produced an average of two or three cases a year. Last year, the only case heard was *Cadder v HMA*. Of these cases, fourteen were dismissed, limiting the ability of bringing similar points back before the Court. Only eight appeals were allowed, four of which were in favour of the Crown. This year's additions to the list have all been at the instance of the Crown. There is no evidence from these appeals and the judgments handed down that the Supreme Court has extended its jurisdiction or heard cases it ought not to. Indeed it appears to me that the Supreme Court operates entirely within its special jurisdiction, and appropriately respects the position of the High Court of Justiciary.

The Scotland Bill Committee heard evidence from a number of eminent jurists.

Lord McCluskey, Evidence to Scotland Bill Committee, 1 November 2011

Similarly, if the European Court of Human Rights in Strasbourg determines a matter of law and rules against what the High Court has been applying, the High Court will accept that and apply the law.

We have a unique chance—perhaps the last for several decades—to correct what is an egregious error that distorts the system of criminal justice in Scotland. I hope that you will advise, as we do, that the opportunity should be taken to remedy it in the way that is proposed.

What does the word “fair” mean? We could ask any child whether it is fair that his brother got this or his sister got that, and we will get no for an answer. Fairness is rather subjective and it creates the opportunity for ingenious people to come up with events at a trial and say that they are not fair. Almost everything that goes wrong for the accused in a trial could be represented as unfair. We have to prevent the floodgates from opening. That is what makes a practical difference here.

I will speak for myself and not for the review group. Cadder was a wrong and bad decision, and I have written an article for the Edinburgh Law Review explaining in some detail why that is so.

The significance is that we would be left with a system that David Edward properly described as “constitutionally inept” and which I have described as egregious nonsense. Forgive me for being direct, but there is not time to be polite. We just tell the truth.

If Mr McLetchie’s question is to be answered differently by Strasbourg, it raises a big constitutional crisis: do we have to subvert our procedures and laws just because a bunch of Lithuanians, Georgians, Armenians, Russians, Frenchmen, Maltese and Cypriots have come to a view without considering the Scottish or the English position?

The Lord Advocate

My direct answer is that I would look at the two full-bench decisions in Paton v Ritchie, in which five judges were involved, and the McLean case, in which seven judges were involved, and take the view that the law was clear, that there was not an issue, and that there was compatibility. Therefore, I would not exercise my power to refer the case to the Supreme Court.

It is very important that we navel gaze and look at what is coming up in Strasbourg, what is important, and what has implications for not only Scottish law, but the law in England, Wales and Northern Ireland. I certainly welcome the UK Government’s intervention in the Scoppola case on prisoners voting and I wish that there had been

an intervention in the Salduz case. I think that Judge Bratza, who chairs the Strasbourg court, gave a seminar to the Scottish public law group in which he publicly expressed concern or a desire— perhaps that is not the best way of putting things— certainly a wish that, in the Salduz case, the UK Government had intervened on behalf of the Scottish Government.

One of our judges, Lord Reed, is an ad hoc judge in the Strasbourg court and has written a leading textbook on it. Our Lord President has recently sat in the Supreme Court, in the grandsons of Cadder case, which was argued two weeks ago. Lord Clarke, a senior judge in Scotland, also sits on the Supreme Court. So I disagree completely with the notion that our judges are getting human rights decisions wrong. They do sometimes get things wrong, as all courts do—the Supreme Court itself sometimes gets things wrong in Strasbourg's view.

Lord Hope said that is very important that there is a dialogue between the Supreme Court and the Strasbourg court; Judge Bratza, the chair of the Strasbourg court, has alluded to that as well. On Horncastle, the Supreme Court expressed concern that the Strasbourg jurisprudence proceeded without a proper understanding of English law: that is the basis upon which it has asked the Strasbourg court to reconsider its earlier judgment. I welcome that: it is good when the Strasbourg court is adult enough to take that into account. We await the judgment from Strasbourg, but that is an important case for Scotland as well.

Advocate General

There is a question about whether the certification procedure succeeded in that respect, but we are not talking about the Supreme Court being flooded with cases from Scotland. The figures—as best we can tally them up—are that, since the Supreme Court's establishment some two years ago, permission to appeal has been granted on four and refused on 17 occasions. In the four cases in which it was granted, two appeals were upheld and two were dismissed. To me, that does not seem to amount to a torrent, so I do not think that the practical reason for the bringing in of certification in England and Wales applies in this case.

I have heard, although we cannot now confirm it, that Donald Dewar was anxious for the newly established Scottish Parliament to have a shining record on human rights and that we should not give any easy let-outs.

The suggestion from the McCluskey Review of requiring certification of general public importance has raised concerns. In principle, I have no difficulty with the notion but, in practice, the Scottish Courts have dealt with such issues in a manner which leaves me unconvinced that they would be able to approach the question of certification in the same mature manner as the courts in England. This has implications for the application of human rights law in Scotland.

CARLOWAY REPORT

The Review's recommendations are designed to re-cast and modernise the system so that it meets the requirements of the Convention, and provides a comprehensive, effective and fair criminal justice system for the foreseeable future. It seeks to re-build and reinforce the system's foundations by incorporating Convention rights in larger measure and at greater depth. It has challenged traditional legal thinking, looking to modernise, clarify and simplify the system as a whole wherever possible. The ultimate intention has been to re-establish Scotland at the forefront of law and practice of human rights in general.

The aim is to have a system that not only surpasses minimum requirements today, but also stands up to developments in the foreseeable future.

A primary concern of the Review has been to ensure that key Articles of the Convention are seen to underpin the emerging system. These are principally, although not exclusively, the Article 5 right to liberty and the Article 6 right to a fair trial. Although they must be at the heart of any provisions on custody and police questioning in particular, they must also permeate the system as a whole.

The Report makes important recommendations about the rights of a suspect or arrested person while in custody. The maximum length of time in custody before charge should become 12 hours. Court appearance should be within a maximum of 36 hours of arrest. In many cases that latter limit would be an improvement. Personally I think that the normal maximum for custody before charge should be 6 hours, as it was before Cadder. Most detentions are completed within 6 hours, and extensions of the 6 hours could be allowed for the more exceptional cases.

Access to a lawyer is an integral part of what the Report recommends. The role envisaged is not just that of offering advice in relation to what, if anything, to say during police interview. As the Report says:

If a person has been arrested on suspicion of having committed a crime, he/she may wish to instruct immediate steps to demonstrate his/her innocence and secure his/her freedom. These might include, for example, the ingathering of evidence to support an alibi or real evidence such as CCTV recordings.

Indeed the role envisaged appears to extend well beyond the mere giving of legal advice and to encompass the broadest range of support for a suspect.

The Report recommends a letter of rights to be given to every suspect. This is a development which was coming anyway as part of the EU Roadmap of Procedural Safeguards. Indeed this is one Proposal for a Directive to which the UK did sign up,

having decided not to do so in relation to the Proposal relating to access to a lawyer. If the Carloway Report is implemented in full Scotland may get closer to that EU Proposal even without a UK opt-in.

There are to be greater protections for children, defined as those under 18, and vulnerable suspects. Current protections, such as appropriate adults, are too often entirely ineffective. Tying them in with increased use of legal advice may improve the situation.

In general terms the Report fully recognises the start of a 24 hour justice system. That we should have a 24 hour system may come as a shock to those of you who thought we already had one. The police, in particular, operate 24 hours a day, as do many others in the system, although even with the police the timing of scheduled activities may well be geared towards the normal working day when resources are greatest. For the legal profession *Cadder* and its fallout has seen lawyers have to consider how best to help and advise their clients at any hour of the day. Before *Cadder*, or at least before the LS's Interim Guidelines, we didn't have to bother as, whatever might have been suggested, we were simply not allowed into interviews and received word about clients detentions either when we could do nothing about it or when it was already too late because they had been interviewed, and whether entirely guilty or not, had said stupid and unguarded things which would later convict them.

Obviously the headlines about the Carloway Report have focussed on the recommendation that corroboration should be abolished. To my mind it would be a most regrettable if the loss of a key Scottish safeguard for ensuring fairness in trials and avoiding miscarriages of justice was considered an acceptable price of recognising the inevitability of greater access to legal advice. Increased fairness in the police station should not mean greater unfairness in a trial.

This type of approach, which saw corroboration included in Lord Carloway's Terms of Reference, is typical of the lazy and meaningless idea of rebalancing the justice system. Yes, we should treat victims and witnesses well, and no doubt better than we do, but taking away rights from suspects or accused people will not necessarily lead to that. The thinking of some after *Cadder* seemed to be - we've had to make the system fairer in a way we resisted, so we must deliberately set out to make it less fair in some other way to restore the balance.

THE FUTURE

Earlier this year Lord Hope addressed the SYLA (http://www.supremecourt.gov.uk/docs/speech_110401_v2.pdf). He said:

What then of the future? I am as strong a believer in the virtues of the Scottish legal system as I ever was. In some respects my belief in it has been strengthened by what I have learned south of the Border. But I also believe very strongly that, if it is to be kept up to date and able to compete with the English system, our system must look outwards and not inwards as it adapts to the realities of modern life. One of the great virtues of Scots law, as a mixed system, was its willingness to adapt itself so as to keep pace with the way things were done elsewhere. Pride in our own system is one thing; isolationism is quite another. We have much to gain by maintaining contact with the way that law is practised in England and Wales and beyond. We have much to lose if we were to raise the drawbridge and cut ourselves off from the outside world. The Supreme Court, where Justices from all three jurisdictions of the UK engage with each other on so many important and difficult issues, is there as a vital point of contact. That applies to Convention rights issues as much as it does to issues of private law. I hope that I have been able to reassure you that, from the Scots point of view, our precious legal system is indeed respected in that court and that it is secure in its hands.

In many respects the Carloway Report offers us an opportunity to approach the future in a more positive way in relation to human rights. Personally, I think it is not a safe enough foundation on its own. I like the idea of a full human rights audit of our system, to bring it fully up to date with the latest human rights developments, but also to anticipate challenge and embrace useful change.

Only if we do that might we have greater confidence in the notion that rights have come home.

JOHN SCOTT QC SOLICITOR ADVOCATE

SASO ANNUAL CONFERENCE

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