

MEDICINE AND THE LAW

Legal liability for failure to prevent pregnancy (wrongful pregnancy)

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Can the conception of a child ever constitute damage recoverable in law? This article considers the liability of healthcare practitioners for failing to prevent a pregnancy. Developments leading to the recognition of wrongful pregnancy as a cause of (legal) action in South Africa (SA), are briefly outlined. The salient points of the relevant judgments by SA courts are set out to expose the rationale underlying the judgments and to highlight that recognition of liability for wrongful pregnancy resulted from an application of fair and equitable principles of general application. Conduct that could expose practitioners to liability is identified from reported cases and inferred from general principles laid down in case law.

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Can the conception of a child ever constitute damage recoverable in law? This article considers the liability of healthcare practitioners for failing to prevent a pregnancy. Developments leading to the recognition of wrongful pregnancy as a cause of (legal) action in South Africa (SA), are briefly outlined. The salient points of the relevant judgments by our courts are set out to expose the rationale underlying the judgments and to highlight that recognition of liability for wrongful pregnancy resulted from an application of fair and equitable principles of general application. Conduct that could expose practitioners to liability is identified from reported cases and inferred from general principles laid down in case law.

For current purposes, wrongful pregnancy may be defined as a situation in which a child is conceived to a parent or parents who had received negligent advice or treatment from an expert aimed at and expected to prevent a pregnancy or aimed at confirming the parent's or parents' inability to procreate.^[1] The legal action is instituted against the expert – usually a medical practitioner – whose negligent treatment or advice causally contributed to the pregnancy.

Choice and responsibility

We live in a time of increased difficulty in conceiving, and one in which assisted reproduction has developed into a huge and profitable industry. Conversely, our age is also one of a world facing overpopulation, in which contraceptive measures play a role in avoiding the ills of overpopulation and the alleviation of poverty. Owing to huge scientific advances, we now have more options with regard to procreation than ever before. For example, the development of contraceptive measures brought the possibility of avoiding procreation, where procreation would be economically devastating to the parents. The question arose whether a person can be held liable for frustrating such a decision to prevent a pregnancy. At the time when humankind lacked the know-how and ability to manipulate their procreative functions, the law was silent. The choices that were opened up through science brought with them responsibilities, and the law has assumed much greater significance in regulating reproduction. The right to make decisions regarding reproduction is now entrenched in the SA Constitution.^[2]

The medical profession plays an important role in ensuring the realisation of this right. Those using contraceptives expect these

products to be free from defects and safe for use, and they will use them under expert medical guidance in the hope of effectively avoiding pregnancy.^[1] Most literate persons will know that contraceptive methods are not foolproof and the possibility of failure could be anticipated. In the event of a pregnancy, despite the use of contraceptives, it would be very difficult to prove a causal connection between any act or omission on the part of any one person and the resultant pregnancy.^[1]

The chances of successfully laying the blame for an unwanted pregnancy on a medical practitioner are much larger where the latter is approached for sterilisation. Here the intention is clearly to avoid pregnancy at all cost; the person who undertakes to render the sterilisation service is easily identifiable and clearly bears the responsibility of exercising reasonable care and applying reasonable skill to ensure success (see Definitions of concepts below).^[1] However, it does not automatically follow that a medical practitioner who renders such services, necessarily and by implication, warrants the success of the procedure.^[3] In the case of a vasectomy, for instance, the patient's ejaculate may still contain sperm for a considerable time after the procedure. In roughly 1/80 000 cases, a man may even father a child despite the apparent absence of spermatozoa in his ejaculate.^[4,5] Thus, for instance, a case occurred in the UK, where a woman fell pregnant while her husband produced persistently negative seminal specimens.^[1,6,7] However, it remains the responsibility of the practitioner to ensure that the patient is properly informed of such risks, including the possibility of conception despite the operation 'due purely to the vagaries of nature,'^[7] as well as of the modus operandi for establishing or confirming sterility.

Practitioners are often consulted for expert advice on reproductive health. A patient may want to know whether he or she would be able to have children, or whether there is any medical reason for not conceiving, despite sexual intercourse without contraceptives. Here, negligence in the performance of the indicated tests, handling specimens, failure to do such tests as are necessary to establish sterility, or even a misrepresentation that the patient is indeed incapable of procreating, may easily lead to a pregnancy that, if not unwanted, was at least beyond the parents' contemplation. In this

kind of situation – just as in the case of a failed sterilisation – the party responsible is readily identifiable and can easily be called to account.

Definitions of concepts

As it is possible to base a claim for wrongful pregnancy on either contract or delict, it is apposite to explain these concepts. In the normal course of events, health practitioner and patient would enter into a contract^[11] for the provision of contraceptive services, whether it be the prescription, dispensing or placement of oral contraceptives, hormonal injections, implants, vaginal rings, intra-uterine devices, or the performance of a vasectomy, tubal ligation or other sterilisation procedure. Most often, the terms of the contract include the provision of contraceptive advice, either in conjunction with the foregoing, or independently. Ordinarily, the contract for the provision of contraceptive services is not required to be in writing.^[8] In the case of surgical sterilisation, however, written consent is required,^[9] and a form is prescribed for the purpose of obtaining consent. The written consent form furnishes proof of the existence of a contract between medical practitioner and patient. It is an implied term of the contract between doctor and patient that the doctor will exercise such professional skill, competence and judgment as the reasonable practitioner of his/her branch of the profession possesses, and will treat the patient with the care that may reasonably be expected from such a practitioner.^[10] A medical practitioner who fails to perform in accordance with an express or implied term of a contract commits breach of contract. Hence, failure to measure up to the standard of reasonable care would amount to a breach of contract.^[10-12] It is, however, also a general principle of SA law that a contract that is contrary to public policy (*contra bonos mores*) is unenforceable.^[12]

A patient's ability to institute legal action against a medical practitioner does not depend on the existence of a contract. It is a general principle of SA law that a legal obligation arises where a person, through his/her (i) conduct, (ii) wrongfully and (iii) culpably (i.e. negligently or intentionally), (iv) causes (v) harm to another.^[12,13] Provided all five the abovementioned elements can be proved, the conduct constitutes a delict (civil wrong) in SA law. When interpreting negligence, our courts also have regard to the standard of skill and care possessed and exercised by the reasonable practitioner belonging to the defendant's particular branch of the profession. Hence, it is evident that a medical practitioner can incur liability based either on breach of contract or delict if he/she fails to exercise reasonable care and/or apply reasonable skill in providing contraceptive services.

The types of loss or damages that can result from the kind of conduct under consideration, can be categorised as either patrimonial or non-patrimonial in nature. Patrimonial loss is a calculable monetary loss or decrease in the plaintiff's patrimony (estate), i.e. a loss or reduction in value of a positive asset in the plaintiff's estate, or the creation or increase of a negative element of his/her estate (i.e. a debt).^[13] Pure economic loss is damage of a patrimonial nature that is not the result of physical injury, personality impairment, or damage to property.^[13] Non-patrimonial loss, on the other hand, is a harmful change in, or factual disturbance of, a person's legally protected personality interests (e.g. physical-mental integrity, dignity, privacy, feelings), which change or disturbance does not affect the person's economic position.^[13]

Development in SA law

The courts have had the opportunity on a number of occasions to consider liability for wrongful pregnancy. Through their judgments they laid down the law and created precedents. The development of SA law on wrongful pregnancy is traced in the three subsections below.

Pregnancy after vasectomy: *Behrmann v Klugman*^[14]

The plaintiffs were the parents of a normal child conceived and born after the defendant, a surgeon, had performed a vasectomy on the father. Their action was based upon alleged breach of contract, and alternatively, delict. They contended that the surgeon had failed to advise the child's father to have a sperm count before resuming intercourse without contraception. They alleged that the surgeon had made certain statements that caused them to believe that the vasectomy would render the man sterile after 10 weeks. The doctor testified that it was his practice to warn patients not to engage in unprotected intercourse before he had declared the man sterile, and that it could take up to 9 months to obtain two negative sperm counts. On the facts before the court it found in favour of the surgeon. The court was not convinced that the plaintiffs had really believed that sterility would be achieved after 10 weeks, as they had waited much longer before resuming intercourse without contraception. The court held that the plaintiffs had failed to establish that the contract between them and the doctor contained an express or implied term or warranty regarding the permanent success of the operation.

In view of the court's finding on the facts, it was unnecessary to consider the more fundamental question, i.e. whether recognition of this type of claim would be *contra bonos mores*. Although the plaintiffs' claim was rejected, the judgment did not exclude the possibility that a claim for wrongful pregnancy could succeed where the facts support such an action. Taking into account subsequent case law (as discussed below), in which it was held that this type of action is not *contra bonos mores*, it is conceivable that such claim will succeed if the plaintiff can prove that he was not properly informed of, for example, the necessity of first establishing sterility before resuming unprotected intercourse or the risks of recanalisation of the vas deferens. The case further illustrates the importance of keeping proper records, also of the information given to the patient.

Recognition of contractual liability for failure to perform a tubular ligation: *The Edouard case*^[15]

The facts giving rise to the claim

In this case, the court had to decide whether the action for wrongful conception/pregnancy was *contra bonos mores*, as it was beyond dispute that the agreed-upon procedure, a tubal ligation, was never performed. The defendant had contracted with the plaintiff and his wife to perform a tubal ligation on the woman at the time of giving birth by caesarean section to her third child. Believing that the sterilisation procedure had been performed, the couple took no precautions to prevent pregnancy, and the woman fell pregnant 4 months after the birth of her third child. The tubal ligation was eventually performed at the woman's insistence when the fourth child was born.

The damages claimed

The child's father brought action for damage allegedly suffered in consequence of breach of contract. He claimed: (i) the cost of the tubal ligation eventually performed on his wife; (ii) the cost of maintaining the child from her birth until she attains the age of 18 years; and (iii) non-patrimonial damages for the discomfort, pain and suffering, and a loss of amenities of life suffered by his wife in consequence of the pregnancy and the birth of the child by caesarean section. The defendant conceded that it was liable for damages for breach of contract as a result of its failure to effect the tubular ligation that had been agreed upon, but contended that payment of the cost of the tubal ligation would discharge its liability.

It is important to note that the parties were in agreement that, to their knowledge, the reason for seeking a tubal ligation was that the

plaintiff and his wife could not afford to support more children.^[15] It was also common cause that the plaintiff and his wife would not have agreed to give the child born as a result of the failure to perform the sterilisation out for adoption.^[15]

The defendant denied liability for the cost of raising the child on the grounds that although the contract for the woman's sterilisation was valid and enforceable and in itself not contrary to public policy, it would nonetheless be contrary to public policy to allow the parents of a healthy and normal but unplanned child to recover such costs where the parents refuse to give the child out for adoption.^[15] The argument was that in assessing such damages the court is called upon to decide whether a pecuniary value can be placed on a healthy life. It was argued that it would run counter to the sanctity of human life for a court to have to hold that the cost of maintaining a healthy child could constitute damage or injury to the parents.

The judgment by the Durban and Coast Local Division of the Supreme Court

The court was at pains to explain that contractual liability for this type of claim is in accordance with the general principles of our law. A court will only depart from the general principles regarding liability if there are public policy considerations that are so cogent as to justify a modification of or exception to the general principles: 'Courts of law will be reluctant to discover new principles of morality or considerations of expediency and policy on which to invalidate contracts which on accepted legal principles would be valid, because it is a fundamental principle of our law as well (a principle which is itself based on public policy) that contracts which have been freely and seriously entered into should be enforced.'^[15]

Unable to find public policy considerations cogent enough to justify an exception to or modification of the general principles, the court rejected the defendant's contentions. In its judgment the court said that it 'is part of the parental instinct to accept and love, and care for, a child – even an unplanned one, and there is 'nothing inconsistent in the attitude of the parents if they were to say that they had not wanted another child but that now that the child has been born they love it and refuse to part with it.'^[15] However, because of the breach of contract, the parents now face the dilemma that they had sought to avoid with the sterilisation operation, i.e. having a child whom they are unable to support.

Judgment was granted in favour of the plaintiff for the relief sought, with the exception of the claim for non-patrimonial loss ((iii) above). After a thorough examination of the common law, case law and legal opinion, the court concluded that non-patrimonial loss was not recoverable for breach of contract, and refused to follow the lead given by courts in the UK, where such damages can indeed be claimed on contract.^[15] The court pointed out that in the case of a breach of contract resulting in bodily injuries, there would be a concurrent claim for damages in delict in every case where the breach was wrongful and accompanied by fault (intention or negligence) on the part of the defaulting party.^[15] As a delictual claim can easily be conjoined with a contractual claim in the case of concurrent liability, the court refused to extend liability in contract to non-patrimonial loss.^[15] However, in the case at hand, a delictual claim was not conjoined and, therefore, non-patrimonial loss could not be recovered.

Arguments raised on appeal to the Appellate Division, and the court's answers to these

Edouard's case was taken on appeal to the Appellate Division, where it was heard by a five-judge bench (Table 1).

The Appellate Division's judgment

The Appellate Division unanimously confirmed the judgment of the trial court and the judgment was reported as *Administrator, Natal v Edouard*.^[16]

The Appellate Division agreed with the trial court's refusal to award non-patrimonial damages for the woman's pain and suffering, as the claim was brought in contract, and non-pecuniary loss cannot be recovered in contract.^[16] As a general rule, such damages can be claimed on the basis of negligence in delict. However, the Appellate Division was not convinced that the facts agreed upon in this case could find a claim for pain and suffering. The court remarked *obiter* that it may be questioned whether neglect leading to conception and a consequent birth could be equated with the inflicting of a bodily injury.^[16] An *obiter* remark does not have binding force in law, as it represents an opinion uttered in a judgment on a matter that is not essential to reaching a decision. Note also that the Appellate Division did not reject the notion that conception and birth could be equated to the inflicting of a bodily injury, but merely indicated that it may be open to attack.

Table 1. Arguments raised on appeal in *Edouard*, and the Appellate Division's answers to these

Appellant's argument	Court's pronouncement in answer to appellant's argument
The birth of a normal, healthy child cannot be regarded as a legal wrong against its parents ^[16]	The wrong is not the unwanted birth as such, but the prior breach of contract that led to financial loss ^[16]
The financial burden of having to maintain a child is outweighed by the benefits of parenthood (the birth of a child is a blessed event) ^[16]	Although tangible benefits accruing as a result of a breach of contract or the commission of a delict must be set off against the gross loss suffered by a plaintiff, there is no basis in SA law that the <i>non-pecuniary</i> benefits must be brought into account ^[16]
It would be highly undesirable for any child to learn that a court has publicly awarded damages to his parents because his birth was a mistake ^[16]	The possibility that a child will learn later in his life about such a judgment is rather remote. Once it is recognised in our law that this type of claim is well founded, relatively few cases of this nature will go to court. In any event, a child who is not given up for adoption ceases to be unwanted. Only the additional financial burden caused by its birth remains unwanted ^[16]
The award of damages will transfer the obligation to support and maintain the child from its parents to the defendant. This runs counter to public policy, which demands that there be no interference with the sanctity accorded by law to the relationship between parent and child ^[16]	This is a fallacious argument. The award of damages does not extinguish the parents' obligation to maintain the child, but at best enables them to fulfil it. For example, should the award be made and the money be stolen, the parents will remain obliged to support the child ^[16]

The court's *obiter* remark does no more than raise some doubt as to the likelihood of a claim for non-patrimonial damages succeeding in delict.

The court qualified the applicability of its judgment by stating that the finding that the claim of wrongful pregnancy was admissible was intended to pertain only to a case where, as here, a sterilisation procedure was requested and performed for socioeconomic reasons. The Appellate Division agreed^[16] with the trial court's caution that '[d]ifferent considerations might well apply where the consideration influencing the decision to have the operation was not an economic one.'^[15]

Recognition of delictual liability for misrepresentation leading to pregnancy: *Mukheiber v Raath*^[17]

In *Mukheiber v Raath*^[17] the plaintiff instituted a delictual action against the doctor in circumstances where no agreement had ever been reached that the doctor would perform a sterilisation on the patient.^[17] Liability founded on contract was, therefore, out of the question.

The facts giving rise to the claim

A married woman and her husband claimed damages from a gynaecologist following the birth of a normal child. The gynaecologist had attended to two previous pregnancies of the woman. During the latter of these pregnancies, the woman visited the gynaecologist a number of times for routine antenatal consultations.^[17] In the course of one of these visits, they agreed that the gynaecologist would deliver the baby that the woman was carrying at the time by way of caesarean section some 11 days later. During the same consultation, the question of a sterilisation arose when the woman told the gynaecologist that she did not wish to fall pregnant again. The gynaecologist required the woman to discuss the matter with her husband and to convey their decision to him at their next consultation.^[17] The woman did not discuss the matter with her husband that evening and went into spontaneous labour early the next morning. The baby was delivered by the gynaecologist by way of emergency caesarean section. It was common cause that the parties had never agreed on sterilisation and the gynaecologist never performed one.^[17]

Six days after the caesarean section, the woman accompanied by her husband visited the gynaecologist for the removal of the sutures. The parties' versions of what was said in the course of that visit differed completely.^[17] The plaintiffs averred that, having removed the sutures, the gynaecologist called the patient's husband into the surgery and told them that 'he had performed a sterilisation on [the patient], that she was now a "sports model", and that they did not need to worry about contraception.'^[17] The defendant disputed the plaintiffs' version. The trial court could not decide which of the versions was more probable and therefore found that the plaintiffs had not acquitted themselves of the onus of establishing that the defendant made the alleged misrepresentation.^[17] On appeal to a full court of the Cape High Court, the trial court's judgment was reversed. The gynaecologist then appealed to the Supreme Court of Appeal.

The damages claimed

The plaintiffs' claim was based on delict. They alleged that the gynaecologist's negligent conduct (the negligent misrepresentation) had caused them damages in the form of pure economic loss when, relying on the misrepresentation, they failed to take contraceptive measures and a child was conceived and born. They claimed compensation for: (i) confinement costs; and (ii) maintenance of the child until he becomes self-supporting.^[17] Non-patrimonial damages were not claimed.

The judgment by the Supreme Court of Appeal

The Supreme Court of Appeal agreed with the full court's finding that the probabilities favoured the plaintiffs' version, i.e. that the

gynaecologist had made the misrepresentation (i.e. that the patient had been sterilised).^[17]

Regarding the element of unlawfulness, the court stated that the test in the context of misrepresentation was whether, in the particular circumstances, the defendant had a legal duty to take reasonable steps to ensure that the representation was correct before making it.^[17] In this particular case, the following circumstances were held to indicate the existence of such a duty: the doctor-patient relationship that existed between the parties required the defendant to be careful and accurate; the objectively material nature of the representation (carrying the real, objective risk of the conception of an unwanted child) and the subjectively material nature of the representation (the dangers of a false representation should have been obvious to a gynaecologist in the defendant's position); the misrepresentation inducing the plaintiff and her husband not to take contraceptive care; that it must have been obvious to the defendant that the plaintiffs would rely on what he tells them; and the representation related to technical matters concerning a surgical procedure about which lay people would be ignorant and the defendant knowledgeable.^[17]

As far as the element of negligence was concerned, the court found that the defendant should reasonably have foreseen the possibility that his representation could cause damage to the plaintiffs and should have taken reasonable steps to guard against such occurrence. As he failed to take such steps, his conduct was negligent.^[17]

The court concluded that the defendant *factually* caused the damages claimed: had it not been for his misrepresentation, the plaintiffs would have taken contraceptive measures, and the child would probably not have been conceived and born.^[17] However, the defendant contended that his liability should be limited by the mechanism of *legal* causation in terms of which damages that are too remote cannot be recovered.^[17] The court found that the yardstick to be applied in determining the extent of the liability (i.e. the limitation of liability so as to exclude excessively remote damages) is that of public policy.^[17] The public policy considerations that underlie the judgment in *Administrator, Natal v Edouard*^[16] were found to be applicable in the case at hand. The court found that the limits of liability depend on the same considerations of public policy, whether a claim was founded in delict or contract.^[17]

The court saw no need for limiting claims, such as those under discussion, to cases where the request for sterilisation is made for socioeconomic reasons.^[17] In this regard, the *Mukheiber* judgment extended the recognition afforded wrongful pregnancy claims beyond the circumstances contemplated by the trial court and the Appellate Division in *Edouard's* case (see The Appellate Division's judgment above). The court went even further and made it clear that such claims should not be limited to instances where the request for sterilisation was made by a married couple, or to instances where the husband had given his consent. In the case at hand, the plaintiffs' wish not to have any more children was motivated by socioeconomic and family reasons, which were socially acceptable reasons that could not bar them from succeeding with their claim.^[17]

As regards the extent of damages claimable, the court held that both confinement and maintenance costs were reasonably foreseeable and therefore compensable. However, the court placed the following limitations on the doctor's liability: (i) it cannot exceed the parents' obligation to maintain their child 'according to their means and station in life'; and (ii) it lapses when the child is reasonably able to support himself.^[17]

In light of the above, the court concluded that considerations of public policy did not preclude the granting of the relief claimed, and dismissed the appeal.

Summary of principles espoused in case law

The judgment in *Behrmann* confirmed that:

- in the absence of an *express* warrantee, a court should be slow to find that the contract between doctor and patient contained an *implied* warrantee as to the results of an intended operation – in this case a warrantee of infertility.

The judgment in *Edouard* confirmed that:

- contractual liability can be incurred on the general principles of contract law for failing to prevent a pregnancy and resulting birth
- there are no policy considerations cogent enough to justify an exception to or modification of the general principles of contract in the case of a wrongful pregnancy
- only patrimonial damages can be recovered for a wrongful pregnancy resulting if the claim is founded on a breach of contract
- it is questionable whether neglect leading to conception and birth could be equated with the inflicting of a bodily injury for which compensation may be sought in delict
- the defendant could be liable for the reasonable costs involved in raising a child to the age of 18
- there is no duty on the plaintiff to mitigate his/her loss by having an abortion or giving the child up for adoption
- the court's finding that the claim of wrongful pregnancy was admissible was intended to pertain only to a case where a sterilisation procedure was performed for socioeconomic reasons.

The judgment in *Mukheiber* confirmed that:

- even in the absence of a contract, a patient may recover damages for wrongful pregnancy
- liability could be incurred even in the absence of *clinical* negligence
- liability could be incurred on the basis of a misrepresentation
- the yardstick to be applied in determining the extent of the liability (i.e. the limitation of liability so as to exclude excessively remote damages) is that of public policy
- the same considerations of public policy apply, whether a claim was founded in delict or contract
- there is no reason to limit wrongful pregnancy claims to instances where the request for sterilisation was made by a married couple, or to instances where the husband had given his consent, or, most importantly, to instances where the motive for requesting sterilisation was of a socioeconomic nature
- reasonably foreseeable damages can be recovered, but liability is limited in the following respects:
 - it cannot exceed the parents' obligation to maintain their child 'according to their means and station in life'
 - it lapses when the child is reasonably able to support himself.

In view of the general principles enunciated in our case law, one may deduce that the following types of conduct could conceivably give rise to an actionable claim for wrongful pregnancy:

- incorrect, inadequate, or lack of preoperative counselling, e.g. on the danger of recanalisation of the vas deferens after a vasectomy, or of female sterilisation not achieving sterility^[3,18]
- failure to perform an agreed sterilisation or other contraceptive measure
- failure to perform a sterilisation properly so as to result in infertility, e.g. by ligating a ligament rather than a fallopian tube during a sterilisation on a woman^[18,19]
- misrepresentation that a sterilisation was performed, while it was in fact not done

- false assurance that a patient (either before or after sterilisation) is infertile, whether it be as a result of negligent testing or negligent interpretation of test results^[3]
- failure to carry out sperm tests correctly or properly after a vasectomy^[19]
- incorrect contraceptive advice leading to pregnancy
- incorrect, inadequate, or lack of postoperative advice, e.g. on the need to use contraceptives until sperm tests have proved negative^[3,18,19]
- incorrect positioning of intrauterine contraceptive, resulting in pregnancy
- the wrong advice on their chances of having a child with a disability deprives the couple of the choice to rather prevent the pregnancy than to take the risk of conceiving a child with a disability.

Although there has not yet been a reported case where a claim was instituted for the birth of a normal but unwanted child born after, and as a result of, a failed abortion, it is conceivable that such a claim could also succeed in SA law, provided that the failed abortion was one that met the requirements in terms of the Choice on Termination of Pregnancy Act.^[20] Liability might also follow where medical interventions aimed at addressing childlessness or infertility result in multiple pregnancies. Prospective parents might be prepared and capable of raising one child, but they may not necessarily be desirous or prepared and capable of raising more than one child of the same age at the same time. It is therefore very important to inform prospective parents of the risk of more than one live birth associated with such interventions.

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