



Negligently Inflicted Psychological Harm and the ‘Sudden Shock’ Requirement: A Comparative Analysis

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Introduction

Most legal jurisdictions throughout the world now recognise a general right to seek redress in respect of the concept of negligently inflicted ‘pure’ psychological harm or damage,¹ albeit to varying degrees and applying quite different rules and value judgments in affording such recognition. Common law jurisdictions in particular have been quite slow to recognise such a duty and even now, following such recognition, there would appear to be a judicial bias in favour of physical injury cases and of restricting the categories of claimants in respect of psychological harm claims by imposing a narrowly defined and quite rigid set of criteria necessary to establish such a claim. One of the traditional criteria required in order to successfully establish a claim for psychological harm is the requirement that the psychological injury be shock-induced and arise by virtue of a sudden fright or jolt, as opposed to a gradual onset of such injury by virtue of the cumulative effects of a particularly difficult set of circumstances. In fact, the requirement of a sudden shock formed such a central component in the idea of recovery for psychological harm that the whole concept itself has often been termed ‘nervous shock’,² which terminology is, it is submitted, inappropriate and serves only to confuse the general concept of psychological harm with one of its component parts and which, in the interests of clarity, should be avoided.

The aim of this paper is to assess the current law with regard to the necessity or otherwise of such a sudden shock component in the successful establishment of a psychological harm claim in three common law jurisdictions, namely Australia, England and Ireland. It will endeavour to establish, in as far as it is possible to so establish, the reasoning behind the imposition of such a

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¹ ‘Pure’ in the sense of psychological harm unaccompanied by any parasitic physical injury or even fear of such injury to oneself – though the concept of psychological harm in this context has been termed differently in many jurisdictions, such as ‘nervous shock’, ‘emotional distress’, ‘mental harm’ etc. However, for the purpose of this paper, the topic will be termed psychological harm.

² Particularly in England, see for example *Alcock V Chief Constable of South Yorkshire* [1992] 1 AC 310; [1991] 3 WLR 1057; [1991] 4 All ER 907; also in Australia, see *Jaensch V Coffey* 919840 54 ALR 417; 155 CLR 549; and in Ireland, see *Fletcher V The Commissioners of Public Works in Ireland* [2003] 2 ILRM 94.

requirement and, to the extent that it still exists, will evaluate the desirability of its continued existence. In this regard, the paper will begin with an analysis of the seminal Australian case dealing with the sudden shock requirement, due to the fact that this decision formed the basis for the incorporation of the sudden shock principle into the laws of the United Kingdom and Ireland. It will critically analyse this decision and consider some conceptual difficulties associated with it. The paper will then proceed to a consideration of the position of the law vis-à-vis this requirement in the U.K. and Ireland and will assess the reasoning behind the incorporation of such an approach in both jurisdictions and the criticism that may be levelled at such an approach. Finally, the recent apparent change of approach of the Australian High Court in this regard will be discussed and recommendations will be made with respect to the future role, if any, of this sudden shock component in the tort of the negligent infliction of psychological harm.

The Sudden Shock Requirement in Negligently Inflicted Psychological Damage Cases

The seminal decision under Australian law dealing specifically with, *inter alia*, the requirement of a sudden shock in negligently inflicted psychological damage cases, and a case which provided the basis for decisions in several other jurisdictions, such as the U.K.³ and Ireland,⁴ is the case of *Jaensch V Coffey*.⁵ This case concerned the development of a psychiatric illness on the part of the respondent by virtue of having witnessed, in the local hospital, the injuries sustained by her husband following a road traffic accident caused by the negligent driving of the Appellant and also having seen her husband taken to theatre on several occasions, being informed by the medical personnel that his condition was quite serious and, having gone home for some rest, being called back in some hours later because her husband's condition had deteriorated. Whilst finding for the Respondent on the facts and dismissing the appeal, the High Court of Australia apparently recognised the requirement that in cases involving the absence of physical injury, that the psychological harm suffered be 'shock-induced', i.e. caused by "...sudden, sensory perception – that is by seeing, hearing or touching – of a person, thing, or event, which is so distressing that the perception of the phenomenon affronts or insults the plaintiff's mind and causes a recognizable psychiatric illness."⁶ Psychiatric harm caused or suffered in any other way, other than by sudden shock, was held not to be recoverable and in this regard, Brennan J. famously gave two examples: firstly, where a spouse suffered a psychiatric injury by virtue of having to care for a tortiously injured husband or wife over time, or secondly a parent who suffers such psychological harm due to the wayward conduct of a brain damaged child.⁷

This judgment and in particular the express enunciation of such a sudden shock requirement has been subject to widespread, and it is submitted, deserved academic criticism.⁸ Firstly, the reasoning behind the imposition of such a restriction on the right to recover in these psychological harm cases is most unclear from the judgment of Brennan J; he merely states that this is so without giving any underlying justification for such a position. Indeed, he rules out

³ *Alcock V – Chief Constable of South Yorkshire* [1992] 1 AC 310; [1991] 3 WLR 1057.

⁴ *Kelly V Hennessy* [1995] 3 IR 253; [1996] 1 IRLM 321.

⁵ [1984] 54 ALR 417; [1984] HCA 52; (1984) 155 CLR 549.

⁶ *Ibid. per Brennan J.* at 430.

⁷ *Ibid.* at 429.

⁸ See, for example, Trindade, "The Principles Governing Recovery of Damages for Negligently Caused Nervous Shock" [1986] CLJ 476, 478-480.

recovery in cases not involving sudden shock even though such gradual onset psychological harm may be a reasonably foreseeable consequence of the negligence of the tortfeasor.⁹ Moreover, by giving specific examples of situations involving the gradual onset of psychological harm, concerning the spouse or the parent referred to above, he compounds the problem by failing to give any specific reason for the exclusion of such, it would appear, worthy claims. It can only be assumed from the tenet of the judgment as a whole that it is a remoteness issue, that such illnesses occurring months or even years after a specific event would be too far removed from that initial event to justify the imposition of liability on a tortfeasor; however that is not at all clear from the judgment. In fact, taken a little further, it could be argued that the actual facts of the case do not support the imposition of a sudden shock requirement in these psychological harm cases: it would appear from the judgment of Brennan J, referring to and not disagreeing with, the judgement of Bollen J in the Supreme Court of South Australia, that the illness suffered by the respondent was caused by the sight and hearing of certain things on the night of the 2nd June and into the morning of the 3rd June, and also *during the course of* the 3rd June following the respondents return to the hospital following the aforementioned telephone call requiring her to return as soon as possible.¹⁰ Should this not be more accurately described as an accumulation of events over a period of twenty four hours or more, rather than a 'sudden, sensory perception' of an event? Were it not to be viewed as such an accumulation, then when exactly did the sudden sensory perception occur on the facts? It has to be assumed that the definition of the word sudden would import some element of immediacy. It is submitted that there in fact was no sudden shock within the definition of Brennan J in this particular case, but that the illness suffered by the Plaintiff was due to the combined effects of the sights and sounds of the 2nd and 3rd June 1979, *and also* of the realisation over the following number of weeks that her husband's condition was quite perilous and of a consideration of the consequences of his death for the respondent were it to occur. This contention is supported by the dicta of Brennan J where he states that the respondent was under the impression for three to four weeks following the accident that her husband was going to die.¹¹

However, notwithstanding the criticism of this doctrine among academics and the conceptual difficulties with the reasoning of the Court as expressed above, the holding in this case, that liability for the negligent infliction of psychological harm will only attach to a tortfeasor where, *inter alia*, the claimant suffers such psychological harm by way of sudden shock as opposed to gradual onset over time, has formed the basis for decisions in and been incorporated into the law of several jurisdictions, not least of which being the United Kingdom. The first case to expressly deal with the necessity of psychological harm arising by way of sudden shock in the U.K. was the case of *Alcock V Chief Constable of South Yorkshire*,¹² which was one of the many cases concerning the Hillsborough football disaster of 1989, in which 95 supporters were killed and many hundreds injured due to the negligence on the part of the police in allowing overcrowding at a particular end of the stadium. In this case the claimants consisted of people who either attended the match or saw or heard the news on television or radio, and were in various degrees of relationship to some of the victims, being friends or relatives.

⁹ *Jaensch V Coffey* (1984) 54 ALR 417 at 429.

¹⁰ *Ibid.* at 424.

¹¹ *Ibid.*

¹² [1992] 1 AC 310; [1991] 3 WLR 1057; [1991] 4 All ER 907.

According to Lord Ackner, liability for psychological harm only attaches to a tortfeasor where such harm is induced by shock, that is “the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over time of more gradual assaults on the nervous system.”¹³ Lords Keith and Oliver also referred to the requirement of sudden shock, requiring “a sudden assault on the nervous system”¹⁴ and “sudden and unexpected shock to the plaintiff’s nervous system”¹⁵ respectively. In stating this opinion, Lord Ackner quoted the examples of Brennan J in *Jaensch V Coffey* regarding the cases of gradual onset of psychological harm in the spouse and parent as being insufficient to attract redress. While again the judgments of their Lordships can, and have been,¹⁶ criticised for the imposition of such an arbitrary and apparently unfair division between cases involving a sudden shock element and those concerning a gradual onset of psychological harm, it is at least possible to ascertain some reasons for the imposition of such a requirement from the judgement of Lord Oliver. He states that while the law may be quite illogical with regard to this matter and apparently unfair, it is essentially a policy reason behind the restriction of the ability to recover for negligently inflicted psychological harm and the imposition of limits to such recovery, such as the requirement that the illness be sustained by sudden shock. In addition, he appears to subsume the sudden shock requirement with the general requirement of proximity, by stating that the necessary degree of proximity between the parties to an action is established, at least partly, “by the *sudden and direct* visual impression on the plaintiff’s mind of actually witnessing the event or its immediate aftermath” and “...to extend liability to cover injury in such cases [of illness arising by way of gradual realisation or onset] would be to extend the law in a direction for which there is no pressing policy need and in which there is no logical stopping point.”¹⁷ (emphasis added).

It would appear therefore that policy considerations have played a very important role in the decisions of the U.K. courts dealing with the whole area of the negligent infliction of psychological harm, and the narrower concept of the sudden shock requirement has suffered from the consequential effects of such an approach.¹⁸ Therefore, the sudden shock requirement is now well established as being a necessary component of a successful claim for psychological harm in the U.K.¹⁹ Whilst, as aforementioned, the principle policy reason advanced to support such an approach is that abandoning the imposition of the shock requirement would open the floodgates to claims in respect of this cause of action and would, in the words of Lord Oliver, involve “virtually limitless liability”,²⁰ it is not at all clear why this would be so and, it is submitted, no convincing justifications for or reasoning behind such a postulation have been proffered. The

¹³ [1992] 1 AC 310, 401.

¹⁴ *Ibid* at 398.

¹⁵ *Ibid* at 411.

¹⁶ See Teff, ‘The Requirement of “Sudden Shock” in Liability for Negligently Inflicted Psychological Damage’ (1996) 4 Tort L Rev 96.

¹⁷ *Alcock V Chief Constable for South Yorkshire* [1992] 1 AC 310, 416 per Lord Oliver.

¹⁸ See *McLoughlin V O’Brian* [1983] AC 410; [1982] 2 WLR 982; [1982] 2 All ER 298; *Alcock V Chief Constable of South Yorkshire* [1992] 1 AC 310; *White V Chief Constable of South Yorkshire* [1999] 2 AC 455; [1998] 3 WLR 1510.

¹⁹ Cf the case of *Walker V Northumberland County Council* [1995] 1 All ER 737, where gradual onset of psychological harm due to stress at work was held to be recoverable – however, this case is best interpreted, in the context of current U.K. law, as involving a special category of care owing to the special relationship of employer/employee and the particular duties of the employer arising out of that relationship.

²⁰ *Alcock V Chief Constable of South Yorkshire* [1992] 1 AC 310, 417.

range of claimants who suffer medically recognised psychological harm (albeit not by virtue of a sudden shock) and can satisfy the tests of reasonable foreseeability and proximity, and thereby establish a cause of action, is most unlikely to be very extensive at all,²¹ particularly given the additional criteria applied by the Courts in the U.K. with regard to so-called ‘secondary victims’.²²

It is submitted that the additional criteria, as applied to secondary victims in the U.K., are more than sufficient to prevent the opening of the floodgates to claims for the negligent infliction of psychological harm and that, in reality, the imposition of a further sudden shock precondition to recovery is unnecessary to advance such a policy consideration and serves merely to exclude otherwise meritorious claims from succeeding. Indeed, a simple analysis of the two examples provided by Brennan J in *Jaensch V Coofey* clearly indicate the deserving nature of both the hypothetical spouse and parent, and, provided they were to satisfy the reasonable foreseeability (as conceded by Brennan J to be quite possible²³) and proximity tests and were to satisfy the additional English criteria of sufficient degree of relationship and direct perception, what possible, *objectively justifiable* grounds could be relied on to deny them redress? It is submitted none. Indeed it has been argued, with some degree of persuasiveness, that very often the fact that one particular claimant’s injury occurred by way of gradual onset and was consequently more protracted than one whose injury arose by way of sudden shock will lead to a finding of even greater suffering on the part of the former.²⁴ In addition, the Courts have had little difficulty over the years in allowing recovery for cases involving the gradual onset of physical injuries,²⁵ or injuries occurring even years after the event, with the Statute of Limitations being seen as sufficient to determine the cut-off point in these cases.

Unfortunately, it would appear that the Irish position in this regard adds very little to the debate with regard to the sudden shock requirement as, in the Supreme Court decision of *Kelly V Hennessy*,²⁶ it was held that for liability to attach to the negligence of a particular tortfeasor in respect of psychological harm, inter alia, the harm must arise by way of shock, and in this regard, the Court relied on the judgment of Brennan J in *Jaensch V Coffey*, which has been criticised above. Those criticisms can be applied equally, if not more strenuously, to the decision of the Supreme Court, particularly in light of the fact that they appear to have relied on the judgment of Brennan J regarding the sudden shock requirement without any analysis whatever of the desirability of such a requirement or the reasoning behind its imposition in cases of this type. Whilst admittedly it was held on the facts of the case that the claimant suffered *immediate shock* on hearing of the involvement of her husband and two children in an accident and on directly perceiving their injuries at a later stage in the hospital to which they were conveyed, the Supreme Court nonetheless regrettably missed the opportunity to *critically* analyse the experiences and caselaw of other jurisdictions, such as the U.K. and Australia, to take heed of the academic

²¹ Markesinis, *Markesinis and Deakin’s Tort Law* (Oxford: Oxford University Press, 2007) at p. 146.

²² See *White V Chief Constable of South Yorkshire* [1999] 2 AC 455, holding that in cases involving persons who are not physically injured or exposed to the risk of injury, foreseeability, proximity *and* additional factors (such as degree of relationship between the parties and the manner of perception of the incident or immediate aftermath) are relevant to a finding of liability.

²³ *Jaensch V Coffey* (1984) 54 ALR 417 at 429.

²⁴ See Nasir, “Nervous Shock and *Alcock*: The Judicial Buck Stops Here” (1992) 55 MLR 705, 709.

²⁵ One commentator has stated that the Courts are apparently “too blinkered to recognise such a possibility for mental injury” – *Ibid.*

²⁶ [1995] 3 IR 253; [1996] 1 ILRM 321.

criticism of their approach and to formulate as a consequence a novel and coherent approach with regard to this issue, free from the arbitrariness and unfairness inherent in the British and Australian approach as evidenced above. However, as indicated, there is no evidence of any inquiry whatever into the sudden shock requirement. However, to the extent that the issue was not expressly analysed and did not arise for express discussion on the facts of the case, there is perhaps some scope for optimism that the issue may be fully considered at a later date in a case involving a meritorious claimant suffering from gradual-onset psychological harm.²⁷

However, evidence of support for a move away from the sudden shock requirement is apparent in several jurisdictions. In the U.K., the Law Commission of England and Wales has issued a report on liability for psychiatric illness²⁸ which expressly calls for the abolition of the sudden shock requirement in psychological harm cases. It considers the arguments made both in support of and in opposition to such abolition and finds that the case for abolition has been satisfactorily made.²⁹ Two facets of the case for abolition are of particular significance and persuasiveness in this regard: first, the evidence in the report of the opinions of medical professionals specifically on the sudden shock requirement is most interesting, to the effect that the requirement is problematic, unclear and “emotionally misleading”, and “has no scientific or clinical merit.”³⁰ Secondly, the Law Commission made the very valid point that in some cases of psychological harm, as in cases of physical harm, the full extent of the injury may not reveal itself for some time after the event the subject of the proceedings, particularly in cases where the claimant learns of the “...severity of the injuries over a number of days, weeks, months or even years.”³¹ In cases involving psychological harm, aside from issues of causation and remoteness, surely the determining factors in entitling a claimant to recover are the medical evidence of a psychological injury and the source of such injury? Provided a claimant can establish a medically recognised psychological injury and medically recognised causal link between such injury and the event the subject of the proceedings, that should be sufficient to recover and the suddenness or otherwise of such injury should be viewed as irrelevant. In this regard, the reasoning of Henry LJ in the Court of Appeal decision of *White V. Chief Constable of South Yorkshire*³² is, it is submitted, most appealing and very difficult to criticise; whereby he held that it was the entire circumstances of the event that led the claimants, police officers, to suffer psychological harm and not any sudden shock element, stating “[W]hat matters is not the label on the trigger for

²⁷ In this regard, the case of *Fletcher V The Commissioners of Public Works* [2003] 2 ILRM 94 should be noted. Though this case involved the consideration of psychological harm in the context of an employee being exposed to asbestos dust over time by the negligence of his employer, the Court nonetheless considered the principles enunciated in *Kelly V Hennessy* in detail and held that such principles should only be applicable to accident claims, thereby allowing scope for a redirection of the law in non-accident cases. However, the Court, whilst mentioning the sudden shock requirement, did not expressly endorse or reject same; thus, it has to be assumed that such a requirement continues to apply to psychological harm cases in Ireland until expressly decided otherwise as part of the ratio of a Supreme Court decision.

²⁸ Law Commission of England and Wales *Liability for Psychiatric Illness* (London: HMSO, 1998). The Scottish Law Commission has also issued such a report, entitled *Report on Damages for Psychiatric Injury* (Edinburgh: TSO 2004), recommending the abolition of the sudden shock requirement, stating that “it reflects an outdated view of how mental harm is sustained”. The report also states that the shock requirement “produces harsh results and renders some forms of mental harm, such as post-traumatic stress syndrome, more repairable than others, for example, depression” (at para. 2.5).

²⁹ *Ibid.* at para 5.31.

³⁰ *Ibid.* at para 5. 29(2).

³¹ Law Commission of England and Wales *Liability for Psychiatric Illness* (London: HMSO, 1998).

³² [1997] 1 All ER 540; [1997] 3 WLR 1194.

psychiatric damage, but the *fact and foreseeability* of psychiatric damage, by whatever process... Clearly the law should accept PTSD [post traumatic stress disorder] rather than exclude it whether it is caused by sudden shock (properly defined) or not.”³³ (emphasis added)

Notwithstanding the validity of the arguments made by the Law Commission however, the judiciary have not yet ‘caught up’ with such sound reasoning and as a consequence, the law in the U.K. as it currently stands continues to require psychological harm to arise by way of sudden shock in order for a claimant to successfully recover in the Courts. However, several other jurisdictions have ‘seen the light’ in this regard and rejected the sudden shock requirement, such as Singapore³⁴ and South Africa,³⁵ with the Court in the former case drawing a novel distinction between caring for somebody over a long period of time and the witnessing of a protracted event, with the latter being sufficient to justify compensation.³⁶

Moreover, of huge significance, given the influence of the *Jaensch V Coffey* decision around the world and the fact that this case was arguably the genesis of the sudden shock requirement, the High Court of Australia has recently jettisoned this requirement in the case of *Annetts and Anor V Australian Stations Pty Limited*,³⁷ which involved a *series or accumulation of events* which nonetheless entitled the claimants to recover for psychological harm. In this case the sixteen year old son of the claimants went to work for the defendants as a jackaroo at a remote cattle station in Western Australia. Before allowing their son to go however, the claimants requested and received assurances that their son would work under constant supervision and be well looked after, which, unfortunately, was not the case. In December 1986, they were notified by the police that their son was missing and some four months later, were notified that his car had been found bogged down in the desert and that he had died. The accepted consensus was that their son had died in December 1986 as a result of dehydration, exhaustion and hypothermia. It is clear from the facts of this case that no sudden shock, in the form of a sudden sensory perception, was involved here. However, several judgments in the case indicate, quite clearly, that such a sudden shock requirement is not necessary and has no place in the law of Australia. For example, Gaudron J states that “no aspect of the law of negligence renders “sudden shock” critical either to the existence of a duty of care or the risk of foreseeability of a risk of psychiatric injury,” arguing that once such a duty of care and reasonable foreseeability are present, “there is no principled reason why liability should be denied because, instead of experiencing sudden shock, they suffered psychiatric injury as a result of uncertainty and anxiety culminating in the news of their son’s death.”³⁸ It is submitted that this is the correct and most reasoned approach to the issue as in a case such as this where the existence of a duty of care and the foreseeability of psychological harm are clearly established, denying liability to the claimants in this instance would be grossly unfair and arbitrary. In this regard, Gummow and Kirby JJ³⁹ draw on the excessive arbitrariness of such a requirement as evidenced in English Court of Appeal decisions which, by virtue of the

³³ *Ibid.* at 1208-1209.

³⁴ *Pang Koi Fa V Lim Djoe Phing* [1993] 3 SLR 317.

³⁵ *Barnard V Santam Bpk* [1999] (1) SA 202.

³⁶ *Pang Koi Fa V Lim Djoe Phing* [1993] 3 SLR 317, at 333. In this case, a mother’s ‘bedside vigil’ by her daughter’s side over a period of three months until her death following the negligent act led to a diagnosis of post traumatic stress disorder in the mother and was sufficient to justify recovery.

³⁷ (2002) 191 ALR 449; 76 ALJR 1348.

³⁸ *Ibid.* at 465.

³⁹ *Ibid.* at 500-501.

sudden shock requirement, denied liability to some most deserving of claimants.⁴⁰ Incidentally, these Court of Appeal decisions are also utilised by the Law Commission of England and Wales to support its argument for the abolition of this shock requirement.⁴¹

Moreover, of significant interest is the dicta of Gummow and Kirby JJ to the effect that, as no other members of the High Court in *Jaensch V Coffey* expressly adopted the sudden shock requirement as espoused by Brennan J, it could not be taken as settled law⁴² and therefore, by analogy, the Court in *Annetts* were free to disregard such a requirement, which they duly, and it is submitted correctly, did. This perception is of significant interest due to the fact that the decision of Brennan J, in contrast to the situation pertaining in his own country, appears to have been blindly and unquestionably followed in Ireland and also in the U.K. without any analysis or inquiry whatever. Though the House of Lords at least had policy reasons for imposing such a requirement, in Ireland, public policy reasons for excluding liability were expressly rejected by Hamilton CJ in the course of his judgment in *Kelly V Hennessy*.⁴³

Conclusion

In summary, it would appear that the requirement that negligently inflicted psychological harm arise by way of sudden shock as opposed to gradual onset in order to justify recovery in such cases may not, after all, have formed part of the *ratio* of *Jaensch V Coffey* in the High Court of Australia and, rather inexplicably therefore and without objective justification or sound reasoning, such an approach was adopted in other jurisdictions, most notably the U.K. and Ireland. However, the very fact that the High Court of Australia has done a volte face and expressly and conclusively rejected this requirement, in a clear and fully reasoned fashion, serves to expose in an even clearer light the folly of the incorporation of the requirement initially without any further thought or analysis. It can only be hoped that the apparent move away from such a requirement, in the form of a recommendation from the Law Commission of England and Wales in the U.K., to its more explicit rejection in the *Annetts* case in Australia, will proceed apace and become an unstoppable and inevitable force in this area of tort law, ultimately reaching the corridors of judicial power in the House of Lords in London and the Supreme Court of Ireland in Dublin.

⁴⁰ See *Sion V Hampstead Health Authority* [1994] 5 Med LR 170 and *Taylorson V Shieldness Produce Ltd.* [1994] PIQR P329, where parents were denied recovery where they witnessed the deaths of their children over a period of several days in hospital.

⁴¹ See Law Commission of England and Wales *Liability for Psychiatric Illness* (London: HMSO, 1998) at para. 2.63-2.64.

⁴² (2002) 191 ALR 449 at 500.

⁴³ [1995] 3 IR 253; [1996] 1 ILRM 321.

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