DOLMANS INSURANCE BULLETIN

Welcome to the June 2025 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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REPORT ON

Successful Defence of an Injury Claim Brought by a Teaching Assistant Pushed Over by a Child with Additional Needs in a Playground Incident

CS v Caerphilly County Borough Council

In this matter, the claim arose from an incident at a Local Authority run specialist school for children with additional needs. Dolmans were instructed to represent the Defendant Local Authority. The Claimant alleged that, during the course of her employment at the school as a level 1 teaching assistant, she had suffered personal injury after having been pushed over from behind in the school yard by a 12-year old pupil with Autistic Spectrum Disorder and Avoidance Syndrome.

We were instructed early in the case and the Claimant had been provided with extensive disclosure before proceedings were issued, to include behaviour programmes, serious incident forms and accident forms relating to previous incidents involving the child, as well as the incident complained of. In that sense, the background and history of this pupil was well established.

The Claimant's case was a smorgasbord of breaches of various statutory duties, including failure to risk assess and devise a safe system of work, as well as specific allegations of negligence that the school had failed to provide adequate training when handling difficult children, failed to ensure that adequate staff were available to deal with children and failed to warn staff of the individual behavioural needs of the child. In her Witness Statement, the Claimant specifically alleged that a teacher and a level 3 teaching assistant ought to have been on the yard at the material time.

The Defendant Local Authority's case was that the child's behavioural needs had been assessed and communicated to staff. Staffing on the yard was sufficient and had included a teacher and a level 3 teaching assistant (though, specifically, not from the child's class). The Claimant had received relevant '*Team Teach*' de-escalation and crisis intervention training in the past, though this had not been refreshed because she was no longer in a class which required her to have this specific training and the school had targeted Team Teach re-training at staff in classes where de-escalation and crisis intervention was more likely to be required. There were other staff on the yard that had up-to-date relevant training. Witness Statements were obtained from the child's teacher as well as from the Deputy Headteacher at the school.

The Defendant Local Authority benefited from a pre-trial conference with trial counsel, Mrs Rachel Russell of St John's Chambers in Bristol, and the witnesses.

REPORT ON

The matter came to trial before Deputy District Judge Rees in the County Court at Blackwood on 29 January 2025.

In giving her evidence, the Claimant conceded that it was not her case that the behavioural needs of the child had not been assessed and communicated to staff. The Claimant accepted that a teacher or a level 3 teaching assistant were present on the yard, but instead contended that had they been from the child's own class then this would have prevented the pupil from pushing her over. Her reasoning for this was that a more senior member of staff from the child's class would have been more able to predict the child's behaviour. This specific allegation had not featured in the Claimant's pleaded case or written evidence.

In response, the Defendant Local Authority's witnesses contended that the fact that the teacher and the level 3 teaching assistant on the yard were not from the class of the child concerned was immaterial because staff were responsible for all children on the yard and not just those from their own classes. Staff were rotated on the yard, with the rota being decided by the teachers. The child's actions in pushing the Claimant over were sudden and unforeseen and there was no build-up to that event or evidence of growing dysregulation beforehand. On the contrary, the child would sometimes push staff when he simply wanted to gain their attention when he wanted to communicate and the mere fact that he pushed the Claimant was not necessarily dysregulation.

The Deputy District Judge noted that two allegations were raised at trial, which had evolved from the Claimant's pleaded case and Witness Statement (the allegation of failure to risk assess not being pursued): failure to provide adequate staffing and failure to train. It was for the Claimant to prove, on the balance of probabilities, that the Defendant Local Authority had failed to take reasonable care for her safety at work.

The Deputy District Judge noted that the allegation that the teacher / level 3 teaching assistant be from the child's own class only emerged in oral evidence and had not formed part of the Claimant's pleaded case or written evidence. In any event, he did not consider that this would render supervision inadequate. The suggestion that a teacher / level 3 teaching assistant be from the child's own class would have developed a 'sixth sense' or other skills was highly speculative. It seems likely that the child's actions were sudden and the incident would not have been prevented had the Claimant received the Team Teach re-training.

The Claimant's claim was accordingly dismissed.

Comment

The Defendant Local Authority undoubtedly had a strongly arguable case in this claim given that it had clearly instituted strong measures for the care and supervision for the children at the School. There was also the underlying fact that the provision of education to children with additional needs performs a function with a strong social benefit and notwithstanding that it is a role with different challenges compared to mainstream education. Lastly, the Claimant's case was not helped in that it was poorly prepared and that proper instructions appeared not to have been obtained from the Claimant in respect of what her case was (and not what her solicitors wanted it to be).

Cases of this nature are often considered problematic because claimants in these situations, naturally, attract the sympathy of the court. However, with careful preparation, and with the right evidence and witnesses, they can be successfully resisted at trial, as was the outcome in this instance.

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CASE UPDATES

Costs - Credit Hire - Non-Party Costs Orders - QOCS

Yehunda Tescher v Direct Accident Management Limited (DAML) and AXA Insurance v Spectra

[2025] EWCA Civ 733

If a credit hire claim fails, when and in what circumstances should a non-party credit hire company be made liable for a defendant's costs?

These consolidated appeals concerned two road traffic accident cases where claimants had entered into credit hire agreements and subsequently brought proceedings that included claims for personal injury and credit hire charges. In both cases, the claims failed and Costs Orders were made in favour of the Defendants. However, due to the operation of Qualified One-Way Costs Shifting (QOCS), these Costs Orders could not be enforced against the Claimants. The Defendants sought non-party Costs Orders against the respective credit hire companies. The two Orders under appeal each refused to make that order.

The appeals concerned whether credit hire companies could be liable for defendants' costs under CPR r44.16(2)(a) as persons for whose financial benefit claims were made and whether they were the "real parties" to litigation under section 51 of the Senior Courts Act 1981.

In considering the appeals, the Court outlined the various authorities (*Giles v Thompson [1994] AC 142; Lagden v O'Connor [2004] 1 AC 1067; Symphony v Hodgson [1994] QB 179; Dymnocks Franchise Systems (NSW) Pty Ltd v Tood & Ors (Associated Industrial Finance Party Limited Third Party) [2004] UKPC 39; Myatt v National Coal Board [2007] EWCA Civ 307; Farrell v Birmingham City Council [2009] EWCA Civ 769; Deutsche Bank AG v Sebastian Holdings Inc [2016] EWCA Civ 23, Excalibur Ventures LLC v Texas Keystone Inc [206] EWCA Civ 1144; XYZ v Travelers Insurance Co Ltd [2019] UKSC 48;* all considered) and the relevant rules in the CPR (CPR 44.16(2)(a) and CPR 44.16(2)(b)).

Decision

The Court of Appeal allowed both appeals and made non-party Costs Orders against the credit hire companies. Lord Justice Birss, giving the leading Judgment, established comprehensive guidance for future cases involving non-party costs applications against credit hire companies in the QOCS context.

The Court suggested it would be convenient to approach the exercise of the discretion in two steps: firstly, determining whether the non-party Costs Order of some kind against the credit hire company should be made, and, secondly, deciding the appropriate/just amount of costs.

The Court held that absent some reason why not, when a claimant has been ordered to pay the costs and QOCS applies, a non-party costs order against a credit hire company is likely. The credit hire company is a person for whose benefit the credit hire claim is being made. It is the credit hire company which is the real beneficiary of the litigation for damages in respect of charges for credit hire. The fact that payment of the sums obtained in a successful claim to the credit hire company benefits a claimant by extinguishing their debt to that company does not alter this reality. CPR 44.16(2)(a) was, therefore, satisfied.

While QOCS was introduced to protect claimants in personal injury claims, it was not intended to protect non-parties for whose financial benefit claims were made – CPR 44.16(2)(b). The Court noted that CPR 44.16(3) expressly contemplates non-party costs orders in these circumstances. The Court held that the discretion to impose non-party costs orders under CPR 44.16(3) must be exercised justly. There was no suggestion that fixing credit hire companies with a cost risk when a claim fails would prevent them from offering the service.

In both cases, the credit hire companies' involvement was a real and material cause of the litigation costs incurred by the Defendants, thereby satisfying the causation requirement for a non-party Costs Order without needing a strict "but for" test of causation. The contractual structure of the credit hire agreements, which deferred payment until resolution of the litigation and conditioned relief from immediate payment on the pursuit of a damages claim, was held to effectively render litigation inevitable and to place practical control in the hands of the credit hire companies.

In the Spectra case, Spectra had day-to-day influence over claim strategy and continuation, including in response to settlement offers and discontinuance, even though the Claimant acted in her own name. In the DAML case, the District Judge's findings that DAML had not instructed solicitors, was not copied into court documents and was not overtly controlling the litigation were held to be irrelevant in light of the underlying contractual arrangements that conferred effective control and financial interest upon DAML.

Distinguishing conditional fee agreements, the Court found credit hire companies were the genesis of claims, with hire charges often dwarfing personal injury damages.

CASE UPDATES

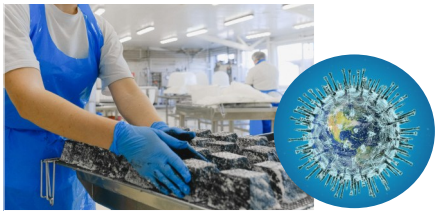
Having found that the jurisdiction is engaged, the second step is to consider what the appropriate costs order would be. There are three possibilities: i) an order for all of the costs of the litigation; ii) an apportionment based on the sizes of the credit hire claim and the personal injury claim; and iii) award of the extra costs attributable to the credit hire as compared to the litigation without it. Where the credit hire claim is several times larger than the personal injury claim (as in both DAML and Spectra) an order for all of the costs would be likely, absent some special feature.

In allowing both appeals, the Court made a non-party Costs Order against DAML for all of the Defendant's costs, and against Spectra for 65% of the Defendant's cost (reinstating the Deputy District Judge's initial Order).

Employers' Liability - Covid-19 - Summary Judgment - Causation

Edwards & Others v 2 Sisters Food Group Limited
[2025] EWHC 1312 (KB)

The Claimants ('C') were employed by the Defendant ('D') where they worked on a food processing line at D's factory. C alleged they worked in close proximity to each other. In June 2020, there was a Covid-19 outbreak at the factory. C alleged that 217 of the 560 staff at the factory (including them) contracted Covid-19 during the outbreak and that the factory was closed on 18.06.20 by Public Health Wales for deep cleaning and to effect improvement in working conditions. C alleged they contracted Covid-19 as a result of D's breach of statutory duty, breach of contract and negligence.



D admitted C worked in close proximity to each other, but averred it implemented enhanced hygiene measures at the factory. D accepted the factory was closed on 18.06.20, but asserted this was as a result of an agreement with Public Health Wales, not at their direction. Breach of duty was denied.

D applied to strike out C's claims or for Summary Judgment on the grounds that C could not establish causation. It was submitted contracting Covid-19 is in the nature of an indivisible injury and even if a breach of duty could be established C would not be able to establish that the breach caused or materially contributed to the injury. C's position was that they would obtain expert evidence on causation from an expert in occupational hygiene following disclosure and exchange of witness statements and that obtaining such a report prior to this stage would be premature and wasteful of costs.

At first instance, the Judge questioned the appropriateness of an occupational hygienist in proving causation, rather than a medical specialist in Covid-19, and could not understand how it was possible to plead a causal link between breach and the development of Covid-19 without any medical causation evidence.

CASE UPDATES

Covid-19 was prevalent in the community at large as well as D's processing plant. C would need an extension of the *Fairchild* approach to causation, which had not been given outside the asbestos arena, and was very different from the case here. The courts were not the venue for formulating any further exceptions to the 'but for' test for causation (which was for Parliament).

The first instance Judge found that C faced a nigh on impossible task in establishing a causal link and were '*hoping something may turn up*'. Something should have turned up before proceedings were issued. C had no real prospect of succeeding. The Judge gave Summary Judgment to D which was said to be in compliance with the overriding objective of dealing with the cases justly and at proportionate cost, given their relatively low value.

C appealed. C submitted that the Judge had erred because she did not appreciate the nature of the causation case being advanced by C. Their primary position was there was at least a realistic possibility that causation could be established on the 'but for' test. C had made submissions that on a scenario where a C lived alone, travelled to work alone and had not gone out at all they could prove their sole exposure to the virus was at the workplace and could succeed on the 'but for' test. The Appeal Judge considered this was not a fanciful scenario.

The first instance Judge had fallen into the error of effectively conducting a 'mini trial' without the benefit of the evidence that would have been available had the case been allowed to proceed to trial. Her conclusion that the 'but for' test could not apply because of the pandemic could not properly be reached within the confines of an Application for Summary Judgment and she had, in substance, made herself the expert.

As regards the Judge's criticism of C's failure to adduce evidence on causation, this was not a clinical negligence case where medical evidence must be obtained and the issue pleaded at the outset. Nor was it a case involving multiple employers. It was more akin to a claim based on contracting norovirus where expert evidence as to causation would not be expected at an early stage. C's procedural approach to expert evidence was not inherently problematic and it was appropriate to await the outcome of disclosure before instructing the expert.

The Judge's criticism of C for not commissioning expert evidence before disclosure was also contradictory to her categorisation of the claims as of relatively low value. The costs of an expert were likely to be significant and it was plainly proportionate to proceed as C did.

Whilst C had not adduced evidence about their behaviour outside the factory, if witness statements on all issues were required to be adduced for the purposes of an application for summary judgment when they would not normally be required at this point, this would encourage the use of summary judgment to conduct the sort of mini trial the higher courts consistently deprecate.

Accordingly, the Judge had erred in concluding C had no real prospect of succeeding on their claims and C's appeal was allowed. Whilst C faced an uphill task, that was not the test.

CASE UPDATES

Highways - Powers and Duties - Public Rights of Way

Suffolk County Council v Lyall
[2025] EWHC 1032 (KB)

The Claimant suffered a slipping accident whilst she was walking along a footpath which was a public right of way that the Defendant Local Authority had a duty to maintain and repair. The footpath was largely unmade, but at points there were wooden bridges over ditches and lengths of wooden boardwalk over boggy stretches. The wooden boardwalk had been installed by the Local Authority in 2015, over an existing right of way. The Claimant's case was that she had slipped on "slimy green mildew" as well as mud and damp fallen leaves. The evidence was that the point at which the Claimant fell was a relatively dark and shady environment.

Following a fast-track trial, the Judge rejected the Claimant's claim under Section 41 of the Highways Act 1980, following the decision in R*ollinson v Dudley MBC [2015] EWHC 3330 (QB)* (authority for the proposition that there is no statutory duty to ensure highways are clear of moss, algae, lichen or similar vegetation).

In relation to the common law negligence claim, the Judge rejected the claim based on a failure to inspect, but upheld the claim on the Claimant's alternative argument on the need for the Local Authority to consider specifying anti-slip measures. The Claimant's claim was, therefore, successful and she was awarded damages.

The Defendant appealed. The three grounds of appeal were:

(1) The Judge failed properly to differentiate between public rights of way and highways maintainable at public expense, and in doing so failed to apply the correct test laid down in *Gautret v Egerton [1867] LR 2 CP 371* as upheld in *McGeown v Northern Ireland Housing Executive [1995] 1 AC 233*.

(2) The Judge effectively held the Local Authority to a higher standard of care in negligence than imposed under statute, whether under the Highways Act 1980 or the Occupiers' Liability Act 1957.

(3) The Judge failed properly to assess or consider the lack of foreseeability of an accident of this nature at this location.

CASE UPDATES

On appeal to the Court of Appeal, the second and third grounds were not pursued in oral argument. The issues for the Court of Appeal to determine, therefore, were:

- Whether the Local Authority was liable under Section 41 of the Highways Act 1980 for the condition of the boardwalk.
- Whether the Claimant's claim constituted a pure omission case which would absolve the Local Authority of liability.

Decision

The Judge's Judgment/reasoning was succinct.

It was held that the Trial Judge rightly rejected the claim under Section 41 of the Highways Act 1980. This was not a highway to which the Highways Act 1980 applied. There could be no duty of care in relation to an omission, i.e. to ensure that highways were clear of moss, algae, lichen or similar vegetation – *McGeown* followed. Had the Claimant slipped on wet mud or grass on an unmade-up footpath, it was clear that she would have had no claim.

However, the Claimant slipped on a stretch of wooden boardwalk which the Local Authority had chosen to install on or over an existing right of way. That made all the difference. The Judge, therefore, upheld the Claimant's alternative argument that the Local Authority had a duty to consider specifying anti-slip measures as part of the initial construction of the boardwalk. He noted that damp and shady conditions made it harder for boardwalk paths to dry out, took judicial notice of the fact that they were likely to encourage the growth of slippery moss and algae and found that the Local Authority had produced no evidence of any initial risk assessment or other reason why anti-slip measures had not been specified or installed from the outset.

On account of the foreseeable risk (which the Local Authority had both created and should have foreseen), consideration should have been given to the need to install anti-slip measures. It was acknowledged that while such conditions can complicate maintenance, the installation of preventative measures (e.g. strips to reduce slipperiness) could be achieved at a relatively low cost given the limited number of boardwalks within the Local Authority's area.

The Trial Judge did not refer to the acts/omissions distinction because it was not drawn to his attention at trial. However, had it been, it was held that he would inevitably have concluded that this was not a pure omissions case.

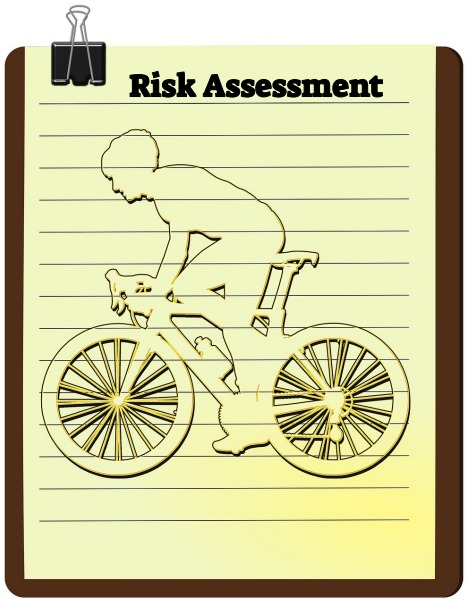
Appeal dismissed.

CASE UPDATES

Negligence - Volunteers - Standard of Care

Hetherington v Fell and Ferryhill Wheelers Cycling Club [2025] EWHC 1487 (KB)

The Claimant ('C') was a member of the Second Defendant ('D2'), a cycling club run by amateurs and volunteers. On 23.05.19, C was cycling eastwards along a dual carriageway in a time trial arranged by D2. The First Defendant ('D1') was driving along the dual carriageway in the opposite direction. D1 intended to turn right off the dual carriageway. He entered the slip lane off the fast lane which curved through a grassy central reservation. D1 did not stop at the give way line at the end of the slip lane. He drove at about 20mph across the two eastbound lanes, whereupon C cycled into the rear passenger side of D1's vehicle and sustained serious injuries. C sued D1 in negligence. D1 denied the claim and brought Part 20 proceedings against D2, alleging negligent risk assessment and failure to put out adequate signs and sufficient marshals. Before trial, D1's insurers admitted liability for C's accident. The issue before the Court was, therefore, the claim for contribution and/or indemnity by D1 against D2.



D2's time trials had run weekly for 10 years between May and August. D2 put signs and marshals on two roundabouts and a sign on the central reservation. D1 had driven past all the signs but said he did not see (or register) them. D1 alleged the sign on the central reservation was partially concealed by grass and inadequate, and should have been placed at the start of the slip lane. He was critical of a 2018 risk assessment which categorised the junction as low risk, particularly as there had been a previous similar accident there less than 2 years earlier. D1 alleged that, at the time of the accident, the sun was low and trees had produced shade over C who had been wearing dark clothing. D1 submitted that in light of the speed of C's bicycle and his reduced conspicuity, a proper risk assessment would have required clearer signs.

D2 defended the Part 20 claim, asserting that it consisted of volunteers carrying out desirable activities and that imposing a duty of care would discourage the organisers and those who took part. In any event, D2 denied that their risk assessment was inadequate and they had taken steps to mitigate the risk at the junction following the previous accident by putting up the sign on the central reservation.

CASE UPDATES

D2 was affiliated to the Cycling Time Trials Council (CTT), the national governing body for cycling time trials in England, Scotland and Wales, which provides rules, regulations and guidance. CTT is split into districts. The course had been approved by the CTT's district committee. The CTT district council consisted of volunteers. The 2018 risk assessment had been carried out by a CTT board member and was followed on the day. The risk assessment did not require a sign at the junction. The previous similar accident had been considered by CTT, but no changes made to the risk assessment. The driver involved in that accident had admitted careless driving and been prosecuted. However, D2 chose to place an additional sign on the junction because of the previous accident.

Whilst CTT's guidance on signage stated it should be placed 100 to 200 metres before any junction on a dual carriageway with this speed limit, D2 decided to place the sign at the junction instead where a driver would be slowing down to cross the carriageway and the sign would be directly in the driver's line of sight. An 'on the day' risk assessment was carried out and identified no changes required.

Following C's accident, CTT's district committee and D2 had decided to stop using the course because of the seriousness of the injuries suffered by C. They denied this was because they had decided the course was too dangerous.

The Judge was impressed by D2's witnesses, who he considered were clearly dedicated to the sport and trying their best to perform the responsibilities for which they volunteered to assist members of the public who wished to do cycle time trials in pursuing their passion.

On the evidence, the Judge found that D1 was clearly to blame for the impact because he failed to look properly or at all, failed to heed the warning signs and marshals and should have stopped at the give way lines. C was there to be seen and should have been seen.

D2 denied that it owed any duty of care in relation to the risk assessment process. The Judge noted that in this case he was concerned with a risk assessment aimed at potential risks caused by third party negligence on public roads, not directly caused by D2's acts or omissions. The Judge further noted that where no duty is established by case law, the three stage test is applied. Applying that test, the Judge concluded a duty of care was owed. Riders entrusted the choice of course, the time of the trial, the risk assessments and warning measures to D2, which created a relationship of close proximity. There was a foreseeable risk of harm from third party drivers who may be careless and thoughtless and are unaware of the time trial. It was fair, just and reasonable to recognise a duty of care on D2 when carrying out risk assessments in relation to the possibility of coming into contact with negligent third party drivers.

CASE UPDATES

In relation to the standard of care, the Judge took into account that D2 was not a business or employer. It did not have a profit making element from which to fund extensive surveys or experts to carry out risk assessments. All those involved had given their time for free, for the love of the sport and to help each other enjoy the sport. Bicycle riding on public roads is inherently dangerous, but people love it. Cycling is encouraged and good for health. If a standard of care in relation to risk assessments is set too high, people may be put off contributing for free or at all. Insurance premiums will rise. D2 and CTT were carrying out an activity for the benefit of the cycling members of society. The people involved were volunteers.

The Judge, therefore, considered that the Social Action, Responsibility and Heroism Act 2015 applied. Account also had to be taken of the Compensation Act 2006. '*This was a voluntary organisation carrying out tasks for free for the benefit of members of society and the standard of care placed upon them in law is not so high that it would discourage such beneficial voluntary activities*.'

The Judge held that D2 (and CTT) had a duty to take reasonable care (1) to identify the relevant, material hazards, and (2) to assess the level of risk posed by those, and (3) to identify the reasonable mitigation measures within their power to reduce the risk, and (4) to inform members of D2 of the assessment in a simple and clear manner so members would implement the control measures. In addition, D2 and CTT had a duty to review the risk assessments after significant events / changes in the course and at reasonable periods. The standard of care to be applied when exercising the duty of care during the risk assessment was that of a reasonably competent and reasonably informed volunteer.

On the facts and evidence in this case, the Judge concluded that D2 were not in breach of their duty of care. The risk assessment was reasonable. The occurrence of one previous accident caused by an admitted negligent driver over a 10 year history of the time trials did not justify a change in the risk assessment. The sun was not a risk that had to be controlled by the meagre control measures available to D2. The limit of the scope of D2's duty was to use reasonable efforts to bring the existence of the time trial to the notice of drivers. The measures in place were reasonable and sufficient. Whilst the sign at the junction was partially obscured by grass, it was big enough to serve its purpose and drivers would have known it meant a cycling event was being held.

The Judge further found that if he was wrong and D2 were in breach of duty because they should have placed a bigger sign, or a sign at the start of the slip road or a marshal at the junction, then any such breaches would not have been causative as D1 would not have taken any notice or seen them.

The Part 20 Claim against D2 was accordingly dismissed.

For further information on any of the above cases updates, please contact:

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