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Tort Liability of Children

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Abstract. The purpose of the study is to determine the compliance of tort law with the modern capabilities of children. The prevalence of cyber-crimes, the active involvement of children in the Internet space allow us to talk about the paradox of the imbalance between legal capacity (tortious capacity) and the actual access of children to commit legally significant actions. In such circumstances, the rules on compensation for harm at the expense of parents (legal representatives) in many cases no longer correspond to the general idea and meaning of tort liability. The ineffectiveness and injustice of the norms on the tort responsibility of children are expressed in the complete absence of the educational function of these norms for the children as tortfeasors. The impunity of the actions of adolescents from the point of view of civil law only leads to the further spread of child violence. A proposal to introduce a rule on joint tort liability of parents and close relatives with whom the child lived with the consent of the parents was sent to achieve the goals of restoring justice. The rule on the age from which it is possible to take into account the guilt of the victim will help to eliminate the inconsistency of judicial acts. The proposed legislative changes are a necessary stage in the formation of a legal system that meets the needs of changing reality.

Keywords: tort law, the liability of parents, children's rights, children as tortfeasors, children's tort liability, the digitalization.

Research area: law.

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Деликтная ответственность несовершеннолетних

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Аннотация. Целью исследования является определение соответствия деликтного права современным возможностям детей. Распространённость киберпреступлений, активная вовлеченность детей в интернет-пространство позволяют вести речь о парадоксе дисбаланса между юридической дееспособностью (деликтоспособностью) и фактическим доступом детей к совершению юридически значимых действий. В таких условиях правила о возмещении вреда за счёт родителей (законных представителей) во многих случаях уже не соответствуют общей идее и смыслу деликтной ответственности. Неэффективность и несправедливость норм о деликтной ответственности детей выражаются в полном отсутствии воспитательной функции данных норм для самих детей-деликвентов. Безнаказанность действий подростков с точки зрения гражданского права влечёт лишь дальнейшее распространение детского насилия. Достижению целей восстановления справедливости направлено предложение о введении правила о солидарной деликтной ответственности родителей и близких родственников, у которых проживал ребёнок с согласия родителей. Устранению противоречивости судебных актов будет способствовать правило о возрасте, с которого возможен учёт вины потерпевшего. Предлагаемые изменения законодательства являются необходимым этапом формирования системы права, отвечающей запросам меняющейся действительности.

Ключевые слова: деликтное право, ответственность родителей, права детей, дети как причинители вреда, ответственность детей за правонарушения, цифровизация.

Научная специальность: 5.1.3. – частно-правовые (цивилистические) науки.

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The norms on the tort liability of children are reflected in Articles 1073–1075 of the Civil Code of the Russian Federation No. 14-FZ of January 26, 1996 (part two). According to them, minors under the age of 14 are unable to bear responsibility. Their parents (adoptive parents) or guardians are responsible for the harm caused by them, unless they can prove that the harm was not their fault. Minors aged from fourteen to eighteen years independently bear tort liability. But in the absence of income or property, the legal regime of compensation is similar to cases of harm to minors under the age of fourteen. Special rules for the tort liability of minors were established taking into account international, constitutional, branch acts, which contain norms on special protection and care for children, on guarantees of their healthy development, and on the protection of their property rights[1].

[1] Preamble, Article 5 of the Convention on the Rights of the Child (approved by the UN General Assembly on 20.11.1989) (entered into force for the USSR on 15.09.1990);
Article 2, 17 of the Constitution of the Russian Federation (adopted by popular vote on 12.12.1993 with amendments approved during the all-Russian vote on 01.07.2020);
Articles 56, 60 of the Family Code of the Russian Federation of 29.12.1995 N 223-FZ (as amended on 02.07.2021);
Federal Law No. 124-FZ of 24.07.1998" On Basic Guarantees of the Rights of the Child in the Russian Federation".

However, the universal digitalization, which has led to a rapid expansion of the ability of children to independently carry out actions in the Internet space, raises the question of the relationship between such opportunities and legal mechanisms for influencing the behavior of violators. This issue primarily concerns the adequacy of the legal structure of the tort liability of minors. Since tort liability performs not only a compensatory, but also an educational function.

There is a controversy in the legal literature regarding the correctness of the dominant approach not only in Russia, but also in foreign countries, according to which in most cases parents (other legal representatives) are liability for the child's tort responsibility[2]. For example, A. M. Rabets defends the independence of the responsibility of parents in torts involving children (Rabets, 2017: 244). E. V. Ruzanova identifies a complex causal relationship between the lack of proper upbringing and the harm caused by minors (Ruzanova, 2018). A. V. Milokhova insists on changing the current mechanism, in which it is necessary to establish the guilt of parents. She believes that the harm should always be compensated, and the law should establish clear criteria for exempting parents from the obligation of compensation (Milokhova, 2010). D. E. Bogdanov (Bogdanov, 2012: 71), Nuno Ferreira (Ferreira, 2008) in their works, they associate the effect of the principle of justice and the educational function with the rules we are considering.

Discussions on the chosen topic are also caused by controversial court decisions, in which in some cases, compensation for harm is imposed on parents without clarifying the grounds for the offense[3], in others, the court establishes the guilt of the tortfeasor, the behavior of the victim who has not reached the age of 14[4]. Both options are theoretically erroneous, since according to the current legislation, there must be four grounds for imposing liability: illegality of acts, harm, causation and guilt. The latter reason is usually established in relation to parents whose actions (aimed at raising a child) caused the illegal behavior of the tortfeasor.

Therefore, the topic we have chosen is relevant. It requires its further development, taking into account the changed conditions of public life, which allow minors to independently, often in secret from their parents, implement their actions on the Internet.

About the income and property of minor tortfeasors

The age groups in force in Russia are quite different from the concept of adulthood in pre-revolutionary Russian law. In modern private law, minors from 14 to 18 years of age are considered as delinquent subjects. According to the norms of the Code of Civil Laws of the Russian Empire, the following categories of minors were distinguished: from 0 to 14 years, from 14 to 17 years and

[2] For example, the parent or legal guardian of a child under the age of fourteen is liable for damage caused to a third person by the act of this child, provided that this act could be considered illegal if his age did not prevent it. A person exercising parental responsibility or legal custody of a child who has reached the age of fourteen, but has not yet reached the age of sixteen, is liable for damage caused to a third person through the fault of this child, unless he can be accused of not preventing the behavior of this child (Article 6: 169 Dutch Civil Code) See.: Dutch Civil Code. Book 6 The law of obligations. Title 6.3 Tort (unlawful acts). Available at: http://www.dutchcivillaw.com/civilcodebook066.htm

[3] For example, the court did not find out why exactly a minor at the age of 12 lived with his grandmother, and not with his parents who are divorced. At the time of the fire, which caused the destruction of the premises, the parents of the minor culprit of the fire were not restricted or deprived of parental rights. No clarifying data characterizing the performance of their parental duties is provided in the court decision. See: The decision of the Oktyabrsky District Court of Arkhangelsk No. 2–2010/2020 2–2010/2020~M-1449/2020 M-1449/2020 from July 30, 2020. Case No. 2–2010 / 2020 on the claim of the Administration of the MO "City of Arkhangelsk" to N. B. Prygunova. Available at: https://sudact.ru/regular/doc/cypjQ8pcsOrC/

[4] For example, the court on the claim of the parents of a minor who suffered serious harm to his health took into account that in the actions of a minor delinquent "there is guilt in the form of negligence, since the injury of a minor T. was obtained as a result of a child's play, any intent of a minor K. there was no reason to harm his health." The court also took into account the behavior of the minor victim, "who did not take security measures and did not move to a safe distance at the moment when the children were throwing bricks from the roof" See: Decision No. 2–90/2017 2–90/2017~M-73/2017 M-73/2017 of May 18, 2017 in case No. 2–90 / 2017 Available at: https://sudact.ru/regular/doc/5slhrxqzWfUw/

from 17 to 21 years. Persons under the age of 17 were often referred to as minors in the norms and law enforcement acts (Isachenko, 1914). According to Articles 653, Article 686 of the Code of Civil Laws of the Russian Empire, compensation for harm caused by minors occurred at the expense of their parents or persons obliged to exercise supervision if they did not take appropriate measures to prevent tort[5]. Otherwise the damages were recovered from the property belonging to the minor. A number of authors believe that these rules were illogical because there was no age limit up to which children could not be held liable in tort (Bespalov, 2011). In the draft Civil Code (Articles 2607–2609), attempts were made to correct this gap[6]. The draft provisions established that minors who had not reached the age of ten or under the age of seventeen, but did not realize the harmfulness of their act, were not responsible for the harm they caused. Parents and persons obliged to supervise minors were responsible for the actions of children if they could not prove that they had no opportunity to prevent the act that caused harm. However, despite some specification of the age and state of awareness of the harm-doer, the rule that compensation for harm can occur at the expense of the harm-doer himself in some cases has been preserved.

It should be noted that children under the age of 14, as in the pre-revolutionary period of the development of law, can acquire property as a result of donation, during the commission of small household transactions and transactions on the disposal of funds provided by a legal representative (Article 28 of the Civil Code of the Russian Federation (Part one) of 30.11.1994 No. 51-FZ). They can earn money, in particular, by participating in the organization and performance of cinematographic, theatrical, circus works (Article 63 of the Labor Code of the Russian Federation No. 197-FZ of 30.12.2001 (ed. of 28.06.2021). Consequently, minors can have both their own income and their own property.

According to polls conducted by the All-Russian Center for Public Opinion Research – 83 % of Russians support teenagers who have decided to get their first job experience before the age of 18[7]. Most of the respondents started working themselves in adolescence. This means that minors are much more likely than one can imagine having their own funds and property, with which it would be possible to cover at least part of the damage to the victim.

More than a hundred years ago, the Russian legislator understood that if a minor has his own property, it is possible to satisfy claims at the expense of this property, why is it impossible to prescribe this in the current law? Nuno Ferreira notes in his work that all legislators need to pay special attention to the rights of children (Ferreira, 2011). This is paramount. We must respect the fundamental rights of children. Therefore, the possible compensation of damage by the child who causes harm can create his personal debt at a very young age and cause a "crushing" blow to the development of the child's potential, his personal, professional plans. If we allow compensation for harm at the expense of the property or income of the child who causes harm, then this can ruin his life for acts committed in childhood (Ferreira, 2011: 589). In this context, it seems that our proposal does not correspond to current trends related to the protection of children's rights. However, for some reason, the arguments of this author do not reflect the need to protect the victims of child tortfeasors. After all, another healthy child can become their victim. He also had personal and professional plans that he might never be able to implement. For example, when the tortfeasor is a child, he threw bricks from the roof of a high residential building at children who were on the playground in front of this building. Having got into the head of one of them, he caused serious harm to health and, of course, suffering and deprivation as-

[5] Code of Laws of the Russian Empire. Volume X. Available at: http://www.consultant.ru/edu/student/download_books/book/svod_zakonov_rossijskoj_imperii_tom_x/

[6] Draft Civil Code of the Russian Empire, 1905 St. Petersburg. Available at: https://constitutions.ru/?p=4930

[7] Rabota dlya podrostkov: za i protiv. [Work for teenagers: pros and cons]. June 17, 2019. Available at: https://wciom.ru/analytical-reviews/analiticheskii-obzor/rabota-dlya-podrostkov-za-i-protiv

sociated with further long-term treatment and health consequences[8]. Why should we care about the happiness of one child and ignore the other? Why are we able to regret what we did in childhood and not show sympathy for a victim deprived of health. After all, according to modern legislation, the maintenance of a child is the responsibility of the parents. This obligation is unconditional and is not even associated with the presence or absence of a parent's permanent and sufficient income. Therefore, the imposition of a penalty on the property of a minor is not capable of leading to its ruin.

Scientific papers state that questions about the age of minors in determining the possibility of compensation for harm should be inferior to the criteria of individual development of a minor. Thus, S. V. Markosyan proposes to formulate a rule according to which the court will have the right to impose the obligation to compensate for harm on parents (other representatives), taking into account the degree of mental development of a minor tortfeasor (Markosyan, 2010). This proposal essentially brings us back to the rules on the tort liability of minors in pre-revolutionary legislation and the draft Civil Code, which indicated a state of awareness, "understanding" of minors, which entailed the possibility of compensation for harm at the expense of the causer (Article 653 of the Code of Civil Laws of the Russian Empire; Article 2607 of the draft Civil Code). We believe that the transition to evaluation categories in the tort under consideration is capable of generating ambiguous court decisions. The establishment of the mental development of each minor tortfeasor cannot occur only on the basis of a survey by a psychologist or a representative of the guardianship authorities.

A fair assessment of the minor's condition will require an appropriate commission examination. The procedural costs caused by this approach will only create conditions for formalism and the imposition of the obligation of compensation for harm on parents in all cases. Or they will create conditions for social tension, when children from disadvantaged families will always be released from responsibility due to their lack of positive experience and mental immaturity, and children from prosperous families will be brought to tort responsibility due to their responsible attitude to school and positive characteristics from others.

Of course, the issues of the possibility of including the property and income of a minor in the compensation for harm require further reflection and are possible only taking into account the inadmissibility of shifting responsibility for improper upbringing and behavior of parents to children. However, situations in which a child under the age of 14 commits offenses and causes harm by burdening his conscientious parents (other legal representatives) with payments for damages are unacceptable. After all, as will be demonstrated further on judicial examples, not in all cases the behavior of a delinquent is the result of improper performance of their parental duties.

The educational function of the tort responsibility of minors

Consideration of the question of the educational function of tort liability, we believe, should begin with a quote from Samoy, I., Borucki, C. and Keirse, A.: "First of all, tort law concerns the search for those cases when damage should be compensated. The law no longer focuses exclusively on personal freedom, but also deals with the broader interests of society (Samoy, 2019). These broader interests of society also affect one of the main functions or goals of tort liability – educational. The law is developing along the path of simultaneous promotion and development of special measures that allow … to have an educational impact on the causer of harm (Kornev, 2006). Through what mechanisms is it possible to influence a minor? It is obvious that in the absence of compensation for damage at the expense of the property of a minor – no. Therefore, the educational function of tort law at the present stage does not manifest itself at all if we are talking about children who already have the ability to perform legally significant actions on the Internet, but are freed by law from the burden of imposing tort liability

[8] Kashinsky City Court of the Tver region. Solution # 2–90/2017 2–90/2017~M-73/2017 M-73/2017 from May 18, 2017 on the case № 2–90/2017 Available at: https://sudact.ru/regular/doc/5slhrxqzWfUw/

on them until the age of 14. We believe that this does not correspond to modern realities and requires revision.

The digitalization of public life requires a revision of the attitude to the child as a delinquent. The Internet space expands the autonomy and independence of children, giving them an almost limitless opportunity to communicate, receive and transmit information, often without parental control. "Early Internet maturation" comes into dissonance with the legal capacity of minors. This is the main paradox that makes scientists and practitioners around the world sound the alarm. A certain conscious formation of the child as a person inexorably gives him a large amount of abilities from year to year. Moreover, a minor at the age of 12 undoubtedly has a completely different awareness of his actions in the world around him than a child at 3 years old. There is an obvious gap in those cases when, for example, a person of 13 years commits a crime (fraud using the Internet), causes significant harm, but, having his own earnings or property, for some reason is not able to pay the expenses of the victim of the crime.

The question arises: if access to participation in the digital space is expanding, and control by parents becomes almost impossible, how can we talk about the lack of responsibility of a minor? It is impossible to exclude a minor from the Internet space in modern conditions. The establishment of "parental control" systems is also not always effective, since children communicate with each other and find ways to bypass them or access the network on other gadgets.

The question of the educational function also touches on the problem of the victim's behavior. If the actions of the delinquent were caused by a long-term (systemic) negative psychological impact (for example, through social networks) that humiliates the human dignity of the child, entailing negative consequences for his health, causing harm is a retaliatory action aimed at stopping such impact. The paradox is that it is difficult to apply the rules on necessary defense or extreme necessity (when another child is being protected) in judicial practice to minors. The reason for this lies in the fact that in the articles that exempt from tort liability or significantly reduce its size (Articles 1066, 1067, 1083 of the Civil Code of the Russian Federation No. 14-FZ of January 26, 1996 (part two) there are no reservations about the minor status of the victim or the causer of harm. In civil law, there is a significant gap in this part, discrediting tort law in general. Bullying (Cyber-Mobbing) as an aggressive harassment of one of the schoolchildren is committed in many cases by a group of individuals and has sophisticated forms and extremely serious consequences. The victim of such harassment is not always able to tell parents, teachers or police officers about it. In such conditions, the victim of persecution becomes the causer of harm when defending his rights.

Here is an example that is quite common for modern society. Unable to withstand the mental pressure, the victim entered into an open fight during which she turned into a causer of harm to the health of the offender. After that, the parent of the harmer, who alone brings up four children, tried repeatedly to settle the conflict peacefully. Both the victim and the causer received bodily injuries, but the parent of the causer did not apply to law enforcement agencies with a statement. The parents of the victim appealed to law enforcement agencies and to the court. Is there any fault of minors here? Apparently, in such an example, the question should be posed differently: "Does private law allow us to compensate for harm for actions aimed at self-defense in the ways that the victim had at his disposal? »[9].

The Resolution of the Plenum of the Supreme Court of the Russian Federation states that if the court establishes the facts of illegal or immoral behavior of the victim, which was the reason for the crime, then these circumstances are taken into account when determining the amount of compensation for moral damage. However, the age of the victim is not indicated anywhere. Is it possible to take into account the guilt of the injured minor? Despite the theoretical provisions regarding the lack of

[9] See: Decision of the Saki District Court of the Republic of Crimea No. –1567/2020 2–1567/2020~M-1120/2020 M-1120/2020 of July 30, 2020 in case No. 2–1567 / 2020 Available at: https://sudact.ru/regular/doc/q3upQqAe9QZ/

delinquency in a child at a young age, there is still no unambiguous answer in the literature. Back in the early 1960s, N. S. Malein wrote that the rules for taking into account the guilt of the victim also apply to a minor (Malein, 1962). Such accounting implies a reduction in the amount of damage that will be recovered from the violator or even an exemption from liability. The causer will be obliged to partially compensate for the damage; the other non-compensated part of the damage will fall on the victim himself, since he is guilty of causing the damage. However, full exemption from tort liability in cases of harm to health or life is impossible (paragraph 2 of Article 1083 of the Civil Code of the Russian Federation No. 14-FZ of January 26, 1996 (part two). However, there are still no explanations in the legislation regarding the age of the causer at which it is possible to talk about such a decrease. The ability to correctly, intelligently assess the meaning of the perfect, the ability to be aware of their actions or guide their actions does not come from the moment of birth. Moreover, if, in relation to the causer of harm, there are at least age criteria in the laws and the features of tort liability are specified, then there are no such criteria in relation to the victim. Therefore, in some court decisions, we can trace the clarification of the guilt and behavior of the victim – a minor, and in others – not. It can be assumed that the courts are deliberately trying to silence the question of the possibility of reasoning about the guilt of the victim. After all, the dominant approach in the legal literature is that if the victim has not reached the age of 14 (minor), his behavior has no legal significance.

The question of the educational impact on the delinquent is directly related to the previous question about age. It is logical to assume that we recognize the possibility of a person understanding his actions from a certain age, then we also recognize the possibility of realizing the consequences of what he has done, realizing the loss of his property or a decrease in income as a fair equivalent compensation. Foreign researchers claim that from the point of view of psychology, minors under 10 years old cannot bear tort responsibility (Jansen, 2017). Starting from this age, children are able to comprehend their actions and evaluate them, to exercise due diligence. That is why laws in different countries formulate a "refutable presumption" about the impossibility of tort liability of children from seven to fourteen years old.

On the issue of the fault of parents (legal representatives)

As mentioned earlier, one of the mandatory grounds of tort liability is guilt. The law does not recognize minors as fully capable subjects. Therefore, the articles on the tort responsibility of minors deal with the fault of parents (legal representatives). The fault is multidimensional. The Russian judicial practice is dominated by the approach according to which guilt means exclusively the mental attitude of the violator to his actions[10].

In tort law, there is a presumption of guilt of the causer and the main task of the victim is to file a lawsuit in which to prove the fact of illegal actions, harm and causal connection between them. The causer must prove the absence of guilt. This approach is similar to the French tort law, which proclaims the presumption of guilt of parents and tort liability is a consequence of a violation of the duty of upbringing, supervision and care of the child (Pauw, 1978: 307). Pieter Pauw notes that the responsibility is based on the offense committed by the parent in that they did not show due care when watching the child. If the child has other relatives in the ascending line – they actually have the opportunity to have no less, or even more influence on the formation of personality. Therefore, we do not agree with those court decisions that trace the automatic imposition of tort liability only on parents in cases where there was an obvious influence of other relatives on the behavior of the child.

[10] It should be recognized that at present there are more and more scientific works orienting the reader to the concept of guilt peculiar to common law countries, which consists in assessing the degree of "reasonableness" of the behavior of the delinquent and the victim, their actions from the point of view of the behavior of an "ordinary, prudent" person. See: in more detail, Zaitseva N. V. Methods of determining reasonableness in tort legal relations on the example of common law countries. Bulletin of the Saratov State Law Academy. 2020. No. 5 (136). pp. 170–178.

For example, in the case where the decision described the circumstances of the fire, it was noted that the children lived with their grandmother, who periodically smoked[11]. This is not an isolated case. Staying with relatives is a natural practice and it should not remove responsibility from those persons to whom parents have entrusted their child (Kulikov, 2021). According to the results of the investigation, the grandmother's guilt in the occurrence of an uncontrolled fire has not been established. Here, compensation for damage occurred on the principle of causing, since there is no data in the case materials indicating the parents ' fault in not fulfilling their duties. Permanent residence with a smoking grandmother could not but affect the child's consciousness. The court did not clarify the reasons for the separation of parents with children. It is quite possible that the reasons were valid. And the transfer of children to temporary residence with a close relative was objectively the best option for children. In such cases, it would be necessary to establish the joint responsibility of parents and persons directly influencing the formation of personality. In this regard, the legislation should take into account that the residence of children or the presence of children with close relatives with the permission of parents should be regarded by the courts as the exercise of supervision over them. It is possible to establish joint and several liability in cases where there is a fault in the upbringing of parents and supervision of other close relatives.

Education should not remain the exclusive prerogative of the parent. Not every single family with children is an isolated group. Moreover, the state should create conditions for a safe life, primarily for children. They act out of age and are more aware of what is happening around them. It is impossible to protect them from the digital space. Modern models of forming adequate communication for their child imply the active involvement in the process of monitoring such communication not only of parents, but also of close relatives, teachers, and the state, which should provide safe and high quality content and, accordingly, fair tort laws.

Conclusion

Modern tort law needs to be improved, taking into account the peculiarities associated with the digitalization of public life and, in fact, obtaining unlimited freedom of action for minors.

The issue of preventing violations committed by minors is complex. It should be resolved both with the help of information legislation aimed at eliminating illegal content, blocking information harmful to children's health in the Internet space, and with the help of insurance and family legislation. However, the purpose of this study was to determine the compliance of the legal regulation of the institution of tort liability of minors with modern conditions. And within the framework of this institution, we believe it is necessary to solve the problem of accounting for the behavior of the victim – a minor. The legislation does not specify-from what age it is possible to take into account the behavior (guilt) of the victim. This gap creates problems in practice that were already known to Soviet civil law. The contradiction of court decisions destabilizes the law enforcement process and negatively affects the authority of tort, therefore, civil law as a whole, pursuing just ideals and the idea of full compensation for harm. Therefore, in art. 1083 of the Civil Code of the Russian Federation No. 14-FZ of January 26, 1996 (part two), it is necessary to prescribe the age from which it is possible to take into account the guilt of the victim.

In cases where children live or regularly stay with close relatives with the permission of their parents, it seems inappropriate to assign responsibility to the parents, since close relatives also directly influence the behavior of the child, as well as his parents. The joint responsibility of parents and persons directly influencing the formation of personality should be established, and the residence of children with close relatives with the permission of parents should be regarded by the courts as the exercise of supervision over them.

[11] See: The decision of the Oktyabrsky District Court of Arkhangelsk No. 2–2010/2020 2–2010/2020~M-1449/2020 M-1449/2020 from July 30, 2020. Case No. 2–2010 / 2020 on the claim of the Administration of the MO "City of Arkhangelsk" to N. B. Prygunova. Available at: https://sudact.ru/regular/doc/cypjQ8pcsOrC/

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