HUMAN RIGHTS AND REPRODUCTION: WRONGFUL SURROGACY CLAIM[1]

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Abstract

In cases of *wrongful surrogacy*, there is a mix-up of gametes or embryos intended for one woman, which are transferred to another as part of a assisted reproductive tecnhologies (ART). Nowadays, as one might expect, the possibility of medical negligence in the field of ART is a real one, and it is in this context that we place our focus, there are situations in which the gametes or embryos used belong to people who wanted them to be used to produce their own offspring, but they end up being implanted in the uterus of a woman who has no intention of carrying a child for someone else or of bearing someone else's children. Despite the contractual relationships and what they encompass — or what is not included in them — or even if included, the balance of rights and obligations of each party outweighs the terms that any contract might establish. *Ultimately*, the decision must always be to safeguard the integrity of human creation, even if dispersed amongst several people, and parental identity which, in many cases, as noted, cannot be confined to the page of paper that the parties have signed.

Keywords

Human Rights; Reproduction; Motherhood; Parenthood; Medical Responsibility.

Summary

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1.INTRODUCTION

The era of biotechnology and predictive diagnostics for genetic diseases has paved the way for new forms of medical civil liability. So-called *wrongful actions* are medical liability claims for breach of *the legis artis medicinae.*

In this regard, *wrongful birth and wrongful life claims* are well-known[3, 4] . In the former, the claim is based on the absence of genetic diagnostic tests or foetal ultrasound scans and on the failure to provide information[5] to the mother regarding possible congenital conditions of which the foetus may be a carrier. Thus, the mother loses the opportunity to lawfully terminate the pregnancy, since, because of that omission, she was unable to form her will correctly — that is, her consent is therefore not informed.

In this field too, one may question the emergence of *'wrongful genetic makeup*':

'[...] in this context, the question will arise as to whether the parents or the child themselves may be compensated if the former have been prevented from resorting to available germline gene-editing

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[3] The term *'wrongful life'* first appeared in a decision by the US court in the State of Illinois, in the case of Zepeda v. Zepeda, although it was not directly related to this issue. It has become a common term for this type of claim, as opposed to *wrongful death claims*.

[4] See, in particular, the Supreme Court of Justice (STJ) judgments in Portugal of 19 June 2001 and 17 January 2013.

[5] Whether due to a failure to carry out the tests required by the *legis artis*, a misinterpretation of the results of the tests carried out, or a failure to disclose information or the disclosure of incorrect information regarding the results of those tests.

techniques to ensure that their offspring are born healthy (particularly in those cases where the transmission of the disease to descendants is not a mere probability, but rather a certainty...), or, having resorted to them, due to some (bio)medical failure (namely, medical malpractice in the performance of the procedure), the child ends up being born with the very genetic diseases or malformations that were intended to be avoided." (Figueiredo, 2020, pp. 20–21)

In this context, Vera Lúcia Raposo, drawing on Savulescu's concept of *'Procreative Beneficence'*, alludes to the idea of 'private eugenics':

'[...] it aims not only to satisfy parents' desire for the "ideal child", but also — and indeed above all, at least from the perspective of reproductive duties — to prevent diseases and malformations likely to cause intense physical and emotional suffering to the children who will be born and, ultimately, to future generations. Consequently, this is not a matter of 'racial purification' or of exacerbating discrimination between sick and healthy people, but of preventing illness and pain, based on a premise so simple that it has been overlooked: being healthy is better than being sick." (Raposo, 2019, p. 479)

In the case of *wrongful life claims*, compensation is sought by the child themselves against the doctors for having been born with a condition that causes them harm[6] .

This is an action brought by '*[…] disabled children against the people, especially doctors, for being born. Courts around the world are*

[6] In February 2016, the Portuguese Constitutional Court ruled that these actions were constitutionally admissible (Judgment No. 55/2016 published in the Portuguese Diário da República, 2nd series, No. 51, of 14 March 2016).

reluctant to acknowledge such claims due to the ethical and legal implications they have» (Evgenia, 2012, p. 107) . In these cases, negative reactions arise immediately due to the claim for compensation associated with *'life damage'.* In this argument, as Carneiro da Frada notes, 'damage to life' (Frada, 2008) forms the cornerstone of so-called 'wrongful life' actions, where life is viewed as damage liable to compensation for the violation of the right not to be born [7] . As is evident from the case of McKay v. Essex Area Health

[7] It was in this context that the reasoning behind *the Perruche judgment* was developed [L'Arrêt Perruche, Cour de Cassation, Assemblée plénière, 17 November 2000, 99-13. 701, published in the bulletin, available at www.legifrance.gouv.fr (accessed 26 May 2016)]. The decision has been the subject of various studies, for example, VICENTE 2009, 117–141. In summary, on 14 January 1983, Nicolas Perruche was born in France. He was born with severe physical and neurological problems resulting from *in utero* exposure to the rubella virus contracted by his mother, known as *Gregg's* syndrome, which was not detected by the medical professionals who monitored her during pregnancy, as the current state of medical science would have permitted, given the existing and standardised prenatal diagnostic methods. Legal proceedings were brought against the doctors and the laboratory that carried out the tests by Nicolas's parents and by those acting on behalf of their son, combining claims for compensation from the parents — for breach of duty by the healthcare professionals, which led the parents to carry the pregnancy to term in the expectation of the birth of a healthy child — and by the child, for the suffering caused by the conditions from which he suffers and for the additional expenses incurred by his disability. Although medical and laboratory error in the diagnosis of the tests carried out on the mother was demonstrated, and her *wrongful birth claim* was upheld, the fact remains that the claim that Nicolas himself was entitled to compensation was successively denied. It was in the year 2000 when, on 17 November, the French Supreme Court, contrary to the lower courts, ultimately granted Nicolas Perruche himself the right to compensation for

Authority and Another (Caulfield, 2001, p. 144) , and which has been used as an argument, admitting these actions would be a disregard for impaired life, that is, that a child with a medical condition is less valuable than a healthy child, which would irreparably call into question the dignity of the former given the stratification.

In turn, in *cases* of *wrongful conceptions*[8] , we may have several scenarios:

'[I]n the first, conception has taken place and, subsequently, the birth of a child who is both physically and psychologically healthy, resulting from the failure of a contraceptive method applied directly by the parents, without the intervention of any medical professional. But this also includes situations where sterilisation has been performed by a doctor to prevent conception, and yet, despite the procedures adopted, conception occurs nonetheless. The error lies in the negligent result of a surgical sterilisation procedure, which has failed to achieve its intended objective." (Miranda, Barrena, & Vega, 2015, p. 19)

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the suffering he endures as a result of his disability and the additional costs it entails. The decision sparked a heated debate on the subject within French society, which even led to legal changes, given its impact, giving rise to the so-called *'anti-Perruche'* law. In the guise of a legal statute, the Perruche case law was effectively overturned, and the very scope of parents' right to compensation in *wrongful birth claims* was restricted, limiting it almost exclusively to non-pecuniary damages, whilst referring the additional costs resulting from the child's disability to social security. V. (ALMEIDA ARAÚJO 2016).

8 Or *wrongful pregnancies*.

In this context, the question that may arise is whether there is actual harm, given that what is at issue is the birth of a child — a healthy one, specifically — and whether that existence can be regarded as harm.

The truth is that, for the most part, these claims are upheld on the grounds that '*[…] the cause of action is that a person has attempted to avoid pregnancy itself. The injury alleged in the claim is the pregnancy itself, and that the physician's negligence is the cause of that* pregnancy' (Sullivan, 2000, p. 111) .

2. CASES OF WRONGFUL SURROGACY – BACKGROUND

A case of *wrongful surrogacy* arose in 1998 in the US when Vincent Fasano and Akeil Richard Rogers were born.

The first child is white and the second black, but they were twins. The fertility clinic where Deborah Perry Rogers and Robert Rogers, as well as the Fasanos, were undergoing fertility treatment made a mistake in handling the embryos and transferred one of their embryos to Mrs Fasano [Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (2000)].

The case was revealed by the clinic, leading to legal proceedings in which the Rogers sought to be granted custody of their son[9] and to terminate the agreed visiting rights, as well as to amend the child's birth certificate. The Fasanos were genetically unrelated to the child,

[9] The couples had previously signed an agreement whereby the child would be handed over to the Rogers, but the Fasanos were guaranteed visiting rights.

the wife being the surrogate mother, and who*, in the end,* also acknowledged herself as *merely* the surrogate.

In 2003, also in the US, in the case of Robert B. v. Susan B., 109 Cal. App. 4th 1109 (2003), a problem also arose concerning the mistaken implantation of a couple's embryos into another person.
In this case, Robert and Denise went to a fertility clinic to arrange for the fertilisation of an egg from an anonymous donor with Robert's sperm, which did take place, but three of these eggs were ultimately transferred to Susan, a woman who had engaged the same clinic to have fertilised eggs from anonymous donors implanted in her. Susan gave birth to Daniel, and Denise gave birth to Madeline in 2001, both of whom had Robert as their biological father. The case went to court, which ruled that Robert was the father of both children and, in Susan's case, that she was the mother, despite not being the biological mother. Denise invoked the Calvert and Buzzanca cases to have her status as a mother recognised by applying the criterion of intention, which was denied, because, in this case, unlike in those cases, on the one hand, Denise had no genetic link to the child, but Susan had the gestational link, so it was not possible to resort to the tie-breaker, that is, intention. Furthermore, although in the Buzzanca case only the criterion of intention applied, neither the surrogate mother nor the donor invoked this link to establish maternity. Nor did Susan wish for Robert to be considered the child's father, as this would imply a change in her right to have a single-parent family, and paternal filiation would jeopardise the integrity of her family. The court held that, unlike in cases of sperm donation, Robert had not consented to his biological material being used for that purpose, but rather to

produce a child of his own, and therefore has the right to be recognised as the child's father.

Back in 2009, also in the US, the Savage case was decided — *'In February 2009, Sean and Carolyn Savage received amazing news: through in vitro fertilisation, they were pregnant with their fourth child. In a devastating turn of events, they also discovered that the child Carolyn was carrying was not biologically* theirs' (Vangessel, 2015, p. 681).

From another perspective, but specifically considering a case of surrogacy, the Malahoff v. Striver case reveals a surrogacy agreement that ultimately did not come to fruition.

In this case of traditional surrogacy, Malahoff hired a married surrogate mother to bear a child, for which he paid $ 8,500. The woman was inseminated and became pregnant, and the child was born with microcephaly[10] .

The *intended father* did not want the child to be treated, which was refused, and a court order ensured that care was provided. The man refused to pay the surrogate mother or to take the child, and contested paternity. However, blood tests showed that the child was in fact the daughter of the surrogate mother's husband. Furthermore, it was established that the cause of the child's condition was a virus present in *the intended father's* semen.

The Strivers now sought compensation and brought a claim against Malahoff, as well as the other parties involved in the proceedings,

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[10] The child suffered from deafness, mental disability and neuromuscular problems.

including the doctors, lawyers and intermediary, seeking compensation for themselves and for the child. The court dismissed the claim and drew attention to the fact that the child is the responsibility of the parents (Deharo & Madanamoothoo, 2020, pp. 362–364) .

The parents' reproductive freedom was exercised, and the associated risk—including that which ultimately materialised in this specific case—is inherent in the reproductive process, which entails accepting the consequences of a fallible process . Such a position recognises the child's dignity and the life that deserves protection (Soniewicka, 2019, p. 84) .

In another case of surrogacy that took place in 2005, a Canadian couple travelled to India to hire a surrogate mother.

The intention was to use the husband's sperm and an egg from an anonymous donor, which took place, resulting in the birth of twins a year later. When the couple approached the Canadian High Commission in New Delhi to apply for citizenship for their children, DNA tests revealed that the girl was the beneficiary's daughter, but the boy was not. Citizenship was not granted to the son, and the family remained in India for five years, until 2011, when a Canadian identity card was issued for the daughter and authorisation was granted for the son to travel. In Canada, the parents applied through the courts for their son to be granted citizenship on humanitarian grounds (Darling, 2017, p. 195).

In such cases, what occurs is an error resulting in one person's gametes or embryos being used for another. Who should be the child's parents[11] ?

3. CONTRIBUTION TOWARDS A SOLUTION

In fact, asexual reproduction involves a series of medical procedures that entail the manipulation of biological material and the transfer of fertilised eggs to the woman's uterus.

The possibility of medical error also arises at this stage — ranging from incorrect handling of gametes and/or embryos, which may lead to their destruction, to the use of sperm, eggs or embryos that have been mixed up and are used on the wrong recipients.

Not only do the *legitimate* recipients lose the biological material and embryos, but this may also give rise to potential disputes over the child's parentage. The illustrative selection of cases we have chosen can be grouped as follows:

a) Cases in which the *intended parents* enter into a surrogacy contract, but the gametes used do not correspond to those that should have been used, leading to children being born without a genetic link to at least one of the intended parents, or;

[11] This may also include situations where a gamete bank is used. However, the gametes selected were not the ones used; instead, others were used. In this case, the child will not have the characteristics that were chosen, due to an error in the selection of gametes or embryos.

b) Cases in which the gametes or embryos of one person are used in another, resulting in the woman giving birth to children who are genetically related to another person or persons who had no intention of being gamete donors, but rather of procreating, whilst the surrogate mother also had no intention of actually being a surrogate, but rather of having children of her own.

In this regard, the Ethics Committee of the American Society for Reproductive Medicine considers that best practice is that which ensures there are rigorous procedures to prevent errors; furthermore, in addition to the principle of informed consent, the need to disclose errors made is recognised as an ethical principle by the American Medical Association, the American College of Physicians, the American Congress of Obstetricians and Gynaecologists, the Joint Commission and other professional bodies (Ethics Committee of the American Society for Reproductive Medicine, 2016a), recommending that clinics have written policies and procedures on how to reduce, but also detect and report, any errors that may occur.

In any case, the truth is that, should this occur, and beyond the responsibility of the clinics, doctors and other professionals who may be involved in the misallocation of gametes or embryos, the problem of determining who the child's parents are does indeed arise[12] . This

[12] A separate and distinct issue is determining who should have custody of the child. Cases of child mix-ups are not uncommon and are not dependent on any assisted reproductive technology. In general, the claims of the biological parents take precedence over those of third parties, unless there are reasons to the contrary,

particular issue deserves further discussion, but, whilst acknowledging that it falls outside the scope of our work, we believe we should state the position we take.

On the one hand, in a first group of situations, we have cases where a woman becomes pregnant with gametes or embryos that are not her own or those she has chosen.

Our understanding is that, in principle, this woman and, if married, her husband will be the parents of that child.

Even assuming that they have resorted to ART treatment in order to have children of their own, the manifestation of the volitional element as a criterion and connecting factor continues to manifest itself solely within the legal sphere. It is true that the desired genetic link with the child does not exist, but not only were they the ones who initiated the process, they were also the only ones who expressed the wish to have a child, which, despite the absence of such a link, remains a child[13] .

Reproductive freedom is the freedom to resort, within certain grounds, to ART to reproduce, but it is not a right to a child, much less the right to a particular child. Furthermore, in the event of any errors, the associated risk must be shared amongst those who participated in

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namely where there exists a de facto family relationship between those third parties and the child which, if severed, could jeopardise the child's best interests. In such cases, however, there is no doubt as to who, at least *ab initio*, are the child's parents. Nevertheless, in cases of embryo or gamete mix-ups, biological relationships with the child are established, alongside differing expressions of will regarding the exercise of reproductive autonomy by each of the parties involved.

[13] As is the case with heterologous IVF.

the process and who, even before the child is born, have been recognised as having a parent-child relationship for the establishment of the parental relationship and, in this case, despite the error, it continues to manifest itself within the sphere of the beneficiaries, in addition to the responsibility that the person exercising that reproductive right has in relation to the life they are bringing into being. In this regard, reference is made, for example, to Hubin in his principle of dependent life (Hubin, 2017) .

In such cases, regardless of the origin of the gametes or the embryo, the pregnant woman who expresses the intention to have children and therefore initiates the relevant causal process, despite not being the genetic parent, finds that maternal identity is rooted within her. This is the case, for example, with heterologous IVF involving the use of donated gametes or embryos. As shown in the figure below, the manifestation of parental identity implies recognising the identity of the woman as a mother, otherwise a surrogate pregnancy would be coercively imposed on a woman who has never assumed the role of a reproductive surrogate.

Although it may be said that, in this case, there is no intention to have that particular child, the surrogate mother does intend to have a child, and it is this that is at issue, not the child. This means that, for us, given that the dignity of the child itself is at stake, it is inconceivable to assess the intention in relation to the specific child and on the grounds that the child was born in accordance with an image created by the parents.

In the other group, we have situations where the genetic donors also intend to have a child and, in that spirit, have provided their genetic material. That is to say, they did not act as mere

contributors to another person's procreative process. In this case, who should be the child's parents?

Let us consider the following references.

In the case of Evans v. The United Kingdom, the ECHR examined, under Article 8[1]of the ECHR, the right to decide whether or not to have children in the context of assisted reproductive technology (ART). In this case, the court considered the exercise of the right to procreate after the prospective parents had cryopreserved embryos, but the husband subsequently refused to use them; the court held that the reproductive freedom of those who do not wish to have children must take precedence over those who do, since otherwise parenthood would be imposed on those who do not want it.

The court held that imposing parenthood on those who do not want it undermined their reproductive freedom.

This case is significant in that it develops an understanding that biological material holds a special status, given the impact that it, or its use, has on the reproductive freedom of its *producers.* The court acknowledged the particular significance that the genetic material holds in relation to parental identity, as the main focus of the case was on reinforcing that identity in relation to the man who refused its use.

This approach is, for us, particularly relevant, since, on the one hand, it represents what we consider to be the very foundation of surrogacy itself and the solution regarding the parent-child relationship to be established. On the other hand, because it marks the theory of intention in this context — the exercise of the freedom to procreate, that is, the intention to collaborate in another person's procreative project.

In cases of *wrongful surrogacy*, the woman becomes pregnant with embryos that are not her own and/or her husband's, but belong to another couple. In this situation, there is in fact a coincidence between the biological components and the intention, which means that, as far as the women are concerned, any one of them could claim to be the child's mother. But which one?

On the one hand, in this context, the contractual basis associated with surrogacy is entirely absent. This is because, in these cases, there is no contract that the parties have entered into with one another from which any surrogacy agreement could be derived. On the other hand, we cannot assume, *per se*, particularly when adopting a neutral perspective in this context, that the gestational element takes precedence over genetic parentage. In this conflict, there is no discernible form of *accession* regarding the gametic material of the other party, nor a greater recognition of the work carried out by the surrogate mother that would imply a higher-quality recognition of the gestational relationship over the genetic one.

As we have noted, parental identity can exist in relation to both of these women. Either of them has a biological relationship with the child and, likewise, either of them wishes to have a child. Furthermore, as evidenced by the cases cited, this parental identity is recognised in relation to either of the individuals from whom genetic material was collected with the intention of using it to have a child of their own. On the other hand, we also assume that the surrogate mother, intending to establish a parent-child relationship with the child and to raise it, exercises her reproductive rights with the aim of forming a family, as was, in fact, the case in Johnson, where the

conflict of biological relationships was resolved by resorting to a tie-breaker criterion — intention.

As is evident from the cases referred to, a theory based on the parties' intention is required. And it could not be otherwise.

We must take into consideration precisely that element which the courts referred to in both cases. But if both women intend to have a child, how is this criterion applied? Whilst it is true that the genetic mother never assumed the role of egg donor, the surrogate mother also never assumed such a role, having exercised her reproductive rights with the intention of becoming a mother herself.

But what is the basis for favouring one over the other?

It is that, as we have assumed, in order to establish, within the context of surrogacy—which would, in fact, be what is at issue here, albeit informally—the parent-child relationship, this depends not only on the basis of access, that is, the perpetuation of the genetic lineage, but also on the requirements and connecting factors. In other words, the intention of the intended parents to have a child through a surrogate mother, with the intention of establishing a parent-child relationship with the child and raising the child, but also, as a connecting factor, the surrogate mother acting within the scope of her reproductive autonomy as a collaborator in another person's parental project.

This is not the case, and therefore, in this context, there is in fact no substitution of anyone.

We understand that, in this case, the truth is that the beneficiary did not act merely as a donor either, but what is at issue is the conflict between the intentions of one woman and the other. If we follow the interpretative approach, intention is the deciding factor — as is the case in the interpretation of American cases from

California — which does not apply here, since both women intend to procreate. That being the case, there is in fact no surrogacy, so we remain with the sole criterion, the traditional one, since the requirements and the connecting factor are not met.

Furthermore, viewing the mother as a surrogate in this case is, admittedly, and in this instance we agree, a way of erasing her identity as a woman-mother, which is distinct from the identity of a woman-surrogate, as we have previously had occasion to explain. This is a process of reproduction that exploits that identity as a worker for others and against her will, treating her as an object, at the service of others, and which culminates in a forced process of alienation of labour and the product of labour. An incubator for another's child against her will and with no possibility of putting a stop to it. A form of treatment that is utterly unworthy and exploitative of the woman-mother, which for us is unacceptable.

We recognise that a situation such as this is extreme. The significance of the genetic and gestational relationship, as we have acknowledged, is decisive for the child's very identity; and, given that both women intend to have a child, choosing between them is particularly difficult and painful for whichever is passed over. As in the cases mentioned, parental identity is established in relation to the genetic mother. However, we cannot, on this basis, disregard the surrogate mother — she too, in exercising her reproductive freedom, has expressed the intention to have a child and to raise it. This does not mean that it cannot be considered— , particularly taking into account the best interests of the child—that the genetic family is not taken into account or recognised in an *ad hoc* arrangement regarding that child, such as visiting rights, for example. With the growing number of blended

families and multi-parental arrangements, it would be a draconian measure—and one that would in no way safeguard the child's best interests—to eliminate the existence of the genetic mother, even if she were not recognised as the legal mother. Recognising that certainty regarding the parent-child relationship is essential, this certainty is in no way jeopardised by allowing for *ad hoc* solutions that take the child's best interests into account.

In this case, we recognise that, and here indeed, the child has two biological mothers, and either of them is eligible for the establishment of the parent-child relationship. As the child cannot be divided into two, the criterion of intention allows, in our view, the parent-child relationship to be established preferably in relation to the surrogate mother[14] .

On the other hand, and finally, we would have another group of cases in which, through surrogacy, the child conceived is not genetically related to the intended parents or to the intended parent.

For these situations, the UPA 2017, pursuant to section 809(d) of the UP 2017, states:

'*[…] due to a clinical or laboratory error, a child conceived by assisted reproduction under a gestational surrogacy agreement is not genetically related to an intended parent or a donor who donated to*

[14] We would have no objection whatsoever to a filial relationship being established between the two women if the pregnant woman so agreed and there were no conflict with another biological parent regarding biological parentage. We will not elaborate on this issue, but the admissibility of more than two fathers or mothers could be a solution where conflicting interests are of similar weight.

the intended parent or parents, each intended parent, and not the gestational surrogate and the surrogate's spouse or former spouse, if any, is a parent of the child, subject to any other claim of parentage.'

We endorse this position, just as we reconcile this with the position we have adopted regarding the need for a gametic relationship between the child and at least one of the intended parents. On the one hand, this is the basis for resorting to surrogacy. In other words, as we have mentioned, this biological link with the child underpins access to surrogacy, particularly when compared with adoption, and is the reason why we consider that not only do the two situations not overlap, but, on the contrary, they should not overlap. What is required, in our view, is the intention with which the intended parents seek surrogacy, given that they wish to have a child and establish a parent-child relationship with that child, whilst the surrogate mother's connection to the child expresses precisely the opposite intention, as do the donors.

4. CONCLUSION

At issue is the need to define a criterion for determining who retains parental identity in any event, despite the error, and who must bear the risk that the parental project does not correspond to the parents' wishes. But the parents' wish is, *ultimately*, to have a child and not the specific child. We fully understand that mere intention is not protected under Article 8ºof the ECHR. However, unlike the cases decided by the ECHR, what is at issue here is not, using the criterion of intention, to establish a right, but rather to assume responsibility for the life that has been brought into being; and even if it does not

correspond to the ideal of the parental project that was envisaged, just as in sexual reproduction, there are risks to be assumed.

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