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RECENT CHANGES

Changes to District Court Practice Note No. 1 – Case Management in the General List

RECENT DECISIONS

- **Presidential decision on 'substantial contributing factor' (section 9A of the 1987 Act)**
  E-Dry Pty Ltd v Ker [2017] NSWWCCPD 26 (15 June 2017)
- **Who breached the duty of care?**
  Kabic v Workers Compensation Nominal Insurer & Ors [2017] NSW SC1281 (22 September 2017)
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- **Bright lights, big city emergency**
  Logar v Ambulance Service of New South Wales Sydney Region [2017] NSWCA 274 (14 October 2016)

RECENT CHANGES

Changes to District Court Practice Note No. 1 – Case Management in the General List

Link to Practice Note

The NSW District Court Practice Note (No 1) has been revised with changes commencing 16 October 2017.

The Court aims to have cases completed within 12 months of commencement with the intention of allocating trial dates within that period.

- Before commencing proceedings or filing a defence, legal practitioners must notify their clients (in writing) about the requirements of the Practice Note and of the Court's insistence on compliance with its orders.
- The Court may dismiss actions or cross-claims or strike out defences if orders are not complied with and the Court may make costs orders against parties who fail to comply with its orders.
- The Plaintiffs preparation for trial must be well advanced before commencing proceedings serving particulars and supporting documents with the statement of claim. The focus is upon ensuring early preparation for trial and case management by consent orders prepared by the parties.
- In personal injury cases, the defendant must start preparing for trial based on the matters alleged in the statement of claim and particulars including arranging medical examinations.
- The plaintiff must serve proposed consent orders for the preparation of the case on the defendant with the statement of claim. The orders must be drafted specifically for each case. They must include all steps necessary to ensure that the case will be ready to be referred to mediation and/or other form of alternative dispute resolution and listed for trial at the status conference.
- The Court expects that, in most cases, the defendant will have requested particulars of the statement of claim, which the plaintiff will have supplied before the pre-trial conference. The defendant should have also filed and served a defence and any cross-claims by the pre-trial conference.
- Pre-Trial Conferences will be held two months after commencement of proceedings. The parties must be able to tell the Court the precise nature of any expert evidence to be relied upon and the names of any experts so that appropriate directions can be made.
- The Court will make appropriate directions and orders to ensure that the case is ready to be listed for hearing at the status conference.
- Parties are required to issue subpoenas as early as possible so that documents can be produced and inspected and are available for the proper preparation of the case, including submission to experts.
- The Court will refer all appropriate cases for alternative dispute resolution and the Court's power to do this is not dependent on the consent of the parties.
- Matters listed for a Status Conference will generally be referred for ADR. Parties must have instructions about ADR including the availability of clients, witnesses and counsel.

- For matters in which the hearing is estimated to take 3 or more days, the Court will order the parties to participate in mediation and for those matters where the hearing is estimated to take less than 3 days, order the parties to conduct an informal settlement conference.
- The parties will be required to give the Court an estimate of the length of the hearing when a hearing date is allocated that is 'honest and reliable, having been given earnest consideration by the parties'.
- Substantial underestimates of the length of a hearing may lead to costs orders being made against legal practitioners.
- The Court will only grant adjournments of hearings where there are very good reasons, that do not include the unavailability of counsel, failure to comply with standard orders for hearings or other orders or directions made by the Court or failure to properly prepare the matter for hearing.

RECENT DECISIONS

Presidential decision on 'substantial contributing factor' (section 9A of the 1987 Act)

E-Dry Pty Ltd v Ker [2017] NSWWCCPD 26 (15 June 2017)

Link to decision

Summary

The worker was a carpet cleaner. His knee gave way as he walked from his van to a client's house in March 2016. It was his first job of the day.

The employer agreed that the worker had suffered an injury that arose out of or in the course of employment but disputed that employment was a substantial contributing factor to the injury in relying upon the provisions contained in section 9A of the *Workers Compensation Act 1987*.

The worker commenced proceedings in the Workers Compensation Commission claiming, inter alia, right knee surgery, specifically a right knee reconstruction.

The employer filed a Reply maintaining the section 9A argument.

Arbitral decision

Although there were some factual issues, the arbitrator accepted the worker's version that, immediately before the injury, he was walking at a heightened pace because he was late. His van's navigation system had apparently taken him to Bondi Junction instead of Woollahra. The arbitrator also accepted that, immediately before his knee gave way, because it had been raining ("teeming rain"), the worker took a lunging step to effectively jump/leap over a gutter to avoid getting his shoes wet so as not to have wet feet when he entered the client's house. The worker's employer had directed the worker that he was not to enter a client's house with wet or muddy shoes and that he was also not allowed to remove his shoes before entering a client's house.

The arbitrator found that employment was a substantial contributing factor to the injury thus satisfying the requirement of section 9A. In coming to his decision, he accepted that:

- the injury occurred during the worker's normal working hours;
- the injury occurred while the worker was making his way from his van to the client's house;
- the worker was there to inspect the client's carpet and to provide a quote for cleaning the carpet;
- the worker was rushing at the time of his injury as he was late;
- the worker lunged over the gutter in order to straddle the water in the gutter in an attempt to keep his shoes dry before entering the client's house;
- the worker had been told by his employer not to enter clients' houses with wet or muddy or no shoes.

The employer lodged an appeal against the arbitrator's decision specifically his finding that employment was a substantial contributing factor to the worker's injury.

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Presidential decision

President Judge Keating heard the appeal and ultimately confirmed the arbitrator's original decision. He accepted that the arbitrator's findings were correct and did not reveal any error. The President:

- was convinced that the arbitrator was aware that the onus of proof rested with the worker (*Badawi v Nexon Asia Pacific Pty Ltd t/as Commander Australia Pty Ltd* [2009] NSWCA 324);
- found that the arbitrator was entitled to conclude that employment was a substantial contributing factor from an examination of all the evidence as a whole;
- found that the arbitrator "applied the common sense approach to find that he was satisfied of the elements of section 9A, even though he accepted that there was no pivot or twist of the knee at the relevant time (*March v Stramare and Nunan*)";
- found that "the test for the satisfaction of the provisions of section 9A is a legal test … to be decided on the evidence overall including a consideration of matters described in section 9A(2), which do not limit the factors which may be taken into account. It is not purely a medical question: *Awder … v Kernick* [2006] NSWWCCPD 222";
- found that "the arbitrator reasonably inferred that the lunge and commencement to run action would have placed greater strain on the right knee. The arbitrator was permitted to arrive at the decision that he did when deciding on the evidence overall, including the matters in section 9A(2). It was not purely a medical question";
- found that "the evidence overwhelmingly supported the conclusion that the contribution of the employment to the injury was real and of substance";
- noted that the "focus of the challenge on appeal concerned the arbitrator's conclusion that he could not be satisfied that the injury would have happened anyway if the worker had not been working or at work in that environment". The president was satisfied that the arbitrator had adequately explained his reasons noting that immediately before injuring his knee, the worker was rushing because he was late for an appointment. He jumped or lunged over a 'wet' gutter to keep his shoes dry so as not to wet the client's carpet. The President was of the view that the arbitrator's findings were open to him on the evidence and revealed no error.

Implications

From paragraph 107 of his decision, the President provided a comprehensive analysis and a useful summary of section 9A and much of the relevant case law dealing with that provision including:

- the section 9A test "is a question of fact which is determined following an evaluation of all the evidence (*Dayton v Coles* [2011] NSWCA 153)";
- the President quoted from paragraph 110 of the Badawi decision "It is not sufficient to find that as injury under section 4 is established the employment concerned was a 'substantial contributing factor' under section 9A. Sections 4 and 9A require independent satisfaction (section 9A(3))" however he then went on to point out that the Court in *Badawi* also said "there may be circumstances where the factors considered necessary and sufficient to satisfy the test arising out of employment for the purposes of section 4, are sufficient to satisfy the test in section 9A. Whether that is so will depend on the facts. Both are factual questions … It is not sufficient to find that injury arose out of employment and to thereby be able to conclude that the employment concerned was a substantial contributing factor";
- a decision maker is not confined to matters specified in section 9A(2) and may consider other relevant factors (*Fox v NSW Police Force* [2012] NSWIRComm 134);
- "the assessment of whether the employment is a substantial contributing factor to the injury is not solely a medical question but a question which is based on an assessment of all the evidence, lay and expert" (*StateCover Mutual Ltd v Smith* [2012] NSWCA 27).

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This decision includes an interesting factual scenario with respect to the section 9A 'test' specifically whether employment was a substantial contributing factor to an injury with a useful summary/analysis of that test by the President of the Workers Compensation Commission.

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RECENT DECISIONS

Who breached the duty of care?

Kabic v Workers Compensation Nominal Insurer & Ors [2017] NSW SC1281 (22 September 2017)

Link to decision

Summary

A labour hire company will not be in breach of its non-delegable duty of care in a situation where the risk of injury is not something which would have been apparent to the direct employer on an inspection of the site and with knowledge of the adequacy of the work safety systems in place. A principal contractor will not be liable where it has delegated a specific task to a competent subcontractor particularly where the task in question involves specialised skills and particular dangers. A worker may be found guilty of contributory negligence notwithstanding a poor understanding of English and a fear of being sacked, if the risk of injury is apparent and he fails to inform the supervisor of the danger.

Background

The plaintiff was working as an unskilled labourer on a building site in Redfern when he fell from a raised platform, suffering injury. His direct employer was Caringbah Formwork Pty Ltd (Caringbah) who had hired the plaintiff out to Calcono Pty Ltd (Calcono), a subcontractor of Deicorp. The plaintiff sued Caringbah for work injury damages and sought *Civil Liability Act* damages from Calcono and Deicorp. Caringbah was deregistered and was substituted by WCNI in the proceedings.

The plaintiff fell from a raised wooden platform on a metal frame that was on a second level within the building site, beneath the concrete slab which formed the third level. Calcono was the formwork contractor in the site. The subcontract required it to provide all of the necessary formwork services at the site for Deicorp. The subcontract required Calcono to comply with all OH&S legislation and provide 'handrails, guards and/or barricades…where any step or drop exceeds 1 metre'.

The plaintiff said that the area where he fell was wet and that he slipped on the plywood on the platform because it was very slippery when wet. He alleged that there was no handrail or cross-bracing on the upper level of the metal frame on which the plywood rested. Accordingly, there was nothing to prevent his fall once he slipped. Deicorp and Calcono disputed that the formwork was wet and maintained that there were cross-braces on the upper level of the metal frame.

The plaintiff was working subject to the direction of a supervisor employed by Calcono. He was stripping formwork from the underside of the third level slab. As he did so, he would pass them to another worker standing on the floor below. The plaintiff said that water was dripping onto the platform from above and that the supervisor had a look at the general area before the plaintiff started working, but did not climb up onto the platform.

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The other worker with whom the plaintiff was working gave evidence that the area was wet and that this must have been obvious to the supervisor when he inspected the site and directed them to work there. Both the plaintiff and the fellow worker did not complain, for fear of being sacked.

An employee of Deicorp was called to give evidence that it was not raining on the morning in question. He attended at the scene of the accident, as he was the first aid officer. He said that there were diagonal braces on the upper level of the metal frame and that the area where the fall occurred was dry. He noted that the clothing of the plaintiff was dry.

The judgment

The judge took regard to the fact that the plaintiff and the fellow worker who asserted the areas to be wet were not known to each other previously or subsequently and therefore it is improbable that their stories had been concocted. The first aid attendant did not inspect the deck from which the plaintiff fell. Deicorp and Calcono failed to call the supervisor to give evidence and the judge placed significant emphasis on his absence. For that reason, an adverse inference was drawn against the defendant in respect of the absence of the supervisor's evidence.

The judge accepted that Caringbah owed a non-delegable duty of care to the plaintiff however the plaintiff was working subject to the direction of Calcono and there was no evidence to suggest that Caringbah was aware of unsafe working practices at the building site:

> As a matter of practical reality, Caringbah was in no position to control the state of the building site, either generally or on the particular day and at the particular location where the fall occurred. Although Caringbah was the de jure employer of the plaintiff, Calcono was unquestionably his de facto employer, in terms of actually and directly controlling the conditions in which the plaintiff worked. To give but on example, it was a foreman employed by Calcono who directed the plaintiff and Mr Vujatovic to work at the particular location where the fall occurred; Caringbah had absolutely nothing to do with that decision.

There was no evidence to suggest that Caringbah was aware that it was sending workers to a building site that was unsafe, either generally or in a particular way. Accordingly, the judge found that Caringbah had not been in breach of its non-delegable duty of care to the plaintiff.

Turning to Deicorp, the judge accepted that it had delegated the formwork to Calcono and because of the dangers associated with the work. The areas where it worked were isolated and restricted. Accordingly, Deicorp and its employees were in no position to exercise direct control over the particular spot where the fall took place.

The judge was satisfied that Deicorp had appropriate safety measures and, pursuant to the subcontract, had delegated the formworking tasks to Calcono and had a general lack of control over the activities of the plaintiff and Calcono. The plaintiff was directed to work at the precise location where the injury occurred by the employee of Calcono and the area was isolated from the presence of other workers due to its inherent danger. Accordingly, Deicorp was not in breach of the duty of care which it owed to persons employed to work on the site.

It was accepted that Calcono breached its duty to the plaintiff by failing to take reasonable precautions against the possibility that he could fall from the elevated deck. This was a foreseeable risk of injury particularly if Calcono had been aware that the area was wet, presenting a significant risk to the plaintiff of slipping and falling from an elevated deck.

Interestingly, the judge found that the plaintiff was well aware that he should not work in the rain both as a matter of common sense and as a result of his experience on other building sites. He had attended safety briefings and toolbox talks. His lack of English speaking skills would not prevent him from understanding his responsibilities. Even though he may have been reluctant to refuse to work, he ought to have drawn to the attention of the supervisor the fact that the deck was wet so that the supervisor could be given the opportunity of directing him to another area to work until the deck was dry. The plaintiff was found to have contributed to his injury by his own negligence to the extent of one third.

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Implications

This case is another example of the growing judicial trend of finding that labour hire companies, although still owing a non-delegable duty of care to their employees, may not be in breach of the duty of care to the employee if the circumstances of the injury are such that the direct employer had no control over the place where the plaintiff was required to work. Further, simply because the head contractor has an overarching responsibility for safety on a site does not mean that it will always be in breach of that duty, depending upon the circumstances in which the injury occurs. Furthermore, a worker may still be negligent, notwithstanding the direction of a supervisor, if the worker fails to bring to the attention of the supervisor a potential risk of injury.

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RECENT DECISIONS

Causation: credible witnesses v contemporaneous record

Barnes v The State of New South Wales [2017] NSWCA 254 (13 October 2017)

Link to decision

Summary

The NSW Court of Appeal has recently handed down a decision in which the recollection of witnesses whose credit was not in question was favoured over a submission that contemporaneous documents were inconsistent with the evidence on causation.

Background

On 21 February 2003, a worker was injured when the car in which she was travelling as a back seat passenger ran into the rear of a stationary vehicle. The vehicle in which the worker was travelling was being driven by the appellant. The worker and the appellant were both on their way to work at Liverpool Hospital. The worker suffered injuries to her neck and left shoulder, for which her employer was liable to pay compensation.

Some 11 years later in December 2014, the respondent (employer) commenced proceedings against the appellant, claiming an indemnity in respect of the compensation paid to and on behalf of the worker pursuant to section 151Z of the *Workers Compensation Act 1987* ('the Act'). The appellant admitted breach of duty of care but argued that the motor vehicle accident did not cause the worker's injuries.

The claim was initially heard by Judge Curtis in the District Court who found that the worker's injuries were caused by the motor vehicle accident and entered judgment for the respondent. The judge noted that an employer's right of recovery is limited to the amount of damages that the third party is liable to pay to the worker. He then assessed the damages that would have been payable if the worker had sued the appellant, in the sum of $620,731.

The amount of the indemnity was also noted to be limited to payments made in the six year period that preceded the commencement of the recovery proceedings that were not statute barred from recovery by the operation of section 14 of the *Limitation Act 1969*. The judgment entered was for the amount of compensation paid during that period plus interest.

There was no explanation to why recovery proceedings had not been commenced earlier, however, there is some indication that the worker had at one point contemplated suing the appellant herself [in which case, the worker would have been required to repay the full amount of compensation paid out of any damages that she recovered section 151Z(1)(b)].

The judge's finding on causation was primarily based on the evidence given by the worker and her supervisor. The worker claimed that her neck and shoulder began to hurt shortly after the accident and her supervisor confirmed that she had complained of pain within a few days of the accident.

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On appeal

The appellant argued that the primary judge had failed to give adequate reasons for his finding on causation and failed to have regard to relevant evidence which suggested that the worker had a pre-existing condition or that her injuries were caused by other factors unrelated to the accident.

The credibility of the worker and her supervisor were not in question. Rather, the appellant submitted that their recollection was understandably poor, given the passage of time. The appellant submitted that the contemporaneous documentary evidence and medical reports were more relevant to determining the question of causation and drew the court's attention to several documents, including:

- Clinical notes of the worker's GP noting complaints of neck pain in 1999 with no record of any complaint in the neck or shoulder for at least three months after the accident, despite several consultations.
- An incident report dated 21 February 2003 recorded the worker's response to a question about her injuries as stating: "*none only strain on elbows from bracing*".
- The worker made a claim for compensation on 4 July 2003 for rotator cuff tendinosis that was reportedly caused by repetitive strain at work. No mention was made of the motor vehicle accident.
- Dr Machart, Dr Harvey and Dr Casikar all reported that the worker's injuries were unrelated to the motor vehicle accident.

Decision

Mr Justice Sackville (with Macfarlan JA and White JA agreeing) held that the primary judge had failed to give proper consideration to the appellant's arguments on causation and did not have regard to the relevant evidence. Accordingly, it was found that the fact finding process had miscarried.

However, as there was no issue surrounding the credit of the witnesses, rather than remitting the matter back to the District Court for trial, the Court resolved the matter on the evidence before it.

Timing of complaints

The worker gave evidence that she was stiff and sore immediately after the accident. This was supported by the evidence of her supervisor, who stated that she noticed that the worker was stiff at first and later became slower in her duties. She specifically recalled the worker complaining of pain in her neck and shoulders only a few days after the accident. In cross-examination, the worker's supervisor adhered to that evidence.

The Court found that while the recollections of the worker and her supervisor with regard to the timing of her complaints was not perfect, the evidence as a whole supported a finding that the worker had reported her shoulder pain to her supervisor within a week or so of the accident.

Medical evidence

The Court did not place much weight on the reports of Dr Machart, Dr Harvey and Dr Casikar.

Dr Machart reported that the motor vehicle accident could not have caused the worker's injuries and suggested that she may have a pre-existing condition but did not describe the nature of any such pre-existing condition. The Court did not consider his opinion to be "definitive or conclusive".

Drs Harvey and Casikar had only conducted file reviews and did not actually examine the worker. It also quickly became apparent that the history given to those doctors by those who had qualified them, was that the worker was symptom free for several months after the motor vehicle accident. This was inconsistent with the findings of fact that the worker suffered neck and shoulder pain shortly after the accident.

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Implications

This decision provides a good example of how the court will place significant weight on the evidence given by credible witnesses, despite their recollections being affected by the passage of time.

It also confirms that the court will give very little weight to the evidence of doctors who are not given a relevant history or who do not examine the worker before providing their opinion.

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RECENT DECISIONS

Bright lights, big city emergency

Logar v Ambulance Service of New South Wales Sydney Region [2017] NSWCA 274 (14 October 2016)

Link to decision

Summary

In October 2017, the NSW Court of Appeal upheld a District Court ruling for the defendant in respect of liability arising out of a motor vehicle collision involving an ambulance that had entered an intersection on a red light when responding to an emergency.

In both the primary and appeal decisions, the ambulance driver was held to have acted as a reasonable person would in the circumstances, weighing up competing priorities such as social utility and the risk of harm pursuant to section 5B of the *Civil Liability Act 2002* (NSW).

Facts

In June 2011, Mrs Logar was injured when her car and an ambulance driven by Ms Riches collided at an intersection in Penrith, NSW.

The collision occurred when Ms Riches entered the intersection against a red traffic light while responding to an emergency. Mrs Logar, who had a green traffic light, failed to stop to allow the ambulance through the intersection.

Mrs Logar contended that although Ms Riches was entitled to proceed through a red light when responding to an emergency and with lights or sirens activated pursuant to the Road Rules 2008 (NSW), Ms Riches also had a statutory obligation to take reasonable care when doing so. Mrs Logar argued that Ms Riches had failed to take care in having:

a. travelled through the red light at the intersection at an excessive speed;

b. failed to stop and observe whether it was safe to enter the lane Mrs Logar was travelling in;

c. failed to take an alternative, safer route through the intersection which may have improved her line of vision.

Judgment at first instance

Negligence

District Court Judge Philip Taylor did not accept Mrs Logar's allegation that the ambulance lights and sirens were not activated, preferring instead the versions of events provided by Ms Riches and 2 independent witnesses who did not see the collision, but who had heard and seen the sirens prior to the collision.

In applying section 5B(1)(c) of the *Civil Liability Act 2002* (NSW), his Honour undertook an assessment of whether a reasonable person in Ms Riches' position would have taken other or additional precautions to those she took. Noting section 5B(2) provides a list of considerations, including the probability and likely seriousness of harm, his Honour

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found that while the risk of harm was present, Ms Riches took steps to minimise it by slowing down, moving only a minimal distance into Mrs Logar's lane, travelling with lights and sirens activated and attempting to check the lanes as best she could. Further, his Honour found that Ms Riches' delay would burden the injured or ill person to whom the ambulance was travelling to assist and that the social utility of a speedy response by ambulances was readily apparent.

In determining liability, his Honour stated that the real question to be determined was whether Ms Riches should have avoided the risk of harm and remained stationary until it was clear that the vehicles in Mrs Logar's lane had stopped or Ms Riches' light had changed to green.

In taking all of the above into consideration, his Honour concluded that Ms Riches took a reasonable course of action in an emergency situation.

Contributory Negligence

To address the prospect of his decision being overturned on appeal, his Honour assessed Mrs Logar's contributory negligence at 60% for failing to observe the ambulance's lights and siren and the surrounding stationary vehicles.

Basis for Appeal

The appeal was ultimately dismissed, with Schmidt J and Emmett AJA of the Court of Appeal agreeing with the findings of Judge Taylor and Macfarlan JA dissenting.

The Court of Appeal:

1 (a) held that Judge Taylor did not err in failing to make a finding as to the actual speed of the ambulance and;

(b) held that Judge Taylor did not err in finding that the ambulance was driven slowly and carefully through the intersection;

2. held that there was no error in Judge Taylor's finding that Ms Riches did not breach her duty of care to Mrs Logar;

3. was not required to determine contributory negligence, however in dissenting to (2), Justice MacFarlan also found contributory negligence of 50% on the part of Mrs Logar.

Findings on Appeal

The decision of the Court of Appeal and the primary decision of Judge Taylor provide some guidance about:

1. determining the scope of the duty of care an emergency services driver owes to other road users when responding to an emergency situation;

2. how a reasonable person in the position of an emergency services driver ought proceed;

3. balancing competing priorities, including risk of harm and social utility pursuant to section 5B of the *Civil Liability Act 2002*; and

4. the scope of the duty of care owed by an ordinary road user to emergency services in an emergency situation.

In this case, the social utility of the ambulance responding to an emergency of some significance outweighed the risk of entering the intersection against a red light and colliding with another vehicle. In this respect, it was identified that the key duty of Ms Riches was not to avoid any risk of collision at any cost, but rather to take reasonable care in the circumstances and the discharge of this duty was to be judged prospectively, not retrospectively.

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