FIELD LAW
100TH ANNIVERSARY

Insurance

Defence & Indemnity

December 7, 2015

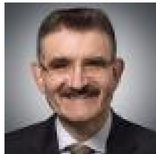
Announcement of New Defence & Indemnity Format

We are pleased to provide the November 2015 edition of ***Defence & Indemnity (D&I)*** in a new format. We took some time off to survey our readers and to reformat this publication.

Most respondents to our survey indicated a preference to receive ***D&I*** in a digital format. The digital edition will be provided to readers in an email setting out the table of contents. Readers can select which case briefs they would like to read by clicking on the "Read More" link for any particular case.

Defence & Indemnity will now be published approximately five times a year in a more concise form. The case briefs will be shorter and we will review approximately five cases in each edition.

We hope that you enjoy our new format. For any questions or comments you may have please contact Rebecca Walkemeyer at rwalkemeyer@fieldlaw.com or 780-423-7681.



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I. INSURANCE ISSUES

A. Pedestrian struck by unidentified motorist not covered by her own SEF 44 Endorsement

1. *Ostrowercha v. Co-Operators General Insurance Company*, 2015 ABQB 636, per Sanderman, J. [4150]

The Defendant, Co-Operators, issued a standard automobile policy to the Plaintiff, which had an attached S.E.F. #44 Endorsement with a limit of $1 million.

The Plaintiff went to a campsite, which she walked beyond the perimeter of in order to make a phone call to her boyfriend. She passed between two vehicles parked in an area used for temporary parking, and as she emerged from between them she was struck by a vehicle that ran her over and left without stopping, resulting in her suffering horrendous injuries. The driver and owner of the vehicle were never identified.

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B. Insurer conflict of interest: insurer-appointed counsel removed from the case, replaced by insured's choice of counsel at insurer's

expense

1. *Hoang v. Vincentini*, 2015 ONCA 780, per Laskin, J.A. [4151]

The Insured Can Hoang had dropped off his six year old son Christopher Hoang in downtown Toronto. The boy's hat blew off and he chased it into an intersection, where he was hit by a car driven by the Defendant Vincentini. The son Christopher brought an action against his father and Vincentini (and Ford Credit Canada as Vincentini's lessor) with respect to injuries.

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C. Cost of replacing glass in order to remedy faulty workmanship excluded by exclusion clause

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Station Lands Ltd retained Ledcor as a construction manager for the construction of the EPCOR tower in Edmonton. Station Lands then contracted with various trade contractors to supply and install the goods and services necessary for the project. Early in the project, Station Lands obtained an "All Risks" policy from Northbridge to cover "all direct physical loss or damage except hereinafter provided" (the "Policy"). The Policy was designed to cover all actors and activities on the site for 3.5 years or to the end of construction.

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II. LIABILITY ISSUES

A. An employer cannot sue an employee common with a defendant employer where the employee is a common employee of both employers

1. *Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd.*, 2015 ABQB 518, per Master Wachowich [4152]

On January 18, 2010, a fire occurred at the Fort Hotel, owned and operated by the Plaintiff, Shamac. The Plaintiff's insurers brought this action as a subrogated claim to recover the money they paid to Shamac.

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III. QUANTUM/DAMAGES ISSUES

A. For psychological/psychiatric injury, the plaintiff must proffer evidence that the injury is a recognizable illness

1. *Saadati v. Moorhead*, 2015 BCCA 393, per Frankel, J. [4154]

Appeal from an award of $100,000 for non-pecuniary damages for a psychological injury arising out of a motor vehicle accident. While trial judge rejected the plaintiff's claim that he sustained a brain injury, the judge found he was a "changed man" based on testimony from family and friends. Even though the plaintiff did not plead or argue for damages for a psychological injury, the trial judge still awarded it.

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December 7, 2015

I. INSURANCE ISSUES

I.A.1. Pedestrian struck by unidentified motorist not covered by her own SEF 44 Endorsement

***Ostrowercha v. Co-Operators General Insurance Company*, 2015 ABQB 636 [4150]**

I. FACTS AND ISSUES

The Defendant, Co-Operators, issued a standard automobile policy to the Plaintiff, which had an attached S.E.F. #44 Endorsement with a limit of $1 million.

The Plaintiff went to a campsite, which she walked beyond the perimeter of in order to make a phone call to her boyfriend. She passed between two vehicles parked in an area used for temporary parking, and as she emerged from between them she was struck by a vehicle that ran her over and left without stopping, resulting in her suffering horrendous injuries. The driver and owner of the vehicle were never identified.

The Defendant brought an application for summary trial to dismiss the Plaintiff's claim against them on the basis that there is no coverage available under the S.E.F. #44 Endorsement.

The S.E.F. #44 Endorsement read as follows:

> In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the Insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by the insured person by accident arising out of the use or operation of an automobile.

II. HELD: Application Granted, Plaintiff is not covered by SEF 44

1. The Court found no ambiguities in the policy

   (a) "Inadequately insured motorist" was defined as either an identified owner/driver whose insurance is less than the Coverage; or the driver/owner is in an uninsured or unidentified automobile within the definition of "Uninsured Automobile Coverage" in the policy.

      (i) "Unidentified automobile" is defined as an "automobile which causes bodily injury or death to an insured person arising out of the physical contact of such automobile

with the automobile of which the insured person is an occupant at the time of the accident" provided the identity of either the owner or driver of the automobile cannot be ascertained.

(ii) "Occupant" is defined as "a person driving, being carried in or upon or entering or getting onto to [*sic*] alighting from an automobile."

2. Based on the definitions above, it was held that the Plaintiff did not fall within coverage.

(a) If the driver were known, but under- or uninsured, she would be covered.

(b) Because the driver was not known, the Plaintiff must have been an occupant of the motor vehicle.

III. **COMMENTARY:** The Court, while sympathetic to the Plaintiff's plight, found that this result was necessary, as there must be a link to the insured vehicle, otherwise the policy could extend to any form of injury suffered involving any motor vehicle regardless of the circumstances. If that was the case, SEF 44 endorsements would be general accident/injury insurance, which they are not.

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Insurer conflict of interest: insurer-appointed counsel removed from the case, replaced by insured's choice of counsel at insurer's expense

***Hoang v. Vincentini*, 2015 ONCA 780, per Laskin, J.A.**

I. FACTS AND ISSUES

The Insured Can Hoang had dropped off his six year old son Christopher Hoang in downtown Toronto. The boy's hat blew off and he chased it into an intersection, where he was hit by a car driven by the Defendant Vincentini. The son Christopher brought an action against his father and Vincentini (and Ford Credit Canada as Vincentini's lessor) with respect to injuries.

The father Can Hoang was insured by The Personal, which had him sign a non-waiver agreement, then appointed Flaherty McCarthy to defend as defence counsel. The insurer Personal did not add itself as a third party by order to the action or seek an early determination of the coverage issue, as it could have done.

After a trial by judge and jury, the father was found 100 percent liable. The son was awarded $835,000.00 ($150,000.00 for generals plus $684,228.22 for future care costs). The jury found the insured father liable, particularizing the negligence. All but one of the particulars related to the father's negligent parental supervision of his son. The father was also found liable for "unsuitable choice of loading area."

The parties agreed that the claims against the insured father with respect to negligent parental supervision were not covered by the auto policy.

The insurer now faced two actions, one brought by its insured, the father Can Hoang for indemnification, and the other by his Plaintiff son Christopher Hoang for direct payment per s. 258(1) of the *Insurance Act*, R.S.O. 1980, c. I8. In both claims, the Plaintiffs relied on the jury's finding of "unsuitable choice of loading area."

The Plaintiffs appealed the trial decision, asking that liability be apportioned equally between Vincentini and Ford Credit (on one hand) and the insured father (on the other), plus they asked for an increase in the damage award.

Flaherty McCarthy filed a Notice of Cross-Appeal on behalf of the insured father, asking the Court to set aside all particulars of negligence against the insured father and to dismiss the action against him. One of the particulars that it sought to set aside was the jury's finding of "unsuitable choice of unloading area."

The insured father and Plaintiff son argued that the jury's finding of "unsuitable choice of unloading area" put the insurer in a conflict of interest with its insured father or created a reasonable apprehension of conflict. It applied to have Flaherty McCarthy (in the individual defence counsel in that firm) removed as defence counsel for the insured father, to be replaced by counsel of the insured's choice, at the expense of the insurer.

II. <u>HELD:</u> For the insured father and Plaintiff son; applications granted; insurer-appointed defence counsel to be replaced by new counsel at the insurer's expense.

1. The Court found three principles apply on the question of insurer-insured conflict of interest:

   [14] In his oral argument, Mr. Adair, counsel for the appellants, set out three principles which he says, and I accept, are relevant on these motions. They are:

   > (1) Where a lawyer is appointed by an insurer to defend its insured, the lawyer's primary duty is to the insured. That is so even though the lawyer is paid by the insurer and the insurer may eventually have to pay the claim against its insured. Deschênes J.A. discussed this principle in ***Pembridge Insurance Company v. Parlee***, 2005 NBCA 49, 253 D.L.R. (4th) 182, at para. 17:
   >
   > > It is now beyond dispute that a lawyer appointed and paid for by an insurer to defend its insured in compliance with the insurer's contractual duty to defend owes a duty to fully represent and protect the interest of the insured. By doing so, the lawyer, of course, is also acting in the insurer's interest in the sense that the plaintiff's claim (a claim that the insurer may eventually have to pay) is being challenged. But, first and foremost, once appointed, the lawyer must represent and act on behalf of the defendant insured with the utmost loyalty and only in the latter's best interest. No one seriously contends that the lawyer is or should be allowed to take a position contrary to the interests of the insured defendant which he has been appointed to represent. [Citations omitted by the Court].
   >
   > See also ***Mallory v. Werkmann Estate***, 2015 ONCA 71, 330 O.A.C. 337, at para. 29.
   >
   > (2) An insurer may be required to relinquish control of the defence and pay for independent counsel retained by its insured only if there is "in the circumstances of the particular case, a reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer": ***Brockton (Municipality) v. Frank Cowan Co.*** (2002), 57 O.R. (3d) 447 (C.A.), at para. 43.
   >
   > (3) Where the insurer has insisted on a reservation of rights or its insured has

signed a non-waiver agreement, then a conflict of interest may arise if coverage under the policy turns on the insured's conduct in the accident giving rise to the litigation. Goudge J.A. discussed this principle in ***Brockton***, at para. 42:

> If the reservation of rights arises because of coverage questions which depend upon an aspect of the insured's own conduct that is in issue in the underlying litigation, a conflict exists. On the other hand, where the reservation of rights is based on coverage disputes which have nothing to do with the issues being litigated in the underlying action, there is no conflict of interest requiring independent counsel paid for by the insurer.

2. The Court held that the potential for conflict between insured and insurer "is exacerbated when the insurer insists on a reservation of rights or when the insured signs a non-waiver agreement, putting in question coverage under the policy" (paragraph 15). It was held that the potential in this case was "especially acute… because coverage under [the insured's] insurance policy may depend on this court's view of his conduct at the time of the accident, and because he is the father of the appellant Christopher Hoang."
3. It was held that "[n]ot every potential conflict between the interest of the insurer and its insured requires the insured to yield the right to control the defence" and that to "require the insurer to yield control, the insured must meet the reasonable apprehension of conflict of interest test." It was held that in this case the "reasonable apprehension is readily apparently" because "a reasonable bystander might think counsel appointed by the insurer would focus on overturning the one finding for which the insurer could be liable to indemnify the insured and downplay or focus less on the jury's findings of negligent parental supervision for which the insurer has no obligation to indemnify."

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December 7, 2015

Cost of replacing glass in order to remedy faulty workmanship excluded by exclusion clause

***Ledcor Construction Limited v. Northbridge Indemnity Insurance Company*, 2015 ABCA 121**

I. FACTS AND ISSUES

Station Lands Ltd retained Ledcor as a construction manager for the construction of the EPCOR tower in Edmonton. Station Lands then contracted with various trade contractors to supply and install the goods and services necessary for the project. Early in the project, Station Lands obtained an "All Risks" policy from Northbridge to cover "all direct physical loss or damage except hereinafter provided" (the "Policy"). The Policy was designed to cover all actors and activities on the site for 3.5 years or to the end of construction.

The Policy contained exclusion for:

The cost of making good faulty workmanship, construction materials or design unless physical damage not otherwise excluded by this policy results, in which event this policy shall insure such resulting damage.

Station Lands retained Bristol Cleaning ("Bristol"), another trade contractor, to do a "construction clean" of the exterior of EPCOR tower. Cleaning up following construction was a part of the work Ledcor was responsible for. Under the Station Lands-Bristol contract, the owner (Station Lands) was to provide "all risks" property insurance that included trade contractors and trade sub-contractors etc as additional unnamed insureds. This requirement was fulfilled by the "all risks" policy with Northbridge.

Bristol damaged the windows during the cleaning process by using inappropriate tools and methods such as dull or inappropriate blades to scrape of the dirt and failure to follow the manufacturer's cleaning instructions. As a result, the glass had to be replaced. Under its contract, Bristol was responsible for replacing the glass.

Therefore, the issue on appeal was whether the damage to the windows resulted from "poor workmanship" and therefore excluded from coverage or is "resulting damage", in which case the cost of replacing the glass would be insured.

II. HELD: Appeal allowed loss was excluded from coverage under the Policy

1. The Alberta Court of Appeal found that the "fundamental intent of the policy is to indemnify the owner for a particular type of damage that occurs during construction. It is intended to provide coverage for some unexpected events

and occurrences. It is admittedly not a 'building warranty' agreement." The Court followed the principles for interpreting insurance policies as set out in Progressive Homes that: a court must look to see if the loss is within the general coverage, then if it is within an exclusion and last, if it falls under an exception to the exclusion. All of this must be done bearing in mind the policy as a whole.

2. The parties did not dispute that the damage to the windows was covered by the basic coverage for "direct physical loss or damage". However, the disagreement was whether the damage is excluded as "making good faulty workmanship" or if it falls under the exception to the exclusion as "resulting damage". The resolution of which depended on the dividing line between the physical loss that is excluded because it is the "cost of making good" versus that which is "resulting damage."
3. The insureds (Station Lands and Ledcor) argued that workmanship only included efforts that resulted in the creation of a physical product whereas the trade contractor was merely providing labour or services. The Court rejected this argument as being so narrow an interpretation that it is outside the scope of the plain meaning of "workmanship" and was not supported by the language of the Policy. The Policy covered all consultants and trade contractors involved as well as all activities on the project site; thus, it would be inconsistent to exclude those not creating physical products from coverage. The Court also rejected the argument that the exclusion does not apply to damage caused by one contractor to the work of another, but only to damage caused by a worker to his/her own works. Not only would this lead to incongruous results but it does not square with the nature of the Policy. The Policy was a "blanket" wrap-up policy covering all actors and all activities involved in the project regardless of sequence, contractual relationships or identity of the actor performing the work that is subsequently damaged.
4. Ultimately the Court found that damage that is physically or systemically connected to the very work being carried on is <u>excluded</u> from coverage. This determination involves consideration of:

    (a) The extent or degree to which the damage was to a portion of the project actually being worked on at the time or was collateral damage to other areas;

    (b) The nature of the work being done, how the damage related to the way the work is normally done and the extent to which the damage is a natural or foreseeable consequence of the work itself; and

    (c) Whether the damage was within the purview of normal risks of poor workmanship or whether it was unexpected and fortuitous. (para 50)

5. The exclusion precludes coverage for the cost of redoing the work and the damage connected to that work, such as any damage caused the very object or part of the work on which the faulty workmanship was applied.
6. Therefore, in the instant case, the Court found that the cost of replacing the glass of the

EPCOR Tower is excluded as the cost of "making good faulty workmanship." The exclusion also precluded coverage over the damage directly caused by Bristol in its deficient cleaning of the glass. Such damage was both foreseeable and likely to occur should the workmanship (the cleaning) been done in a faulty manner and is therefore not within the scope of the insurance coverage.

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II. LIABILITY ISSUES

An employer cannot sue an employee common with a defendant employer where the employee is a common employee of both employers

***Shamac Country Inns Ltd. v. Sandy's Oilfield Hauling Ltd.*, 2015 ABQB 518, per Master Wachowich**

I. <u>FACTS AND ISSUES</u>

On January 18, 2010, a fire occurred at the Fort Hotel, owned and operated by the Plaintiff, Shamac. The Plaintiff's insurers brought this action as a subrogated claim to recover the money they paid to Shamac.

The Plaintiff and the corporate Defendants are related companies, and both were owned by MacDonald. She was the sole director and also the direct and indirect owner of the Plaintiff, while she was either the sole or majority owner of the three corporate Defendants.

The fire was allegedly started by the defendant Leroy Linkivic when he was using a propane torch to thaw ice build-up in a drain pipe at the hotel.

Linkivic was hired in 2001 as a handyman/driver. His work as a handyman was to be primarily at the Fort Hotel and another hotel owned by Shamac, as well as other rental properties owned by one of the corporate Defendants. He was to be a driver for two of the other corporate Defendant's, who were in the oilfield hauling business. MacDonald and her husband owned all the companies, and determined Linkivic would be on the payroll of Jolane (one of the oilfield hauling companies) due to that company having better cashflow. Jolane and the other oilfield hauling company, Sandy's, arranged benefits for Linkivic.

Both the Plaintiff and the Defendants brought applications for summary judgment, with the Defendant's applying for summary dismissal.

The Defendant's argued that Linkivic was a common employee of both the corporate Defendants and the Plaintiff Shamac, such that Shamac could not sue him. Shamac argued that Linkivic was an employee of the Defendants, and only a "borrowed" employee of Shamac such that he could be sued.

II. <u>HELD:</u> For the Defendants; application allowed and action dismissed.

1. The Court held that Linkivic was a common employee of the Plaintiff and the Defendants at the time of the fire.

   (a) The test for determining whether a common employer situation exists was described in

Sincair v. Dover Engineering Services (1987) 11 B.C.L.R. (2d) 176 (B.C.S.C.) as "a sufficient degree of relationship between the different legal entities". Wood J. in that case went to say that whether there is a sufficient degree of relationship will depend on the facts of each individual case. The Court, using a review of the relevant case law on the doctrine of a common employer, listed several factors that are considered when determining who the employer is when there is a group of related companies. These include:

(i) Whether the worker performs services for other entities forming part of a group

(ii) The closeness or integration of the relationship between the various entities

(iii) Whether there are common shareholders and directors of (or common control over) the various entities

(iv) Whether one entity holds the worker out as an employee

(v) Whether an entity exercises control over the work

(vi) Whether an employment contract exists between one entity and the worker – however, a written contract is not determinative on its own

(vii) Evidence of an intention to create an employer/employee relationship between the work and the respective corporations within a group

(viii) The worker's relationship with and conduct towards the various entities

(b) Regarding the Plaintiff's argument, the Court found that the legal test for determining whether the employee is a borrowed employee is the same as the one used in determining whether a person is an employee or an independent contractor. Citing the Supreme Court in ***671122 Ontario Ltd. v. Sagaz Industries Canada Inc.***, 2001 SCC 59, the key consideration is the level of control the potential employer has over the worker's activities. The Court came to the conclusion that regardless of whether they look at the doctrine of common employer or of a borrowed employee, the considerations are similar in that what must be determined is who the actual employer is. This determination hinges on who exercises control over the employee in question.

(c) The Court found that the doctrine of common employer was more appropriate than the borrowed employee principle in this case. The Court found that the Plaintiff and the corporate Defendants collectively employed Linkivic. At the time of the fire, Linkivic did do work for Shamac on ongoing basis. He spent a majority of his time doing maintenance work for Shamac's two hotels, notwithstanding the fact that his salary was paid by another one of the companies. As well, MacDonald was the controlling mind of the group of companies consisting of the corporate Defendants and the Plaintiff.

2. The Court held that, as his employer, Shamac (and consequently, Shamac's insurer) could not sue Linkivic.

   (a) The Court reviewed the case law in regards to potential liability of employee to their employer. The Court relied on ***Douglas v. Kinger (Litigation Guardian of)***, 2008 ONCA 452 for the principles that an employer cannot bring an action against its employee in simple negligence. Older case law suggested a division between "skilled" and "unskilled" employees, where the former could result in success in such an action, while the latter will not unless the conduct is intentional or reckless.

   (b) The Court found that Linkivic was an "unskilled worker" and therefore Shamac, as the employer, would only have liability against him if he started the fire intentionally or recklessly. This was not the case here, and therefore Shamac (and its insurer) are not able to bring an action against him.

   (c) The court also discussed that, as an employee of Shamac, Linkivic is possibly an unnamed or implied insured under the company's insurance policy. Therefore, the insurance company would have no subrogation rights against him.

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III. QUANTUM/DAMAGES ISSUES

For psychological/psychiatric injury, the plaintiff must proffer evidence that the injury is a recognizable illness

***Saadati v. Moorhead*, 2015 BCCA 393**, per Frankel, J.

I. FACTS AND ISSUES

Appeal from an award of $100,000 for non-pecuniary damages for a psychological injury arising out of a motor vehicle accident. While trial judge rejected the plaintiff's claim that he sustained a brain injury, the judge found he was a "changed man" based on testimony from family and friends. Even though the plaintiff did not plead or argue for damages for a psychological injury, the trial judge still awarded it.

The plaintiff had been in five motor accidents by the time of trial. This trial was in regards to the second accident. Prior to the trial, the Plaintiff was declared mentally incompetent and his action was prosecuted by a litigation guardian on his behalf.

Defendants appealed on three grounds. First, that Mr. Saadati was not entitled to damages for a psychological injury as he did not prove a recognizable psychiatric illness. Second, that the trial judge erred in finding the injuries from the second accident were indivisible from the first one. And third, that the damage award was excessive.

II. HELD: Appeal Allowed, award set aside: Absent proof of a medical condition, damages cannot be awarded for psychological/psychiatric injury

1. Mr. Saadati was held not entitled to damages for psychological injury

   (a) The trial judge stated in his decision that "although the particular medical cause of the psychological injury is not known, the testimony of the plaintiff's family and friends leads to a finding that the…accident…caused a psychological injury."

   (i) The trial judge did not refer to any authorities dealing with when the psychological or emotional effects of an accident are compensable.

   (ii) The appellate court cited multiple cases standing for the proposition that to claim for damages for psychological injury, it must be a recognizable psychiatric illness.

   (b) The plaintiff argued that there was medical evidence at trial to support the finding that he suffers from a recognizable psychiatric condition.

(i) The trial judge was not satisfied that the plaintiff had proven he suffered from a medical condition on that evidence. The Court cannot make a finding based on evidence that the trial judge was not prepared to make.

(ii) Absent expert medical opinion evidence, a judge is not qualified to say what is or is not an illness.

2. The Court did not find it necessary to address the remaining grounds of appeal.

III. COMMENTARY: Although not advanced as an independent ground of appeal, Justice Frankel did comment on the fact that the trial judge decided the case on a ground neither pleaded nor argued. Justice Frankel looked at both BC and Saskatchewan cases that held that it is improper for a judge to decide a case on issues not argued, and is in fact an error of law. Justice Frankel noted that once the trial judge turned his mind to this new ground, he should have notified counsel that he was prepared to consider a claim not pleaded. This would give the plaintiff the opportunity to amend his pleadings, and the defendants an opportunity to call further evidence and make further submissions. In that way, the trial judge would have been aware of the authorities that were brought to the attention of the Appellate court.

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