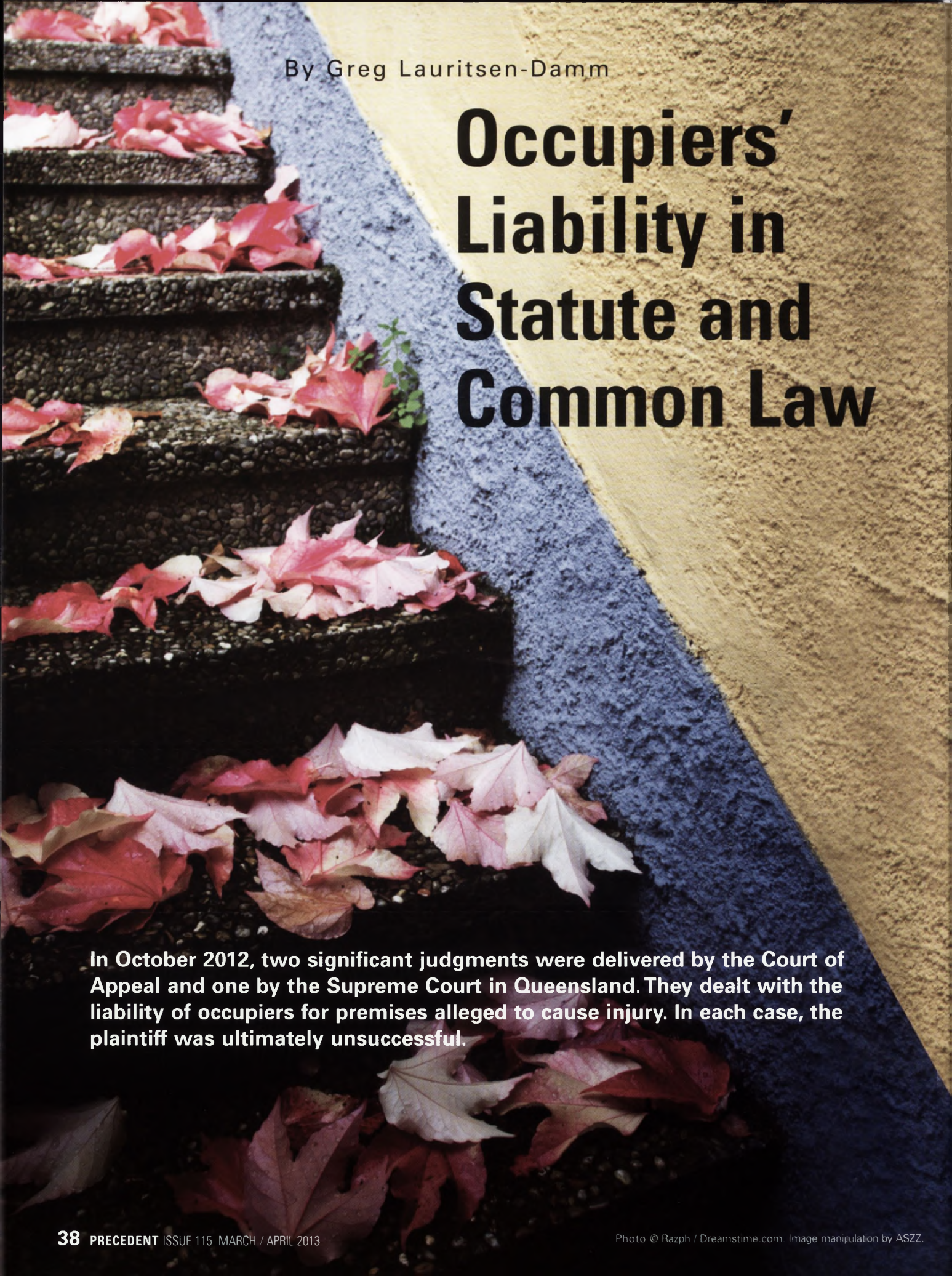

By Greg Lauritsen-Damm

Occupiers' Liability in Statute and Common Law

In October 2012, two significant judgments were delivered by the Court of Appeal and one by the Supreme Court in Queensland. They dealt with the liability of occupiers for premises alleged to cause injury. In each case, the plaintiff was ultimately unsuccessful.

STATE OF QUEENSLAND v NUDD[1]

The plaintiff was a prisoner who required crutches to walk due to an injured ankle. It was alleged that while travelling through a common area of his cell block, his crutch slipped on water, causing him to fall to the ground and suffer injuries.

The trial judge made the following findings:

1. The plaintiff's right crutch slipped on water causing the plaintiff to fall;
2. The risk of injury was foreseeable and was not insignificant;[2]
3. There is a higher duty of care to prisoners with mobility restrictions;
4. A reasonable person in the defendant's position would have taken precautions against this risk;
5. There was an obligation on the defendant to periodically inspect the floors (every two hours);
6. Without inspections the probability of harm was low, but the likely seriousness of harm was significant and the burden of taking precautions was low;
7. There was no reason why the defendant did not take those precautions;
8. The defendant's duty was breached as inspections were not conducted;
9. The breach of the duty caused the fall and injuries; and
10. The appropriate system of inspection would have led to the discovery and removal of the water.[3]

The appellant alleged that it was not open to the trial judge, on the evidence, to find that the factual causation test[4] was satisfied. The grounds of appeal were that:

1. the trial judge focused unduly on the circumstances of the accident rather than the response of a reasonable person, having regard to the risk in question being relatively low; and that
2. The judge erred in finding that:
   a. the water was on the floor long enough to allow a reasonable system to detect and remove it;
   b. any reasonable inspection would have detected the water prior to the incident;
   c. an inspection was required every two hours; and
   d. the risk was not insignificant and a reasonable person would have conducted a specific inspection of the floor.[5]

The Court of Appeal considered s11 of the *Civil Liability Act* 2003 (Qld). In finding for the plaintiff, the trial judge had to rule that the two limbs of that section were satisfied. The only limb challenged on appeal was whether the breach of duty caused the harm (factual causation).[6] The primary judge referred to *Adeels Palace*[7] and said that the plaintiff had to prove that but for the negligent act or omission the harm would not have occurred. In reconciling the issue of when the water came to be on the floor the trial judge utilised probabilistic reasoning as approved by the plurality in *Strong v Woolworths Ltd.*[8]

The appellant argued that such an approach was not applicable for two reasons. The first was that the water would have evaporated from the time of the last (hypothesised) inspection and the fall. The second, and stronger reason according to the Court of Appeal, was that it was not open to the judge to find that the water would have been detected on inspection.

> The first two cases emphasise the importance of the Adeels Palace case – the plaintiff must prove that but for the negligent act or omission, the harm would not have occurred.

The trial judge acknowledged that if the amount of water was so small that it would not be detected by a reasonable inspection system, then the plaintiff would not have satisfied the factual causation test. As the plaintiff and other witnesses did detect other small amounts of water, he decided that the test was satisfied.

In reviewing the evidence of two witnesses (both employees of the defendant), the Court of Appeal concluded that the water they observed was not the water on which the plaintiff slipped. The only person to see the relevant water was the plaintiff and that was only after he slipped.[9] The trial judge said that the two witnesses may have seen the relevant water. On appeal, Fraser JA determined that such an observation was not a finding.

The plaintiff's evidence-in-chief described the water in varying inconsistent ways. In cross-examination, he agreed with a prior statutory declaration he made describing the water as 'a fine spray of water'.

The Court of Appeal held that the plaintiff failed to prove that a reasonable system of inspections probably would have detected the water. The appeal was allowed and judgment was given for the appellant defendant.

GRAHAM & ORS v WELCH[10]

In this case, the defendants appealed the decision that they were liable for the plaintiff's injuries when she slipped and fell on a gumnut which was on the stairs of the defendants' residence. The trial judge found that the defendants breached their duty by failing to provide safe access to the house by adequately pruning or removing the gum tree.

The evidence at trial was that:

1. the defendants had lived in the house for two months;
2. the plaintiff regularly visited the house;
3. the stairs were regularly swept; and
4. no one had experienced problems walking up the stairs in over 12 years.

The Court of Appeal accepted that the risk of injury was foreseeable and that an occupier owes a duty of care to entrants on their land. The issue was whether there was a breach of that duty.[11] >>

In 1997, the Court of Appeal considered a similar case that involved mango leaves being present on stairs of a dwelling.[12] The court saw that risk as far-fetched and fanciful. The leaves were a familiar feature of the steps. Balancing the low risk against the benefits of the tree meant that the defendant was not required to take any steps. The trial judge distinguished the present case to that one on the basis of the significant hazard posed by a gumnut on the stairs.

Atkinson J, who provided the leading judgment, said that there was no basis for the distinction. He said that both hazards could easily be seen and avoided and the plaintiffs were aware of the hazards. The fact that the plaintiff (in the gumnut case) had successfully negotiated the stairs before meant that she had experienced no danger or knew the danger existed.

Atkinson J commented that, "It is not reasonable for court decisions to require the removal of such trees if an entrant to residential premises slips on a natural hazard which is readily apparent."[13] Furthermore, Muir JA stated that it was not shown that pruning the tree would have stopped the gumnuts from blowing on to the stairs.

The Court of Appeal allowed the appeal and gave judgment for the defendants.

The question to be answered was what were reasonable steps that the defendants needed to take to ascertain the existence of defects?

SHEEHY v HOBBS[14]

The plaintiff was injured when she fell down the stairs of the residential premises she rented from the defendants. The allegations of breach of duty against the landlords were enshrined in statute, contract and negligence. The question to be tried was whether there was a reasonable duty on the landlords to make alterations to the stairway that would reduce the risk of injury to users of the stairway.

The contested issues of fact (dealt with separately below) were:

1. The state of the carpet;
2. Making complaints about the stairs; and
3. The width of the 'goings'[15] on the stairs.

The state of the carpet

The plaintiff contended that a 12-year-old carpet would be less likely to provide a non-slip surface compared with other surfaces and the carpet altered the nosing[16] characteristics of the stair treads. The judge accepted these contentions, but said there was no evidence that the carpet had worn through or was particularly slippery.[17] The judge was presented with Australian Standards and British Standards but found them to show only that when determining the foreseeability of risk of a slip and fall, the lower the coefficient of friction[18] the greater the risk. It was accepted that the stairs could have been safer (uncontested expert evidence that carpet has a lower slip resistance than commercial nosing strips).

Making complaints

The best evidence about someone making complaints regarding the stairs was from the plaintiff's daughter. She told the manager of the complex unit that she fell (on a different part of the stairs) but did so in a joking fashion. Her evidence did not suggest that the stairs were at fault for her fall.

Other family members gave evidence of falls but they did not report the falls to the defendants. Furthermore, they did not believe that the stairs were the cause.

The judge had to approach the case on the basis that there was no report of any defect in the stairs, or of any injury being sustained on the stairs during the tenancy of the plaintiff and her family. There was no evidence lead about other tenants' experiences in the unit or other units. No complaint did not mean the stairs were safe or as safe as they ought to have been. The judge referred to cases[19] highlighting that a history of injury is relevant to assessing the risk of harm and the landlord's response to that risk. The significance of the lack of complaint or report of injury was that the landlords had no actual knowledge of a problem with the stairs.

Width of goings on stairs

The plaintiff's expert measured the going on the relevant stair as 235mm (minimum requirement 240mm). The defendant's expert measured the going as 242mm. The difference between the two was that the plaintiff's expert measured the carpeted stair and the defendant's expert measured the stair under the carpet. It was decided that the relevant stair was the one the plaintiff was confronted with. Therefore, the plaintiff's expert was accepted and the goings were found not to comply with the standards.

The judge found, after accepting further evidence from the plaintiff's expert, that there was an increased risk of slipping and falling on these stairs. He believed the stairs could have been safer and summarised his position as follows:

> "Causation, it seems to me, is a matter of common sense. The stairway in question did not meet the minimum requirements laid down by the Building Code of Australia in their carpeted state as the going on the first tread (and on average over the treads) was slightly less than the minimum, had nosings that were rounded and provided a poor visual cue to a user of the stairs, all of which lead to an increased risk of falling. This risk was compounded by the relatively low level of lighting provided over the stairs. There was minimal ability to avert a fall given the absence of handrails."[20]

The judge said that the defendant could have lessened the risk through simple and inexpensive measures. The last issue was whether the landlord was required to take those steps.

Whether the defendants breached contractual or statutory duties required the Court to decide whether the landlord, at the start of the tenancy, should have realised that the premises were not fit to live in or in good repair or if it breached health and safety laws. McMeekin J found that:

1. There was no evidence that the stairs were not in good repair;
2. It was not shown that the defendants breached health and safety laws;
3. It was not contended that the stairs were in breach of the contractual or statutory duty and that alone was causative of the slip (the plaintiff's expert said the slip was caused by many factors);
4. The defendants did not know about the difference in the goings of the stairs or that a reasonable landlord should have;
5. Failure of the landlord to measure the stairs between tenancies was not unreasonable;[21] and
6. Whether the premises were fit to live in was to be determined with regard to the common law (the leading case on point is *Jones v Bartlett*[22]).[23]

The common law duty is:

> 'The duty requires a landlord not to let premises that suffer defects which the landlord knows or ought to know make the premises unsafe for the use to which they are to be put. The duty with respect to dangerous defects will be discharged if the landlord takes reasonable steps to ascertain the existence of any such defects and, once the landlord knows of any, if the landlord takes reasonable steps to remove them or to make the premises safe.'[24]

Therefore, the question to be answered in the present case was what were reasonable steps that the defendants needed to take to ascertain the existence of defects.

McMeekin J said that the defect in the stairs was not known to the landlords and was not obvious to a layperson. The defendants would need to hire an expert[25] which would be unusual and costly. There was nothing peculiar about the stairs.[26]

The plurality judgment in *Jones v Bartlett* provided as follows:

1. There is no duty on a landlord of residential premises to ensure that those premises are as safe for residential use as reasonable care and skill on the part of anyone could make them;[27]
2. It is necessary to show that the premises are defective in the relevant sense and that the landlord knew or ought to have known of that defect;[28] and
3. There is no obligation to replace items which, although not defective, involve a foreseeable risk of injury simply because safer items are available.[29]

McMeekin J considered that for the plaintiff to win he would need to depart from this High Court decision and the three propositions above. He concluded that:

> "The question to be decided is whether the presence of the stairs that could have been made safer...rendered the premises unfit for the plaintiff to live in. In the absence of any evidence of actual or constructive notice of a 'defect' there can be no breach of duty, whether contractual, statutory or at common law."[30]

Judgment was entered for the defendants.

CONCLUSION

The first two cases continue the emphasis the courts are placing on the *Adeels Palace* case. The plaintiff is required to prove that but for the negligent act or omission, the harm would not have occurred. In the first case, the system would not have detected the water and having no system would not have stopped the harm from occurring. In the second case, it was not shown that pruning the tree would have stopped gumnuts from being present on the stairs.[31] Otherwise, the second case demonstrated that the *Wyong*[32] principle still holds firm when evaluating the level of risk, what steps should have been taken and whether the duty was breached. The final case illustrates that without knowledge of a defect, there is no overcoming *Jones v Barlett*[33] in finding a duty of care on a landlord for residential premises. ■

Notes: **1** [2012] QCA 281. **2** *Civil Liability Act* 2003 Qld, s9(1)(b). **3** *State of Queensland v Nudd* [2012] QCA 281 at [3]. **4** *Civil Liability Act* 2003 Qld, s11(1)(a). **5** *State of Queensland v Nudd* [2012] QCA 281 at [4]. **6** *Civil Liability Act* 2003 Qld, s11(1)(a). **7** *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, (2009) 239 CLR 420. The Court considered the equivalent section in the *Civil Liability Act* 2002 (NSW). **8** [2012] HCA 5. **9** The plaintiff gave evidence that the only reason he saw it was because his face was flat on the ground. **10** [2012] QCA 282. **11** The Court was referring to *Wyong Shire Council v Shirt* (1981) 146 CLR 40 at 47, which said that just because a risk is foreseeable does not mean the duty was breached. **12** *Woodward v The Proprietors of Lauretta Lodge* [1997] QCA 183. **13** *Graham & Ors v Welch* [2012] QCA 282 at [24]. **14** [2012] QSC 333. **15** BCA, *Extract from BCA 2012 (Building Code of Australia) (2012)* http://www.colacotway.vic.gov.au/Files/Balcony_Stair_Balustrade_Extract.pdf. *Going* means the horizontal dimension from the front to the back of a tread less any overhang from the next tread above. **16** Urban Hardwood Flooring, *Glossary* http://www.urbanhardwoodflooring.com/Glossary.htm. A finishing piece applied to the forward edge of stairs, step-downs and landings, creating a rounded quality finish. **17** The carpet was thrown out after the accident and not tested. Furthermore, there was no evidence lead by the plaintiff that the carpet did not meet the relevant requirements under the Building Code of Australia 1990 cl D2.13(b)(v). **18** Dynisco, *Glossary* http://www.dynisco.com/glossary. A measure of the resistance to sliding of one surface in contact with another. **19** *Jones v Bartlett* (2000) 205 CLR 166 per Kirby J at [250]; *Sakoua v Williams* (2005) 64 NSWLR 588 per Mason P at [30]. **20** *Sheehy v Hobbs* [2012] QSC 333 at [62]. **21** See *Ridis v Proprietors of Strata Plan 10308* (2005) 63 NSWLR 449, which held that there was no duty to inspect premises to discover defects unknown and unsuspected. **22** (2000) 205 CLR 166. **23** *Sheehy v Hobbs* [2012] QSC 333 at [73]-[76]. **24** *Jones v Bartlett* (2000) 205 CLR 166 at [173]. **25** See *Ahluwalia v Robinson* [2003] NSWCA 175 where it was held there is no duty to hire experts to look for defects. **26** They were thought to be typical internal stairs found in units. **27** *Jones v Bartlett* (2000) 205 CLR 166 at [57], [90]-[92], [171]-[173], [193] and [289]. **28** *Ibid* at [22]-[26], [88], [178], [186] and [252]. **29** *Ibid* at [56], [90]-[91], [93], [137], [173], [249] and [289]. **30** *Sheehy v Hobbs* [2012] QSC 333 at [104]. **31** *Graham & Ors v Welch* [2012] QCA 282 at [4] per Muir JA. **32** *Wyong Shire Council v Shirt* (1981) 146 CLR 40. **33** (2000) 205 CLR 166.

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