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LIABILITY ISSUES in single vehicle accidents

This article examines several cases that illuminate liability issues that can arise in the context of single motor vehicle accidents. The injured person can be the driver, the passenger, or someone outside the car. In most cases, the obligations fall on the owner of the car or the driver.

DRIVER AND PASSENGER INTOXICATED – *Hawira v Connolly*[1]

This case involved three claims:

1. A property damage claim by Ms Connolly against Mr Hawira;
2. A personal injury claim by Ms Connolly against Mr Hawira and Suncorp as the CTP insurer; and
3. A personal injury claim by Mr Hawira against Ms Connolly and Suncorp as the CTP insurer.

The questions to be answered by Daubney J were:

1. Did the accident occur in the way described by Ms Connolly?
2. Was Mr Hawira wearing a seatbelt at the time of the accident?
3. Did ss47-49 (inclusive) of the *Civil Liability Act* 2003 (Qld) apply?[2]

The plaintiff, Mr Hawira, was a tree-lopping contractor for Ms Connelly. It seemed they were also friends outside of work. One afternoon, at about 3pm, they went to a pub where Ms Connelly had arranged to have a business meeting with >>

another person. The plaintiff was not part of the meeting, except for commenting about obtaining building materials from the other party which upset the defendant (and seemed to lead to an argument later that afternoon). The plaintiff was buying jugs of beer during the afternoon with money supplied by the defendant and periodically topped up the defendant's glass. Shortly after 6pm, they left the pub and the defendant drove.

While driving home on the highway, the car went off the road (to the left), hit a tree, flipped and landed on its roof.

During the trip there was an argument. The defendant said the plaintiff tried to get out of the car by opening the door but she told him to get back in the car and stop being stupid. She said he then grabbed the steering wheel (pulling it 180 degrees) and forced the car off the road. The plaintiff agreed that there was an argument and that he tried to get out but he said he tried to get out a short time earlier while stopped at a toll booth. He could not remember the accident itself.

The defendant gave several versions of the accident. She claimed that the plaintiff had been driving, until the ambulance notes, the nurse from the hospital and the toll booth operator all said that she was the driver. By then, she had also found out that the plaintiff could not remember the accident. She then said that he forced the wheel out of her hands. She expanded on this point at the trial. The judge rejected her version as implausible when compared with the physical evidence at the scene and common sense. The fact that she had previous drink-driving offences and that a further one would affect her business was also raised by the plaintiff.

Her BAC was 0.119. The ambulance and hospital notes said she was aggressive and intoxicated (the nurse actually remembered her). The judge ruled that her capacity to drive was impaired at the time of the accident.

The judge said both of them were 'intoxicated'.[3] Mr Hawira had about one beer more than Ms Connolly out of the four jugs.

The judge said that the plaintiff did not lead evidence rebutting the presumption that his intoxication did not lead to a loss of control by the defendant and reduced damages by 25 per cent (see s47).[4] The plaintiff also relied on the defendant's care and skill and was aware that she was intoxicated at the time resulting in at least a 25 per cent reduction (s48).[5] Finally, the court found that the defendant was so much under the influence of alcohol that she was incapable of exercising effective control of the car (s49(2)(d)(ii)), resulting in a 50 per cent reduction.[6] The reading of 0.119 was two hours after the accident. An expert gave evidence that the reading at the time of the accident would have been between 0.1395 and 0.1805. This interpretation means that a driver with under 0.15 BAC can still lose 50 per cent of their damages (it was submitted, but rejected, that the 'under the influence' sub-section applied only to cases where no reading was obtained).[7]

The judge also found that the plaintiff was not wearing a seatbelt and subsequently reduced damages by 16 per cent. Overall, the plaintiff's damages were to be reduced by 66 per cent.

CRIMINAL ACTIVITY – *Miller v Miller*[10]

The plaintiff (appellant), a 16-year-old girl, went to town and tried to get into a nightclub with her older sister and cousin. By the early morning, the last train had gone and they had no money. The plaintiff, who had been drinking, broke into a car and started it. Her sister was then going to drive. The defendant respondent, the plaintiff's mother's cousin, saw the situation and came over and insisted that he drive. Nine people in total entered the car. The defendant drove, speeding and running red lights along the way. The plaintiff asked on several occasions for him to slow down or to be let out. In the end, the car hit a pole and she became a tetraplegic. One of the other occupants died and the defendant respondent went to jail for five years.

The only issue was whether there was a duty. Contributory negligence was agreed at 50 per cent. In Western Australia, there are no statutory provisions regulating the recovery of damages where the plaintiff is acting illegally.[9] As a result, the common law applied. There was, however, a provision within the Criminal Code that dealt with a common intention to commit an unlawful purpose.[10] But it also stated that if a person withdrew from the common purpose, they were not responsible for any offences after that time.[11] The matter was complicated because it was not argued at trial or in the initial appeal to the Court of Appeal that the plaintiff had withdrawn from the activity. The majority (Heydon J in dissent) allowed the argument and allowed the appeal, finding that the plaintiff had withdrawn from the illegal activity and was owed a duty to take reasonable care.

OCCUPANTS MISBEHAVING – *Wilson v Lambkin*[12]

The plaintiff and two of his friends borrowed a car and did 'donuts' in a dead-end street on a deserted road. They said they went there to give the plaintiff some driving practice. The judge rejected that suggestion for several reasons, including the fact that the plaintiff had had his learner's permit for some 11 months, was driving regularly and this was an automatic car.[13] On the way home, the defendant put his foot down and then lost control at high speed. The plaintiff had asked him to slow down, a point which the judge accepted.

The insurer argued that this was a dangerous recreational activity and the injury arose from an obvious risk of that activity. The judge disagreed on both counts (except to say that the activity was mindless). The court held that there was no obvious risk, as the dangerous driving was unexpected. The defendant, although inexperienced, was licensed, and owed a duty of care of a reasonable driver. A claim of contributory negligence was also rejected. However, while the plaintiff received an ISV of 22 for his physical (mainly abdominal) injuries,[14] he was awarded only $8,000 for future economic loss.[15]

LEARNER DRIVER, PASSENGER INJURED – *Imbree v McNeilly*[16]

The plaintiff took his two sons and two of their friends four-wheel driving in the outback. The defendant was 16, did not have a licence or a learner's permit and only limited experience. The plaintiff allowed the defendant to drive his

work car as long as he did not go over 80km/hr. While the defendant was driving and the plaintiff was in the front seat, they spotted a tyre on the road (about 300m ahead). The defendant swerved to the right. The plaintiff yelled at him to brake but he did not. Instead he turned to the left and accelerated. The car overturned. As a result of the accident, the plaintiff became a tetraplegic.

The issues were the standard of care owed to the supervisor as per *Cook v Cook*,[17] as well as contributory negligence. The plaintiff won the trial, but damages were reduced by 30 per cent. The plaintiff also won the appeal 2:1 (but contributory negligence was increased to two-thirds by Basten JA and Tobias JA [in dissent on liability]; and half by Beazley JA). The High Court overturned the *Cook v Cook* standard where the instructor was owed a lower duty of care and applied a general standard of care.[18] The verdict at trial was restored. The plaintiff ought to have given a general instruction not to do anything sudden on a dirt road and a specific one, after the tyre was spotted, to straddle it. The extent of the supervisor's knowledge of the driver's experience is now part of whether there was contributory negligence.

LEARNER DRIVER, DRIVER INJURED – *Thornton v Sweeney*[19]

The plaintiff, Madeleine Sweeney, was 16 and a learner driver with 28 hours' experience when she drove a car with Andrew Thornton (the defendant) as a front seat passenger. The defendant's girlfriend was in the back of the car. They were driving on a country road that was about two lanes wide but with no centre line. The speed limit was 100km/hr but, for a learner, it was 80km/hr. The plaintiff approached a left-hand turn at about 70km/hr (the judge could not be satisfied it was more). The car fishtailed, went off the road, rolled and hit a tree. The judge found that 70km/hr was not a safe speed (taking into account the inexperience and that the road was wet after rain) and that the defendant should have given instructions. There was no finding of contributory negligence and damages were assessed at $5 million.

The trial took seven days. The plaintiff could not remember what happened. The defendant did not give evidence, but his statement was tendered by the plaintiff. The girlfriend could not remember what happened either. The driver of a car travelling the other way said the car lost control early in the turn and looked to be going about 80km/hr. The defendant's statement said that the car's rear swung out slightly going around the bend, the plaintiff overcorrected, took her foot off the accelerator and then put it back on hard (as if to brake). The car then swung out further and went off the road.

Four days of the trial were spent on experts. The experts agreed that, on average, the car was going about 70km/hr while fishtailing. Whether it went faster earlier depended on the steering input, and any braking or accelerating. The plaintiff's expert said that constant speed adjustments were required by the supervisor. The defendant's expert said that >>

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there was not enough time to do anything once the fishtail started. He made a distinction between a professional and a volunteer instructor, because the professional had training and foot controls.

On appeal, several findings came under scrutiny. The finding of speed was questioned, as was the applied standard of care. The court looked at the regulations regarding learners and supervisors.[20] It also considered the case of *Imbree*.[21] A standard for a volunteer supervisor was set, taking into account that reasonable precautions should be taken. What was reasonable depended on the circumstances of the case, the obligations in the relevant road regulations, the fact that no qualifications were required, and that the primary control was with the driver.[22]

The court held that the duty had not been breached. Interestingly, the experts said that a speed of 73-75km/hr was a comfortable speed, whereas it took between 124km/hr and 137km/hr before sliding off the road was inevitable. The plaintiff's expert was rejected as applying hindsight and equating a volunteer with a professional instructor.

The plaintiff's cross-appeal – that the judge should have found that the entry speed was 80km/hr or higher – was dismissed. The court said it was more likely that the plaintiff accelerated rather than braked during the slide.

The court declined to consider contributory negligence, as any finding would only be *obiter*.

The Full Court of the High Court heard the application for special leave on 8 August 2012.[23] The Court, in refusing leave, found that the Court of Appeal was correct in finding that the primary judge did not err in finding that the plaintiff entered and travelled through the bend at 70km/hr and that the duty had not been breached.

Was there a duty and was it breached? Was there causation and could contributory negligence be assessed at 100%?

LEARNER DRIVER, DRIVER INJURED, PRIVATE PROPERTY – *Simpson v Grundy*[24]

The plaintiff, Debbie-Jo, was 17 when she went with her mother, stepfather and brother, Sam, 13, to visit her grandmother on a farm for Christmas. The grandmother lived on the farm with the defendant, Mr Grundy, who owned the farm and another man, Mr Edwards, who owned an old Nissan Bluebird.

While on the farm, the plaintiff 'asked' whether she could take the car for a drive, by saying '*we're going*' – referring to her and her brother. Her stepfather and grandmother told her to be careful. The car was driven on a dirt road on a farm at about 80km/hr when it fishtailed and rolled. The plaintiff, who was not wearing a seatbelt, was thrown from the open window when the car rolled.

The plaintiff had had a learner's permit for about five months at the time of the accident, and about 30 hours of driving. The occupiers of the farm argued that the car belonged to the 13-year-old brother, who would come to the farm on occasions, and that they thought he was going to drive; which would have been ok as he was a good driver. They also said that he had the keys.

The judge was unhappy with most of the witnesses. The most reliable witness turned out to be the stepfather.[25]

The case against the owner of the property was that he failed to supervise (as the occupier, he had the power to stop her driving on his private road). The judge looked at cases involving the supervision of children by parents (there being no general duty to supervise) and considered the presence and the conduct of the parents as relevant in determining whether a breach of duty had occurred, as the parents were in the best position to know and judge the child's conduct. Hence, there was no breach in the circumstances.[26]

The defendant also argued that the plaintiff deliberately fishtailed the car (or as a result of her bipolar disorder). The judge was not persuaded by that, but agreed that the plaintiff was going too fast and was not wearing a seatbelt, resulting in 30 per cent contributory negligence, with deductions of 15 per cent on both points. (An adult would have had to contribute 25 per cent for each point respectively.)[27]

CHILD DRIVER, ANOTHER INJURED – *Zanner v Zanner*[28]

The defendant was an 11-year-old boy. He asked his mother, the plaintiff, whether he could drive the car into the carport when they arrived home from a trip. He had done it several times before (in his father's car). She stood in front of the car. He moved the automatic car forward, his foot slipped off the brake on to the accelerator and the car drove over her. She was awarded $700,000 at trial, but this was reduced by 50 per cent for contributory negligence.

On appeal, issues included whether there was a duty and whether it was breached; whether there was causation and could contributory negligence be assessed at 100 per cent? The defendant was relying on comments by Gleeson CJ in *Imbree* that, in some cases, allowing someone incompetent to drive was negligence itself. There were also comments from the majority that a standard of care owed by a child was 'attenuated'. Tobias JA in the leading judgment held that there was a duty and the standard expected was to keep the foot on the brake and not let it slip (any other standard would amount to no duty at all). As for causation, there was an argument that s5D CLA did not apply. That was rejected. The High Court made it clear (in *Adeels Palace*[29]) that the statute has to be applied. The question remained whether the statute reflected the common law or not. Alsop P dealt with the issue extensively, citing various NSW cases, including several involving Ipp JA.[30] Here, while there were two causes, the mother's conduct and the son's conduct, causation was established.[31] Regarding contributory negligence, the test was whether the apportionment was 'unjust or unreasonable'

and the court held that it was, as the blame could not be said to be equal, and increased it to 80 per cent.

PEDESTRIAN HIT BY CAR – *Allianz v Swainson*[32]

The plaintiff went to a pub for a few drinks. When he decided to go home, he left his bike behind, preferring to walk and hitchhike the 6km. About 2km down the track, he was walking on the left side of the road. The defendant was driving in the same direction. There was no footpath on that side but there was one on the other side. The headlights of the defendant's car lit up the trees in front of the plaintiff and the railing beside him. As the car approached from behind, he said he just turned around. The defendant said, and the trial judge accepted, that he took a step into the lane. The defendant said that he only saw the plaintiff when they were about 15m apart. As there was a car coming the other way, he had nowhere to go.

The judge said that neither witness was impressive. The plaintiff had trouble answering questions about his medical, work, drug and employment history. As for the defendant, the judge rejected his argument that he did not have enough time to do anything or that he could not do anything because of oncoming traffic. In reaching her decision, the judge said that she was relying on her 'life experience' in finding that he should have kept a proper lookout, slowed down and deviated[33] (there was enough room without going into the opposite lane).

The appeal court explained that statement as no more than using common sense to draw inferences from the available evidence.

At trial, contributory negligence was assessed at 40 per cent because there was intoxication (minimum 25 per cent), failing to use a footpath and taking a step into the lane. On appeal, that was increased to 60 per cent despite accepting that ordinarily a car will bear the majority of the blame in a collision between a car and a pedestrian.[34]

INEVITABLE ACCIDENT – *Foster v Claybourn's Discount Tiles*[35]

The plaintiff was driving her car when another car, travelling in the opposite direction, came into her lane and collided with her car head on. The driver of the other car died of a brain tumour before trial. The accident occurred in December 2006, but the defendant's condition was not diagnosed until February 2007. There was a medical report suggesting that the driver was having a seizure, which affected his capacity to drive, at the time of the accident.[36]

The court examined s5 of the *Motor Accident Insurance Act* 1994 and concluded that negligence was not required to meet the definition of 'wrongful act or omission' as contemplated by the section. It was sufficient if the driver caused or allowed his car to move on to the wrong side of the road.[37] The judge distinguished 'bee sting' cases,[38] as they involved 'an intervening agency' independent of the driver. The case law called for an allowance to be made for the person who is suddenly placed in a critical position (but not too much).[39] Here, there was evidence by a person in a car following the deceased that he was going slowly and swerving for about 70 seconds (1km) before the collision. There was also some medical evidence about alcohol withdrawal while subsequently in hospital, but the court did not base its decision on it.

OWNER LIABLE FOR DEFECT – *Harmer v Hare*[40]

The plaintiff and the defendant, both 21, were friends. The defendant had been drinking that afternoon. He had his 20-year-old Ford Falcon, with a modified engine, at his girlfriend's place. It had been there for a month, waiting for work to be done on the steering before it could be registered. It had four bald tyres. It had been raining. There was a suggestion the boys were going to do some burnouts. They were going to the plaintiff's house first. The plaintiff offered to drive. He had previously sold the wheels that were on the car to the defendant.

The car took off. The girlfriend was following. At a roundabout, the car started to fishtail, spun 180 degrees and hit a pole.

The defendant and his girlfriend said that they had told the plaintiff that the car had bald tyres. The girlfriend also said that she saw the plaintiff accelerate as the car started to lose the back end.

There were therefore two possibilities why the accident occurred: the wet road combined with bald tyres, or the plaintiff deliberately spinning the wheels and losing control.

In the first trial, the judge found that the plaintiff said that >>

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the tyres were '*not real good*'. It turns out he said in response to a question, *do you recall their condition: 'not really, but I suppose good*'. It seems the transcript was not available when the judgment was handed down. The plaintiff lost with an alternative finding of 85 per cent against him. The parties agreed there was an error. An appeal was allowed and a retrial (using the initial evidence) took place. The appeal judgment also set out what findings needed to be made.

In the second judgment, the plaintiff won, but was still 25 per cent responsible. The defendant was negligent for not warning the plaintiff about the tyres and for allowing him to drive the car in that state. The plaintiff was partly responsible, because he knew the car needed work for registration so he should have either asked the defendant about its condition or if the defendant was too drunk, to check the car himself.

There were 23 grounds of appeal running for some 20 pages. The court grouped them together.

The trial judge said the plaintiff did not know the condition of the tyres. Her Honour rejected the evidence of conversations about the tyres as fabrications. These findings were upheld on appeal.

The duty was found to be to take reasonable care and all that took was not to let the plaintiff drive. The argument that this was an obvious risk, and that there was therefore no obligation to warn, was rejected.

As for the cross-appeal regarding contributory negligence, the court said that a reasonable person would not have asked about the condition of the car. There was therefore no contributory negligence. The need to check was pure speculation, as the trial judge had not found that the defendant was so intoxicated that he could not give a sensible answer.[41]

OBJECTS THROWN FROM CAR – *Nominal Defendant v Hawkins*[42]

The plaintiff was riding his bike home at 1am when he heard noises behind him including the beeping of a horn, yelling and loud music. He moved from the road to the footpath. The noise got louder. A car slowed down, an object thrown from the car[43] hit him, he lost his balance, rode over a piece of metal, got a flat tyre, fell off and suffered an injury. He won at trial and the Nominal Defendant appealed. Hodgson JA ruled that it was open for the trial judge to find that the driver drove in a way to facilitate the throwing. Also, the inference was available that the driver set out to harass the plaintiff. The next issue was whether the incident was covered by the relevant Act.[44] A Victorian case (*Ross*[45]) and two Queensland cases (*Mani*,[46] *Coley*[47]) were examined. *Ross* involved a shooting; *Mani* a rock being thrown and *Coley* a Molotov cocktail. The test was whether the actual use and operation of the car played a causative role or whether the car was just used to facilitate a crime. This case was barely in the first category. Alternatively, the question was whether the throwing was part of, or independent of, the harassment. Again, it was the former. Sackville AJA added that a proximate/immediate cause had to be found (applying High court's *Allianz* case[48]) and here there were two concurrent and interdependent causes where one could not occur without the other.[49] ■

Notes: 1 *Hawira v Connolly & Anor; Connolly v Hawira & Anor* [2008] QSC 004. **2** The equivalent sections for the different jurisdictions are: *Civil Liability Act* 2002 (NSW) s50, *Civil Liability Act* 1936 (SA) ss46-48, *Civil Liability Act* 2002 (WA) s5L, *Civil Law (Wrongs) Act* 2002 (ACT) ss95-6, *Civil Liability Act* 2002 (TAS) s5, *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) ss14-17. In Victoria there is no equivalent section(s) although s14G of the *Wrongs Act* 1958 states that the court is to consider intoxication to decide whether there is a breach of the duty of care. **3** The definition of intoxicated under the *Civil Liability Act* 2003 (Qld), Schedule 2 is, 'the person is under the influence of alcohol...to the extent that the person's capacity to exercise proper care and skill is impaired'. For the definition in other jurisdictions see: *Civil Liability Act* 2002 (NSW) s48, *Civil Liability Act* 1936 (SA) s3, *Civil Liability Act* 2002 (WA) s5L, *Civil Law (Wrongs) Act* 2002(ACT) s92, *Civil Liability Act* 2002 (TAS) s5, *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s3. The term is not defined in In the *Wrongs Act* 1958 (VIC). **4** *Hawira v Connolly & Anor; Connolly v Hawira & Anor* [2008] QSC 004, at [41]. **5** *Ibid*, at [43]. **6** *Ibid*, at [49] – [53]. **7** *Ibid*. **8** [2011] HCA 40. **9** Contrast that with such provisions found in: *Civil Liability Act* 2002 (NSW), s54; *Civil Liability Act* 2003 (QLD) s45; *Civil Liability Act* 1936 (SA) s43; *Civil Liability Act* 2002 (TAS) s6; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s10; *Wrongs Act* 1958 (VIC) s14G. **10** *Criminal Code Act Compilation Act* 1913 (WA), s371A. **11** *Ibid*, s8(2). **12** [2010] QDC 254. **13** *Ibid*, at [7] – [11]. **14** An ISV of 22 is roughly the equivalent of 22 per cent total body impairment. **15** *Wilson v Lambkin* [2010] QDC 254, at [65]-[69]. **16** [2008] HCA 40. **17** [1986] HCA 73. **18** *Ibid*, at [71], [72]. **19** [2011] NSWCA 244. **20** *Driving Instructors Regulation* 2003 (NSW), *Driving Instructors Regulation* 2009 (NSW). **21** *Imbree v McNeilly* [2008] HCA 40. **22** *Thornton v Sweeney* [2011] NSWCA 244, at [113]. **23** *Sweeney (BHNF) v Thornton* [2012] HCATrans 179 (8 August 2012). **24** [2011] QSC 299. **25** *Ibid*, at [4]-[16]. **26** *Ibid*, at [51]-[56]. **27** *Ibid*, at [71]. **28** [2010] NSWCA 343. **29** *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48. **30** The cases involving Ipp JA were: *Ruddock v Taylor* [2003] NSWCA 262; 58 NSWLR 269, *Tambree v Travel Compensation Fund* [2004] NSWCA 24; (2004) Aust Contracts Reports 90-195, *Harvey v PD* [2004] NSWCA 97; 59 NSWLR 639; *Graham v Hall* [2006] NSWCA 208; 67 NSWLR 135; *Coastwide Fabrication & Erection Pty Ltd v Honeysett* [2009] NSWCA 134; *Stojan (No. 9) Pty Ltd v Kenway* [2009] NSWCA 364. **31** *Zanner v Zanner* [2010] NSWCA 343, at [81]-[83]. **32** [2011] QCA 136. **33** *Ibid*, at [5]. **34** *Ibid*, at [31]. **35** [2010] QDC 290. **36** The report was provided by Dr Weidmann, neurosurgeon. After giving his evidence at trial, Robin DCJ considered his opinion to be relatively tentative and not to be relied upon. **37** *Foster v Claybourn's Discount Tiles* [2010] QDC 290, at [10]. **38** *Scholz v Standish* [1961] SASR 123; *Lafranchi v Transport Accident Commission* [2006] 14 VR 359, although the accident in this case was not caused by a bee stinging the driver. **39** *Foster v Claybourn's Discount Tiles* [2010] QDC 290, at [16]. **40** [2011] NSWCA 229. **41** *Ibid*, at [250]-[252]. **42** [2011] NSWCA 93. **43** This was alleged by the plaintiff and was accepted by the court at first instance. **44** *Motor Accidents Compensation Act* 1999 (NSW) (MAC Act). In particular, s3 regarding the definitions of 'injury' and 'motor accident' and s34 which provides for claims against the Nominal Defendant. **45** *Ross v Transport Accident Commission* [2000] VSC 112. **46** *Mani v Nominal Defendant* [2002] QSC 152. **47** *Coley v Nominal Defendant* [2003] QCA 181. **48** *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* [2005] HCA 26. **49** *Nominal Defendant v Hawkins* [2011] NSWCA 93, at [71].

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