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The Conditions of Civil Liability of Physician under Afghan Law

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Abstract

One of the fundamental issues in medical law is the civil liability of physicians. Despite physicians' continuous efforts to comply with scientific and practical standards of treatment, errors or negligence may occasionally occur during the course of medical practice, resulting in material and moral harm to patients. In such cases, compensation is required. This study examines the foundations and conditions of physicians' civil liability under Afghan law. Article 776 of the Afghan Civil Code establishes liability based on fault and outlines four essential conditions: the existence of a harmful act, fault, damage, and a causal relationship. The primary objectives of this research are to define liability, explore the concept of physicians' civil liability, analyze the conditions for its realization, and examine its legal foundations in Afghanistan. Employing a descriptive–analytical methodology, data were collected through library-based research. Findings demonstrate that when a physician acts knowingly, cautiously, and in accordance with medical standards, liability does not arise. However, where a causal link exists between a physician's conduct and the harm inflicted, the physician is held liable and obliged to compensate the patient.

Keywords: Civil Liability, Physicians, Medical Law, Fault, Afghan Civil Code

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1. Introduction

The medical profession is one of the oldest professions in the history of human life. Due to its direct connection with human life and death, this profession has always been of great significance. However, alongside its necessity, there are also challenges facing this profession. The most fundamental challenge lies in the absence of specific legislation in this field and the lack of effective oversight over physicians' conduct in the country. This situation results in the absence of standardized criteria for the quality of medical services and a lack of accountability on the part of physicians when patients suffer harm.

Although physicians strive, with utmost care and effort, to adhere to the technical and scientific principles of treatment and medical practice, they may sometimes commit mistakes or errors in the course of their work, leading to physical, material, or moral damages to the patient. Consequently, in order to ensure that such damages do not remain unaddressed, states have enacted rules and regulations in this regard. Afghanistan is among the countries that have defined civil liability, clarified its foundations, and articulated the conditions for its realization. The central issue in this research concerns the foundations of physicians' civil liability and the conditions for its realization under the Afghan legal system. In other words, the study seeks to determine whether Afghan law considers a physician's fault to be compensable. Put differently, what constitutes the civil liability of physicians under the Afghan legal system? If the legal system holds physicians accountable, then on what basis is this liability established, and what conditions have been recognized for attributing such liability to physicians in Afghanistan?

Therefore, this study aims to define the concept of civil liability, examine the legal foundations of physicians' liability under Afghan law and analyze the conditions necessary for its establishment, with particular emphasis on determine the position and significance of physicians' civil liability within the Afghan legal system.

The author has made every effort to study and conduct research in this field in order to find answers to the questions raised in his mind. Unfortunately, however, no research has been found that adequately addresses the issues and challenges of physicians' civil liability in Afghan law.

It is worth mentioning that the author has come across only a few studies whose titles bear some similarity to the present research, yet none

of them provide answers to the questions posed in this study. These studies are reviewed as follows:

A thesis by Amini (2009), entitled “The Civil Liability of Physicians under Afghan and Iranian Law”, has examined the criminal liability of physicians under the Afghan Penal Code of 1976. However, the present research focuses on the civil liability of physicians under the Afghan Civil Code, and therefore, that thesis has not addressed the issues under discussion here. Similarly, an article by Moradi (2011), entitled “The Criminal Liability of Physicians in Afghan and Iranian Law”, also deals with physicians’ criminal liability under the former Afghan Penal Code, without addressing the questions raised in this study. In addition, an article by Samimi (2023), entitled “The Grounds for Physicians’ Liability Arising from Their Conduct from the Perspective of Jurisprudence and Law”, examines the conditions for establishing physicians’ liability under the Afghan Penal Code and Shia jurisprudence. Yet, it does not explore the position of the Afghan Civil Code, which explicitly discusses physicians’ civil liability.

Finally, an article by Abedi and Rezaie, entitled “A Comparative Study of the Foundations of Civil Liability in Imamiyyah Jurisprudence, Iranian Law, and Afghan Law”, focuses solely on the foundations of civil liability under Afghan law, without addressing the issue of physicians’ civil liability at all. Accordingly, the present study carries both scientific and theoretical significance, as it seeks to fill a pressing gap in Afghan legal scholarship by providing precise answers to the above-mentioned questions. From a practical perspective, it also contributes by offering well-documented and reasoned responses to the research questions, thereby supporting patients’ rights, enhancing oversight of physicians’ conduct, and ensuring the improvement of healthcare service quality in the country.

This study employs a descriptive–analytical research method, aiming to analyze the legal foundations and conditions of physicians’ civil liability within the framework of Afghan law. The research is qualitative in nature and relies primarily of library-based and documentary sources. Data were collected through and extensive review of the Afghan civil code, relevant statutory provisions, judicial decisions where available and academic writings addressing civil liability and medical law. The finding indicate that civil liability under Afghan law is fault-based, requiring the presence of four essential elements: a harmful act, fault, damage and a causal relationship between the act and the harm. According to this legal framework, no liability arises when a physician acts knowingly, cautiously,

and in full compliance with recognized medical standards and professional principles. However, when a causal link is established between the physician's conduct and the harm suffered by the patient, the physician is deemed legally liable and is obligated to provide appropriate compensation for the damage caused.

Finally, the structure, or main body, of the research consists of two parts. In the first part, the concept and foundations of physicians' civil liability are examined, while in the second part, the conditions for the realization of physicians' civil liability under Afghan law are analyzed.

2. Concept and Foundations

This section discusses and analyzes the legal concepts and foundations of a physician's civil liability as outlined below.

2.1. Key Concepts

Liability refers to an individual's obligation to compensate for harm caused to another, whether arising from breach of contract or violation of a legal duty (Jafari Langarudi, 2016, p.184). Below, we examine the specific concept of civil liability.

2.1.1. Definition of Civil Liability

Civil liability is a branch of legal responsibility defined as: "An obligation imposed on an individual to compensate for damage caused to another, whether resulting from their own actions, the actions of those under their supervision, or objects/assets under their ownership or control." (Hosseininejad, 2010, p. 13). Thus, the primary objective of civil liability is to redress wrongful damage caused by an individual's actions contrary to legal rights. This principle is affirmed in Article 776 of Afghanistan's Civil Code.²

2.1.2. Definition of a Physician

Linguistically, the term *physician* (in Persian: *pezeshk*) means a doctor—someone who treats and cures patients (Amid, 2010, p. 185). Technically, a physician is someone who, through studying and acquiring medical education, obtaining the necessary academic qualifications, and adhering to the ethical standards of the medical profession, is qualified to practice medicine. This individual is responsible for maintaining, promoting, and

². "Where harm is caused to another due to fault or negligence, the perpetrator is obligated to compensate for the damages."

restoring the health and well-being of the general population, particularly in times of illness (Babazadeh, 2011, p. 7).

2.1.3. Civil Liability of Physician

Physician' civil liability entails accountability for damage caused to patients during medical practice(Daryabari, 2002, p. 126). Specifically, a physician may be held liable for damages resulting from: Diagnostic mistakes, Treatment or surgical mistakes or Failure to fulfill legal or professional obligations toward patients.

2.2. Legal Foundations of Physicians' Civil Liability

Two prominent theories have been proposed regarding the legal basis of physician liability: absolute liability and fault-based liability. This section seeks to answer which theory Afghanistan's legal system has adopted. To address this question, we will first examine each theory separately before determining the position of Afghanistan's legal system.

2.2.1 The Risk Theory

The risk theory posits that anyone who engages in an activity that creates a dangerous environment for others, and who benefits from such activity or environment, must compensate for any resulting damages. This applies regardless of whether the act causing harm was lawful or unlawful, with liability being established solely by proving a causal link between the harmful act and the resulting damage (Motiei, 2016, p.25).

The risk theory is based on the fundamental principle that fault is not among the essential elements of civil liability. Rather, the existence of damage, harmful act, and causal relationship are sufficient to establish liability. However, adopting this theory as the basis for physicians' civil liability presents several problems: first, proving causation becomes particularly challenging when multiple factors contribute to an incident. Second, the theory may lead to unfair outcomes by holding ordinary and reasonable individuals liable.

2.2.2. The Fault Theory

According to this theory, a claimant seeking compensation must prove that the defendant was at fault (Emami, 2007, p.391). Therefore, the only justification for holding someone liable in a civil claim is establishing a causal relationship between the defendant's fault and the plaintiff's damage.

In other words, the fault theory maintains that a physician is liable for patient damages only when proven negligent.

Afghanistan's legal system has adopted the fault-based liability approach. This is explicitly stated in Article 776 of the Civil Code: "When damage is caused to another through mistake or fault, the perpetrator is obligated to compensate for the loss." Furthermore, in criminal matters, Article 45 of the Penal Code provides: "An offense is considered unintentional or accidental when it results from faults, carelessness, oversight, or failure to comply with laws and regulations, and the perpetrator did not foresee the consequences of their actions." Consequently, based on the comprehensive nature of these provisions, Afghanistan's legal system has clearly embraced the fault theory as the foundation for civil liability, including that of physicians.

3. Conditions for Establishing Physician Civil Liability

Generally, four essential conditions must be met to establish civil liability: 1. Existence of harmful conduct. 2. Existence of damage. 3. Existence of fault (mistake). 4. Causal link between the harmful conduct and resulting damage. Thus, a physician can only be held liable when: They have committed harmful conduct, this conduct caused damage to the patient, the conduct was accompanied by fault and there is a causal relationship between the conduct and the damage. The following section examines these four conditions in detail.

3.1. Harmful Conduct

Harmful conduct is one of the fundamental conditions for establishing physician liability. This refers to either: Committing an unlawful act (positive action), or failing to perform a legally required action (omission). Such conduct becomes legally actionable when it violates laws or contracts and causes harm to others. Below we examine both types of conduct.

3.1.1. Physician's Positive Harmful Acts

This refers to actions that violate medical rules/regulations or deviate from accepted medical standards. A physician becomes liable when acting contrary to established medical protocols. Key examples include: Performing surgery incorrectly or outside one's specialty, prescribing incorrect or dangerous medication, performing surgery without obtaining informed consent, conducting unnecessary procedures for personal gain or issuing false medical certificates.

Notably, Afghan law specifically criminalizes certain medical acts: Article 441 of the Penal Code imposes 1-3 years imprisonment for issuing false certificates and Article 571 penalizes physicians providing abortion-inducing drugs.

3.1.2 Physician's Harmful Omissions

This refers to failing to perform legally mandated actions. Physicians may be liable for damages (physical, material, or psychological) when they neglect required medical duties during diagnosis, treatment, or surgery. Common examples include: Refusing emergency care, failing to provide post-operative monitoring, Delaying or avoiding proper diagnosis, withholding necessary medication, neglecting to refer to specialists when needed, failing to maintain medical records or not providing essential instructions (e.g., medication usage)

Article 888(1) of the Penal Code specifically states: "1. if a medical institution or practitioner refuses treatment during duty and this causes physical/psychological harm, they shall compensate damages and face punishment for the committed offense." Thus, Afghanistan's legal system holds that when physicians capable of providing proper diagnosis/treatment refuse to do so, causing patient harm, they must both compensate damages and face criminal penalties.

3.2. Existence of Fault (mistake or Faults)

The requirement of fault means that the harmful conduct must be accompanied by negligence³ or fault⁴. In other words, a physician will only bear civil liability if their harmful actions were the result of fault or negligence, and will consequently be obligated to compensate for the resulting damages. Therefore, a physician is held liable for their actions only when their conduct results from faults, ignorance, mistake, or

³. *Negligence or Mistake is the breach of an obligation that a person is bound to fulfill.* (Katouzian, 1992:66) *In other words, when a physician violates their professional or legal duties, they commit negligence. Article 776 of the Afghan Civil Code treats "fault" and "negligence" synonymously, stating: "If harm is caused to another due to mistake or negligence, the perpetrator is obligated to compensate for the damage." This indicates that Afghan law does not distinguish between mistake and negligence and accepts both as grounds for civil liability.*

⁴. *Fault is defined as: "An act committed by a mentally competent person that violates moral or legal standards due to: Negligence, Forgetfulness, Ignorance, Mistake or Lack of precaution"* (Jafari Langarudi, 2016:263)

carelessness. In other words, if their actions comply with the law or contractual obligations and no medical malpractice has occurred, they will not be held responsible.

Accordingly, Article 776 of the Civil Code of Afghanistan explicitly states: "If, due to a mistake or fault, harm is caused to another, the perpetrator is obligated to compensate for the damages." Alternatively, in other words: "If a medical professional, in diagnosing or treating a patient, commits an act of faults, carelessness, or failure to comply with medical regulations, resulting in physical or psychological harm to the patient, they shall be punished under the provisions of the criminal offense of faults as outlined in this law." (Penal Code, 2017: Article 889) This is because a crime is considered unintentional or negligent when it occurs due to neglect, carelessness, failure to observe laws and regulations, and the perpetrator could not have foreseen the consequences of their actions. (Penal Code, 2017: Article 45) Finally, Article 32 of the Public Health Law clearly states: "If a medical professional neglects or fails in the diagnosis and treatment of patients, causing physical or psychological harm, they shall be held liable and prosecuted in accordance with the law." Thus, under the provisions of the aforementioned legal articles, a physician is only responsible for damages caused to a patient if their actions involve fault or faults. In other words, the fault or medical mistake must be a direct cause of the harm. If the negligence had no effect on the damage inflicted on the patient, the physician will not be held liable.

3.3. The Existence of Harm

Harm refers to any loss or damage wrongfully and involuntarily inflicted upon a person's property, financial rights, body, reputation, dignity, or personal emotions by another party (Barikloo, 2008, p.61). One of the conditions for a physician's civil liability is the occurrence of harm or damage to the patient. Meaning that the physician's wrongful act must have caused actual loss to the patient. In other words, if a physician commits faults but no harm befalls the patient, they cannot be held liable, as the existence of harm is a prerequisite for establishing civil liability. As Article 163 of the Afghan Civil Code stipulates: "Any act of faults that causes harm to another shall obligate the perpetrator to provide compensation."

Regarding when harm is considered to have occurred, legal scholars assert: "Harm arises whenever there is a loss to property, deprivation of a certain benefit, or damage to a person's health, reputation, or emotions." (Jafari Langroudi, 2016, p.142) "It should be noted that the mere complete

or partial recovery of the patient does not in itself constitute harm. This is because the physician, in the treatment contract, does not guarantee achieving a specific outcome (complete recovery or cure). Therefore, if a physician fails to achieve the desired outcome and this failure is due to their own mistake, they shall not be held liable. Because the physician's obligation is to provide standard medical services, not to guarantee a complete result or cure. In other words, liability requires proof of actual harm. Thus, the mere failure to achieve a positive outcome - such as incomplete recovery - does not establish liability, unless the patient suffers actual physical, material, or psychological harm due to the physician's faults. (Borian, 1994, p.126) Article 163 of the Afghan Civil Code further stipulates in this regard: Liability shall only arise when faults cause actual harm. That is to say, physicians are responsible for negligent conduct, not for unsuccessful outcomes unrelated to fault. Below, we shall examine the types of damages recognized under Afghan law.

3.3.1. Material Damage

Material damage refers to harm that can be compensated with money or any loss that is financially quantifiable, including injury to a person's financial rights (Katouzian, 2014, p. 242). Therefore, the damage inflicted on individuals may arise from the loss of property (including tangible items, benefits, or legitimate rights). During the stages of diagnosis, treatment, or surgery, patients may suffer damages due to a physician's actions. According to the law, such damage must be compensated. For instance, harm resulting from medical mistakes may include physical impairment, loss of bodily function, increased medical expenses, or—in the case of a patient's death—funeral and burial costs. Each of these can be compensated financially. Hence, based on Article 163 of the Civil Code and Article 889 of the Penal Code, a physician who is found at fault may be held liable not only civilly (to compensate for the damage) but also criminally.

3.3.2 Moral Damages

Moral damages refer to non-pecuniary harm inflicted upon a person's dignity, mental health, emotions, sensibilities, honor, or reputation, or that of their relatives. (Jafari Langroudi, 2016, p. 142) Notably, moral damages may arise from physical injuries. That is, bodily harm may cause psychological consequences beyond financial losses, such as: Pain, suffering, and loss of well-being from physical trauma, Emotional distress due to breach of confidentiality (e.g., unauthorized disclosure of

medical secrets) or Loss of life enjoyment resulting from disabilities. Example: If a physician discloses a patient's confidential information, this may: Damage the patient's reputation and social standing, or exacerbate their medical condition. Accordingly, non-material damages inflicted by the physician on the patient may stem from material losses or may arise directly from the physician's conduct or medical mistakes. Therefore, Article 778 of the Afghan Civil Code entitles the injured party to claim both material and moral damages. In other words, Afghan law has codified compensation for moral damages - to redress psychological suffering and emotional distress – in addition to material damages. Although Afghan law does not prescribe specific methods for compensating moral damages, the optimal remedies appear to be: A formal apology, and Reputational rehabilitation through publication in an official gazette or newspaper.

3.3.3. Bodily Injury

Bodily injury refers to the harm or damage inflicted on a person's health (Javadi, 2013, p. 108). In other words, it encompasses any form of injury or damage to the physical integrity of a human being and possesses both material and moral characteristics (Rahimi, 2021, p. 71).

Bodily injury is recognized under Afghan law. Article 774 of the Civil Code provides that a person who commits a harmful act - such as murder, wounding, assault, or other forms of injury to the person - is obliged to compensate for the resulting damage. Accordingly, the instances of bodily injury under Afghan law include murder, assault, wounding, impairment of bodily functions or benefits, or aggravation thereof.

Furthermore, Article 889 of the Penal Code holds physicians liable and subjects them to punishment. Therefore, if medical fault or mistake results in the death of a patient, and the other conditions of liability are met, the responsible party is obliged to pay Diye (blood money). Similarly, if the harm affects the patient's physical health or bodily integrity, and the other conditions of liability are satisfied, the responsible party must pay 'Arsh (compensation for non-lethal bodily injury) and provide restitution, unless the absence of fault is proven. Regarding the precise assessment of bodily injury, if necessary, the judge may seek the opinion of medical experts and professionals to determine the extent of the harm.

3.4. The Existence of a Causal Relationship

The fourth condition for establishing the civil liability of a doctor is the existence of a causal relationship between the harmful act of the doctor and the damage caused to the patient. The causal relationship refers to the connection and link between the harmful action and the resulting consequence (Aoudeh, 2011, p. 59). In other words, the causal relationship is the existence of a conventional link between the criminal act and its outcome (penal Code, 2017, Article 36). Therefore, in order to hold a doctor responsible, a causal relationship must be established between the medical act or mistake and the harm suffered by the patient. Otherwise, proving the doctor's liability will be difficult. The causal relationship between medical faults and the harm caused to the patient may sometimes take the form of direct perpetration and at other times be characterized as indirect causation (through instigation or facilitation). Below, I will examine each of these forms under Afghan law.

3.4.1. Damage through Direct Perpetration

Paragraph 1 of Article 57 of the Penal Code defines the perpetrator or direct offender as follows: "*A person who has committed the physical act of the crime alone or in conjunction with others.*" Accordingly, damage through direct perpetration refers to harm caused directly by the physician to the patient. For example, a surgical operation performed by a surgeon, an injection administered by the physician, or medication given directly by the doctor. This interpretation is supported by Article 779 of the Afghan Civil Code, which provides: "*The stated damage must result directly from the harmful act.*" Therefore, in all the above-mentioned situations, if harm is caused to the patient, the physician is held liable, since the direct conduct (or conduct through direct perpetration) of the physician has resulted in the damage suffered by the patient.

3.4.2. Damage through Indirect Causation (Tasabib)

Tasabib refers to a situation in which a person creates the conditions for harm to be inflicted upon another, without directly committing the harmful act or crime themselves—such that, without their conduct, the harmful act would not have occurred. Accordingly, damage through indirect causation refers to harm where the physician did not directly inflict the injury upon the patient but created the circumstances that led to the harm. For example, if a physician, after treating a patient, prescribes unnecessary medications, and the patient dies as a result of taking them, the physician is held liable.

This is because the physician's prescription is considered a strong causal factor or instigator in the patient's death. In other words, had the physician prescribed the necessary and appropriate medication, the patient would not have died. Therefore, as stated in Paragraph 2 of Article 787 of the Afghan Civil Code: "*A subordinate is considered responsible for an act that harms another if they carried it out based on the order of a superior whose command must be obeyed, or if they acted under the belief that such obedience was obligatory.*" Thus, in the aforementioned case, although the patient was the direct actor who took the medication (i.e., the *mubashir* or direct agent), the physician is held liable as the stronger cause (*sabab*), since the act was carried out under their instruction.

4. Research Findings

Physicians' civil liability refers to the accountability of a physician for damages caused to a patient. Two well-known theories regarding the foundations of physicians' liability are absolute liability and fault-based liability. So, In the Afghan legal system, a physician's civil liability is defined based on the principle of fault and is contingent upon specific conditions. A doctor is held accountable to a patient only when their actions result in harm or loss, are accompanied by negligence or carelessness, and there is a clear causal link between the act and the damage incurred. Therefore, a physician's responsibility is conditioned on the presence of fault, the occurrence of harm, and the direct connection between the two.

5. Discussion

The concept of civil liability of a physician involves their legal responsibility for any damages inflicted upon a patient, provided such damages result from the performance of medical duties. Under the Afghan legal system, which is grounded in the fault-based theory, a physician's liability for harm to a patient is recognized only when fault is established. This means that a physician may be held responsible if they engage in a harmful act that results in damage to the patient, provided that the act involves negligence or error and there exists a direct causal link between the physician's conduct and the harm suffered.

Unfortunately, there is a lack of scholarly research on physicians' civil liability in Afghan law, which makes it difficult to compare the findings of this study with previous ones. To address this gap, the author suggests two practical topics for future research:

1. Statistical analysis of medical malpractice in Afghan hospitals.
2. The legal process of addressing medical malpractice in Afghanistan.

These studies would be significant for several reasons: They would enhance the protection of patients' rights, They would help improve the quality of medical services, They would promote greater transparency and accountability, They would provide useful data for the legislature to enact more comprehensive laws and They would increase public awareness of medical responsibilities and legal remedies.

6. Conclusion and Suggestion

Through the study and analysis of the conditions for establishing a physician's civil liability under Afghan law, the following conclusions were reached:

First, conceptual Clarifications: *Liability* refers to a person's obligation to compensate for harm caused to another, whether arising from a breach of contract or violation of a legal duty. *Civil liability* denotes the obligation of a person to compensate for damages caused to another, whether such damages arise from the actions of the person, their dependents, or objects and property under their control or ownership. Civil liability of a physician refers to the legal accountability of physician for harm caused to a patient in the course of fulfilling their professional medical duties.

Second, an examination of Afghan laws reveals that the legal system of Afghanistan has adopted the fault-based liability theory as a general principle concerning physicians' civil liability. The establishment of such liability depends on the fulfillment of four essential conditions. According to Article 32 of the Public Health Law (enacted in 2006), Articles 888 and 889 of the Penal Code (enacted in 2017), and Article 776 of the Civil Code (enacted in 1976), a physician is liable to compensate for damages resulting from medical incidents unless they can prove the absence of fault on their part. Moreover, under the aforementioned legal provisions, the following four conditions must be satisfied for a physician to be held civilly liable: 1- The physician must have committed a harmful act. 2- The harmful act must have caused actual damage to the patient. 3- The harmful act must be accompanied by fault (negligence or mistake). 4- There must be a causal relationship between the harmful act and the resulting damage.

It is worth noting that, in addition to compliance with medical regulations and standards, the criterion for establishing a physician's fault is based on comparing their conduct with that of a reasonably competent

specialist in the same field. In order to protect patients' rights, enhance transparency and accountability, and improve the quality of healthcare services, the author offers the following practical Suggestion:

1. Establish a transparent reporting system for recording medical violations:

Currently, Afghanistan suffers from a lack—or complete absence—of official statistics on medical malpractice. A national reporting mechanism is urgently needed.

2. Create an independent oversight body for investigating medical misconduct:

This institution should first conduct educational workshops for both physicians and patients on their rights and responsibilities. It should then monitor physicians' performance and handle complaints and violations accordingly.

3. Form a joint coordination committee between the Ministry of Public Health and legal institutions:

This committee should develop standardized medical liability guidelines and report regularly to higher authorities to address legal and institutional challenges.

4. Establish a compensation fund for harmed patients:

Such funds are common in many countries and aim to facilitate the compensation of victims of medical accidents—even in cases where no proven fault exists - thus offering support to affected patients.

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