

Criminological Assessment of Medical Misconduct during the COVID-19 Pandemic

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Abstract: This study examines the professional actions of health workers during the spread of the COVID-19 pandemic from the point of view of criminological assessment in the context of labor relations. With the help of political and legal analysis and a comparative legal method, the work considers the international practice of assessing the actions of medical workers from the standpoint of criminal responsibility, political and legal initiatives concerning the protection of the rights of medical workers during the spread of a pandemic and quarantine measures. This study argues for significantly broader criminal immunity for health workers during a pandemic. At the same time, the study gives grounds to assert that today the lack of sufficient empirical data and research complicates an objective assessment of the offender. At the same time, based on the results of this study, it is suggested that in the near future the number of investigations and appeals to the court on issues related to the professional activities of medical workers carried out during the spread of the pandemic will increase..

Keywords: Criminal liability, health worker, labor law, pandemic, patient, professional competence.

INTRODUCTION

The issue of the criminal responsibility of health workers is one of the most debated and controversial issues at the intersection of medicine and law. The study of aspects of legal regulation of medical activity from the standpoint of criminal liability of employees of medical institutions is closely related to both medical and criminal law. Proceeding from the consideration that almost any kind of activity is associated with errors and risks, it should be understood, however, that it is in the field of medical care that errors or unjustified risks tend to play a decisive role in preserving the life and health of a patient. A medical worker, whose actions endanger the life and health of a patient, becomes the object of not only moral condemnation by society, but also bears legal responsibility, including criminal (Jar, 2016).

There are routine medical procedures in which erroneous medical measures can cause serious complications, even if the deviation from medical standards of care (as well as factors such as diligence or caution) was only minor. Under certain circumstances, it can be extremely difficult to draw a clear line between preventable and unavoidable complications caused by such measures. In addition, in

certain circumstances it may be very difficult or impossible to make an effective and reliable judgment of a retrospective nature about the doctor's negligence (Voultsov *et al.*, 2020). From the point of view of labor relations, a health worker who improperly performs his/her professional duties may be brought to disciplinary responsibility. At the same time, it should be noted that during the spread of a pandemic, medical institutions usually try to avoid the use of disciplinary measures of influence on their employees, which is due, among other things, to the unprecedented scale of the pandemic and a shortage of health workers with the necessary qualifications (Shanafelt *et al.*, 2020). At the same time, legislative measures in many countries are also aimed at limiting other types of liability of medical personnel involved in the fight against COVID-19. Health care workers, when exposed to unprecedented stress, can inadvertently pose threats to the life or health of patients. However, such threats from the medical staff can be caused both by them and by independent factors. As can be noted, the health care system of a state, acting to a certain extent as a guarantor of the protection of the labor rights of health workers, is designed to maintain a balance between the protection of the rights of health workers and patients, but at the same time, it is not able to fully protect its employees from criminal prosecution and lawsuits. At the same time, patients or their relatives affected by COVID-19 are not always inclined to assess the activities of health workers positively, demanding compensation for the damage caused to

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them and resorting to criminal justice measures and judicial procedures for this purpose (Clarke Willmott, 2020; Poole, 2020).

Modern studies related to the assessment of the improper performance of professional duties by medical personnel during the COVID-19 pandemic are devoted to such topics as:

- the increase in the occupational load on medical personnel in connection with the pandemic (Shanafelt *et al.*, 2020);
- potential legal liability for a medical worker's refusal to use a ventilator for therapeutic purposes during COVID-19 (Chen *et al.*, 2013; Cohen *et al.*, 2020);
- medical and legal implications for health care workers regarding charges of medical malpractice during the COVID-19 pandemic (Bilotta *et al.*, 2020; Poole, 2020);
- examination of crimes in medical law (Fathi, 2016; Voultzos *et al.*, 2020);
- issues of emotional health of medical personnel during the period of COVID-19 pandemic (Neto *et al.*, 2020).

The relevance of this study is due to the lack of comprehensive information on what factors in the context of the spread of the COVID-19 pandemic can serve as the basis for bringing a healthcare professional who has provided inappropriate patient care to civil, criminal liability, as well as a lack of information about what government initiatives are being taken on this issue in different countries. The purpose of the study is to analyze world practices and current trends in the legislative regulation of the responsibility of medical workers working in the field of countering COVID-19, as well as determining the professional actions of medical workers during the spread of the COVID-19 pandemic in terms of criminological assessment.

MATERIALS AND METHODS

The study is based on the analysis of the following legislative acts:

- Decree-Law of the Italian Republic "Cura Italia" No. 18 as of March 17, 2020;
- Civil Code of the Italian Republic;

- Criminal Code of Ukraine;
- Code of Labor Laws of Ukraine;
- Resolution of the Cabinet of Ministers of Ukraine as of 17 November 1997, No. 1290 "On approval of the Lists of industries, works, professions and positions that give the right to annual additional leave for work in harmful and difficult working conditions and for the special nature of work";
- Criminal Code of the Russian Federation;
- analytical information of the Medical Defense Union (UK).

Using the method of political and legal analysis and the comparative legal method, the work examines the practices of legislative regulation, as well as legislative initiatives, and law enforcement practices of some countries (including the examples of Great Britain, the USA, Italy, as well as Ukraine and the Russian Federation). Namely, the responsibility of a health worker in general and in connection with his/her professional activities related to countering the COVID-19 pandemic, in particular, was determined. Besides, professional actions of health workers during the spread of the COVID-19 pandemic from the standpoint of criminological assessment were determined.

Despite the lack of empirical data, the results of the study allow speaking with a high degree of probability that there is no direct intent in the actions of medical workers whose activities are directly related to countering the COVID-19 pandemic, while medical negligence can become the main factor in patient victimization. From the point of view of criminological assessment of improper performance of professional duties, the factor of emotional burnout of health workers can be considered important in the context of a pandemic's spread. At the same time, it can be argued that all the considered state legal systems provide tacit civil and criminal immunity to medical workers, which is due to the specifics of the pandemic and its scale.

RESULTS

A predominant number of criminal offenses in the provision of medical services contain a substantive element, in other words, the onset of negative consequences for the life and health of a patient is a prerequisite in matters of criminal law qualification in this area. The filing of criminal charges against a health worker is inextricably linked with the fact of establishing

his/her guilt, as well as the causal relationship between actions that have led to negative consequences in the form of harm to a patient's health or death. It is impossible to establish a causal relationship and criminal liability is excluded in the case when the harm caused to health is not the result of the unlawful behavior of a healthcare worker, but occurred due to other circumstances, for example:

- due to a patient's ignorance of medical prescriptions;
- as a result of an unpredictable reaction of a patient's body to medications associated with anatomical features;
- due to the incompleteness of a clinical picture, not related to the actions of a doctor due to objective circumstances, etc. (Fathi, 2016).

Looking at the scale of the COVID-19 pandemic, the burden on public health systems and the specifics of the disease, it is difficult to define criminal acts, as well as to give a criminological assessment of the improper performance of professional duties by medical personnel. In this regard, many countries require the following:

- development and implementation of pre-trial investigation;
- actual methods of carrying out the latter;
- determination of goals, lists of medical documents and data required for the investigation;
- range of questions for an expert;
- the procedure for investigating the circumstances confirming or refuting the guilt of a medical worker (Jar, 2016).

In accordance with the norms of the Criminal Code of Ukraine (Article 140), criminal negligence of a health worker is the action of a worker who, due to the circumstances, has not foreseen the onset of socially dangerous consequences or frivolously expected their prevention. At the same time, with regard to the action, direct intent is also possible. The most common example of criminal negligence is precisely the improper performance of professional duties by a medical or pharmaceutical worker (Jar, 2016).

The COVID-19 pandemic can literally be called one of the key health crises of the past decade. The

unprecedented pressure on health systems in many countries has led healthcare professionals across industries and specializations to focus their efforts and skills on caring for patients with the disease. The rapid spread of COVID-19 and the severity of symptoms it can cause in a segment of infected people have sharply exacerbated the boundaries of healthcare systems (Shanafelt *et al.*, 2020).

Investigative and judicial practice gives reason to believe that it is very difficult to determine the criminally punishable activities of healthcare workers, since the careless form of guilt, inherent in most criminal iatrogeneses, implies a lack of awareness of motives. That is, based on the specifics of the profession, a healthcare worker is not always able to give an objective assessment of one or another of his/her decisions. At the same time, the most common motives leading to negative consequences include the following:

- real or imaginary fear of the onset of the opposite result of medical manipulations;
- an attempt to find the shortest way to accomplish existing tasks with minimal effort;
- the use in their practice of ineffective and outdated, but, at the same time, the usual methods of diagnosis and treatment of diseases;
- indifferent attitude towards patients and visitors to medical institutions (Ognerubov, 2014).

Since the WHO announced COVID-19 as a pandemic, there has been no judicial review of cases of medical malpractice related to the coronavirus in the world, but it is clear that this state of affairs can change at any time (Tang, 2020). At the same time, there is evidence of the initiation of criminal cases by the investigating authorities of different states related to the negligence of medical workers regarding their professional duties to prevent coronavirus. In particular, one of these cases was initiated in Russia under Art. 237 of the Criminal Code of the Russian Federation "Concealment of information about circumstances posing a danger to life or health of people" and Art. 293 of the Criminal Code of the Russian Federation "Negligence" (Bilotta *et al.*, 2020; Interfax, 2020; Liga News, 2020). In the United States, as of early May 2020, there were eight medical malpractice lawsuits related to the actions of health workers taking medical measures related to the treatment of COVID-19 (Hinshaw & Culbertson, 2020).

In the United Kingdom, where the pandemic has become particularly widespread, the Medical Defense Union (MDU), one of the country's largest medical associations, has received widespread media attention by proposing urgent laws of a retrospective nature, giving the national health system and healthcare professionals immunity from clinical malpractice claims arising during the COVID-19 pandemic. This draconian measure is thought to be necessary because the national health system is likely to face a wave of coronavirus-related clinical malpractice trials (Poole, 2020).

The experience of the United States indicates that there is no unified approach in the country to ensure the legislative immunity of doctors related to the performance of their professional duties in situations requiring immediate decisions on how to save a patient's life (for example, the use of ventilators) (D'Adamo *et al.*, 2020). Existing federal and state laws grant limited immunity to doctors and nurses in situations where urgent decisions are required. The scientific community notes that healthcare workers' concerns about liability should be minimized, since even a small likelihood of prosecution can affect the ethics of decisions made by doctors in relation to their duties. It can, for example, be reflected in the appointment of ventilators according to the principle of "first come, first served" and not based on the conditions of objective necessity (Cohen *et al.*, 2020).

Another ethical and legal issue regarding healthcare professional's responsibilities for treating patients with COVID-19 is whether doctors performing duties outside the job description can be held accountable for their mistakes. In the UK justice system, the legal position was summarized by the Court of Appeal in *FB v. Princess Alexandra Hospital NHS Trust* case [2017], where the court affirmed that physicians would be estimated by a standard of qualifications and care appropriate to their previous role. If a doctor does not have the necessary qualifications to perform the duties assigned to him/her, the hospital administration will be responsible for assigning such functions to this health worker (Clarke Willmott, 2020).

Considering the issue of the responsibility of health workers during the spread of the COVID-19 pandemic, attention should be paid to their labor status. In many countries of the world, in particular in the United States, most labor relations between doctors and medical institutions are fixed by written employment contracts. Thus, most of the agreements for the employment of

doctors are governed by the terms of the contract (AMA, 2020).

In Ukraine, the labor relations of medical workers are based, as a rule, on an open-ended employment contract (Tsupenko, 2019). It is the responsibility of every employer to ensure that the rights of employees are properly secured. The legislation of Ukraine provides for the implementation of state supervision and control over the observance of labor legislation by legal entities (regardless of their form of ownership, type of activity and management) and by individuals-entrepreneurs using hired labor (Art. 259-260 of the Labor Code) (The Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1971). These provisions apply to health workers and compliance with these provisions should be monitored by the relevant government authorities. However, in modern conditions, the issue of monitoring the observance of labor rights of medical workers is given a critically small role (Higher School of Advocacy NAAU, 2020). At the same time, it should be noted that according to the current legislation of Ukraine, medical workers are classified as workers with reduced working hours (The Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1971). For medical workers of certain specialties, working hours can be reduced to 33 hours per week. The determining factors should be considered an increased neuro-emotional load in the process of professional activity and potentially hazardous working conditions for health (Antonov, 2008). As can be noted, the factor of emotional and psychological load is reflected in legislative norms (Cabinet of Ministers of Ukraine, 1977), at the same time, it is rarely fully taken into account when developing legislative measures to protect the labor rights of healthcare workers involved in the fight against COVID-19. In Ukraine, in the context of the spread of the pandemic, the government, as an incentive measure, made a decision on monetary allowances for health workers, but such a measure cannot be considered sufficient from the standpoint of counteracting victimization of patients (Ministry of Healthcare of Ukraine, 2020). In this regard, the factor of emotional burnout of health workers (see Figure 1) can be considered an important issue in the context of the spread of a pandemic from the point of view of criminological assessment of improper performance of professional duties. Although this factor does not necessarily include the concept of direct intent, it can significantly affect the victimization of patients (Neto *et al.*, 2020). For doctors, the concept of professional

What Contributes to Physicians' Burnout?

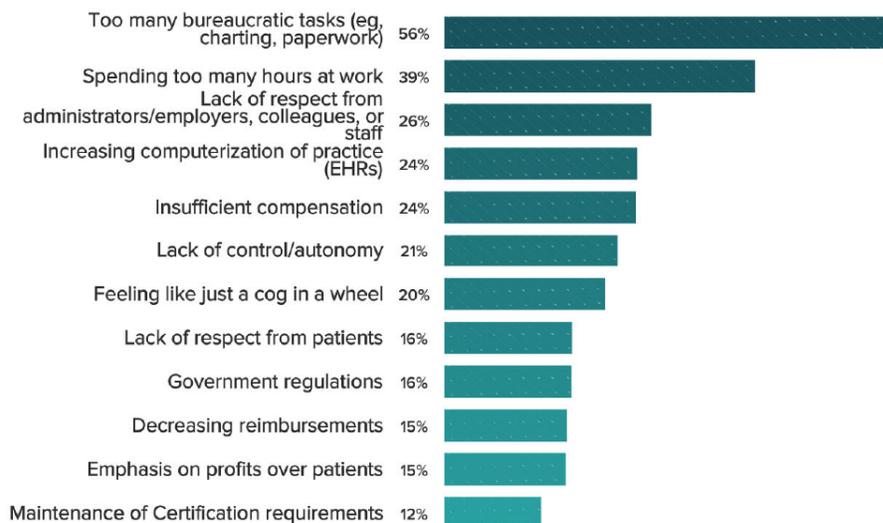


Figure 1: Factors of emotional burnout of health workers, in percentage.

Information is based on Medscape's 2018 Physician Compensation Report (2018).

burnout is closely related to medical errors and the quality of medical care. At the same time, doctors who have experienced medical malpractice also have a higher risk of professional burnout than those who do not have such experience (Chen *et al.*, 2013).

Despite the lack of motives for doctors to commit criminal offenses during the period of the spread of COVID-19, as such, the issue of the legal responsibility of health workers to the patient or his/her relatives in no way conflicts with the above factor. In this regard, in the current conditions of a global pandemic, public health systems must be ready to vigorously defend the rights and status of their workers, as well as be prepared for various kinds of adverse consequences. In some countries, such as the United Kingdom, the health care system has proven to be sufficiently adapted to the challenges of protecting the rights of health workers, but a definitive assessment of its effectiveness remains to be seen. Thus, as a general rule, doctors working in the UK National Health System come under the protection of their employer, who is, in this case, the defendant. In other words, they cannot be held accountable as individuals, since they are protected at the government level through the National Health System Fund, which in turn bears the burden of responsibility (Clarke Willmott, 2020).

At the same time, a patient has his/her legal invariable right for compensation for harm caused to him/her or his/her relatives as a result of medical negligence. If a patient becomes a victim of medical

malpractice during the spread of a pandemic or during a period of quarantine measures, he/she reserves the right to investigate the matter, just as at any other time. If he/she can prove the factor of negligence that caused harm to him/her, he/she is entitled to compensation for such harm (Clarke Willmott, 2020).

Before the start of the pandemic, the State Health Service recorded record levels of allegations of medical negligence. Therefore, there is reason to believe that when the pandemic is over, this trend coming from the patients of many clinics will not abate (Tingle, 2020).

The spread of the global pandemic has created new challenges for the healthcare system in Russia, raising the issue of decriminalizing some of the criminal offenses related, based on the context, to medical practice. In an open letter that the National Association of Honored Doctors of Russia (NAHDR) sent to the Russian president, a proposal was made to release medical workers from criminal liability under some articles of the Criminal Code of the Russian Federation (Criminal Code), including Art. 293 "Negligence", Art. 286 "Exceeding official powers" (RBK, 2020).

The NAHDR emphasizes that the legal acts adopted in recent months related to the treatment and counteraction of COVID-19 provide ample opportunities for their interpretation. Today, Russian medicine is looking for methods of treatment empirically, and in the process of counteracting the disease, medical workers often make decisions based on an unstable legal basis.

Therefore, patients have a wide range of opportunities at their disposal to challenge the actions of health workers in the judicial procedure (Pravo.ru, 2020).

Similar initiatives are being taken in Italy to provide criminal immunity to health workers. In order to reduce the impact of Covid-19 and strengthen public health during the pandemic, the Italian government adopted Decree-Law No. 18 (17 March 2020) (LED Taxand, 2020). In connection with the adoption of this act in the most severely affected regions of the country, many hospitals (both public and private) have been turned into Covid centers. However, this act initially did not say anything about medical responsibility, and therefore an amendment was soon proposed to it concerning the abolition of both civil and criminal liability for medical errors made during the spread of the pandemic. However, its provisions do not apply to cases of serious professional violations and willful misconduct. In addition, according to the proposed changes, cases of serious professional misconduct will be assessed taking into account the number of patients in need of care and the availability of medical resources (medical professionals, medical supplies), as well as taking into account the emergency circumstances in which medical personnel work. This amendment is currently pending and has not been approved (Voultsos *et al.*, 2020).

DISCUSSION

Despite the fact that the question of assessing the improper or inappropriate performance of professional duties by medical personnel during the COVID-19 pandemic may not have been tested in the context of a pandemic, however, as this study suggests, there are prerequisites for this. From the point of view of the fears of individual doctors, today it still seems early to draw conclusions about whether there will be mass trials in connection with their professional activities in the fight against coronavirus. In the context of the British medical system, health workers could be assured that they would not be held personally responsible for negligence, since such responsibility is assigned to the state through its institutions (Clarke Willmott, 2020). However, medical systems in other countries may face serious challenges.

There are several hypotheses about nosocomial spread due to the inability to successfully isolate patients, but they are all considered in the context of purely medical practice. At the same time, it should be noted that viral infection caused by non-compliance by

medical workers with the relevant instructions is, first of all, not only a violation of official duties, a disciplinary offense, but can also be a criminal offense. For example, in Italy, prosecutors in several cities have launched an investigation into some units of extended medical care, in which outbreaks of Covid-19 infection have been noted in relation to professional activities (Bilotta *et al.*, 2020; Smirnova & Nabokina, 2019). At the same time, the recent Decree-Law No. 18 of March 17, 2020 "Cura Italia" says that individual medical liability arises only in the case of gross negligence. This formulation creates the prerequisites for the emergence of fears on the part of a patient, as it opens up a wide space for its interpretation. In this context, the Italian legislator proceeds from the position of applicability to this Law of Article No. 2236 of the Civil Code, which states that "If the execution involves the solution of particularly complex technical issues, the executor is not liable for damage, except in cases of willful misconduct or gross negligence" (Bilotta *et al.*, 2020).

The definition of crimes with a special subject (medical worker) associated with the growth of crime among medical workers in the Russian legal system may be associated with the following:

- low level of professional training of a health worker;
- low wages;
- shifting responsibility;
- awareness of impunity for the commission of professional misconduct due to the intricacies of the specialty;
- lack of proper control over medical records;
- lack of necessary equipment (Galyukova, 2007).

However, it will not be an exaggeration to say that such problems are not unique to Russia. These defining moments in matters of criminological assessment of the actions of health workers to one degree or another can be characteristic in the conditions of other countries.

In Ukraine today there is no unified methodological approach for determining the non-professional provision of medical care services, and there are also no normative criteria for defining the unfair performance of professional duties by a medical worker. In addition, there is a lack of normative

standards for comparing the actions of a health worker with the protocols for the delivery of service. The specificity of the medical specialty makes it possible for any specialist to justify him/herself by shifting the blame to the peculiarities of a patient's body, symptoms or a patient him/herself, etc. (Jar, 2016).

This study, with a high degree of probability, gives grounds to speak about the absence of direct intent in the actions of health workers, whose activities are directly related to countering the pandemic. At the same time, it is impossible to exclude the factor of responsibility of a medical worker in the event of harm to a patient or death of the latter, even in the absence of direct intent, since even the absence of intent does not exclude responsibility. At the same time, it should be assumed that the main factor in matters of criminological assessment of the actions of health workers during the COVID-19 pandemic, as well as in qualifying a criminal offense committed by a health worker, with a high degree of probability, can be the factor of emotional burnout. Burnout is "toxic" for both patients and doctors because it is associated with a loss of empathy, impaired performance, and an increase in medical errors (Malysheva, 2014, 2018; Lutton, 2020; Truog *et al.*, 2020).

At the same time, it should be understood that granting full legal immunity from claims on medical malpractice to doctors and others during the COVID-19 pandemic may subsequently create a collapse of the medical system due to multiple litigations. At the same time, a special role is given to the impartiality of justice and the stability of the legal system, which in this case is designed to maintain a balance between the protection of the rights of health workers and patients (Bubnova *et al.*, 2019; Poole, 2020).

The MDU recognizes that its member healthcare providers work under tremendous pressure to make tough decisions in very difficult conditions. At the same time, the union wants its members to freely carry out their practice, without fear of being unjustly condemned. Besides, any compensation paid will drain health system resources and adversely affect health workers' morale (MDU, 2020; Tingle, 2020).

English common law, when considering clinical negligence in terms of precedent, takes into account the fact that health care workers who work with patients with COVID-19 are equated with practitioners in a war zone. There are forensic precedents that can be applied to define the kind of standard of care expected

of trainee doctors and nurses, paramedics, volunteers and those who work with coronavirus patients outside of their usual practice (Tingle, 2020).

It is assumed that those requirements that have not been put forward during the pandemic and restrictive measures will be put forward when the restrictions are lifted. Thus, one might think that there is a surge in new requirements. However, in the longer term, it may well be that there are fewer complaints of clinical negligence during a pandemic than would normally be expected (Poole, 2020). This circumstance, presumably, can reduce the number of lawsuits against medical institutions and turn the initiators of legal proceedings towards the practice of alternative dispute resolution.

CONCLUSION

Based on this study, it can be said that in the current conditions of the spread of the global pandemic, public health systems are determined to vigorously defend the rights of workers in this area, as well as to be prepared for various adverse consequences, such as investigating the professional activities of health workers and the work of medical institutions, civil lawsuits, etc. Public health systems are called upon to act as a guarantor of the protection of the labor rights of health workers and to help maintain a balance between the protection of the rights of health workers and patients. However, they are not able to fully protect employees in this field from criminal prosecution and legal proceedings. At the same time, patients of medical institutions who have become victims of COVID-19 or their relatives are not inclined to resolve conflicts at the pre-trial level, demanding disciplinary proceedings against health workers, usually resorting to criminal justice and judicial protection of rights.

Despite the lack of sufficient empirical data, the results of the study allow speaking with a high degree of probability that there is no direct intent in the actions of medical workers whose activities are directly related to countering the COVID-19 pandemic, while medical negligence can become the main factor in the victimization of patients in medical institutions. From the point of view of criminological assessment of improper performance of professional duties, the factor of emotional burnout of health workers can be considered important in the context of the spread of a pandemic. This factor, although it does not directly affect the appearance of health worker's illegal

intentions, does not exclude it and, although indirectly, can significantly affect the victimization of patients. For example, among healthcare workers, the concept of professional burnout is closely related to medical errors. At the same time, it can be argued that all the considered state legal systems provide tacit civil and criminal immunity to medical workers, which is due to the specifics of the pandemic and its scale. It is assumed that subsequent studies related to the topic under consideration will be devoted to the issues of pre-trial settlement of disputes between patients and medical institutions related to methods of treating COVID-19, or with issues of criminal-legal qualification of illegal actions of medical workers..

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