Standard of Care during Post Movement Control Order (MCO) SOP among Theme Park Occupiers: A Legal Perspective

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ABSTRACT

Theme parks have attracted many visitors over the years. Its financial blooming, however, was severely affected following the outbreak of COVID-19 pandemic. In Malaysia, the government had allowed theme parks to reopen starting July 2020. Because COVID-19 is still around, occupiers of theme parks and are at the risk of being legally liable upon failing to observe the standard of care required by the law. The aim of this paper is to discuss the occupiers' duty of care towards three types of entrants to the theme parks during the post Movement Control Order. Legal perspective was adopted in discussing the issue. Selected legal cases were reviewed to provide further support to the arguments put forth. Despite having different standards of care imposed on the occupiers towards different types of park entrants, the occupiers may be legally liable for failing to observe the required Standard Operating Procedures. Thus, recommendations were made so that the legal liability of the occupiers can be mitigated.

Keywords: Movement Control Order (MCO), Standard Operating Procedure (SOP), theme park, duty of care, entrants.

INTRODUCTION

According to Milman et al. (2010), theme park segment has contributed to the growth of the tourism sector, providing job opportunity and promoting the image of a country. In 2018, the most visited U.S. theme parks were Magic Kingdom at Walt Disney World (20.9 million visitors), Disneyland Park (18.7 million visitors), Animal Kingdom at Walt Disney World (13.8 million visitors), EPCOT at Walt Disney World (12.4 million visitors), Hollywood Studios at Walt Disney World (11.3 million visitors) and Universal Studios Florida (10.7 million visitors) (Themed Entertainment Association 2019). Overall, the four Walt Disney World amusement parks and two water parks located in Orlando, Florida, had million visitors in 2018, which makes it one of the world's most popular tourism destinations. With about 75,000 workers in the Orlando region, Walt Disney World is the largest single-site employer in the United States (Gabe, 2020).

Meanwhile in Malaysia, people enjoy going to theme parks due to its facilitative environment and weather (Aziz et al., 2012; Theme Park Post, 2014 as cited in Faizan et al., 2018). Many theme parks have long been established in Malaysia, including Genting Highlands Theme Park, Sunway Lagoon Theme Park, A'Famosa Water World, Cosmo's World Theme Park and Bukit Merah Laketown Resort. These theme parks offer fun and excitement to visitors. Newer theme parks include Asia's first LEGOLAND, which debuted in southern Malaysia in 2013, while a 20th Century Fox theme park is due to open in Malaysia in 2021. Although more theme parks are available outside of Malaysia, Faizan et. al. (2018) found that Malaysian visitors are loyal to visit local theme parks compare to non-Malaysian based theme parks. This is evident from the finding on the level of customer delight and customer satisfaction which reflects the visitor's loyalty.

PROBLEM STATEMENT

Body of the text should be in 12pt Times New Roman. Texts are justified. The financial booming of the theme park industry, however, was affected since the outbreak of COVID-19. Affecting more than a million people around the world, safety measures were taken to limit the spread of COVID-19, such as maintaining a safe social distance and limiting the number of people gathered in one place. These measures had severely impacted the theme parks. Such businesses commonly welcome large numbers of people congregated in very close physical proximity. U.S. theme parks have developed a variety of COVID-related safety procedures including the deployment of hand washing stations throughout the property, frequent sanitizing of high-touch surfaces, requiring employees and visitors to use face coverings, and limiting the number of guests permitted to visit the park. These capacity constraints lower annual attendance figures and the admission fees collected by theme parks, as well as impact the surrounding regions where major theme parks are located (Gabe, 2020).

Practicing the same COVID-related safety procedures, Disney theme parks in Florida, Shanghai, Japan and France have reopened. Visitors were urged to follow the safety procedures (MacDonald, 21st September 2020). Meanwhile, Hong Kong Disneyland had reopened in June 2020, but forced to reclosing on July 15, 2020; that is less than a month later (MacDonald, 13rd July 2020; MacDonald, 21st September 2020). Apparently, COVID-19 struck again after the reopening of theme parks. As number of cases rises, the Disney World's four theme parks reduced their operating hours starting in September 2020. Attendance was close to zero and revenues were down more than 90%. Most parks closed by global pandemic during the recent three-month period until September 2020. Almost 60% of Americans, who joined the survey conducted by Morning Consult research company on the revisiting theme park, indicated that they would return visiting theme parks after three months or more from the date of the survey. The phenomenon triggers occupier of theme park to rethink their operating plans after reopening (MacDonald, 21st September 2020).

The COVID-19 pandemic also caused a devastating effect to the Malaysian economy, especially to the business player and vulnerable groups such as lower income individuals (Cheng, 2020). No exception for tourism industry; where the Minister of Tourism, Arts and Culture, Dato' Sri Nancy Shukri disclosed that Malaysia tourism has suffered RM45 billion losses during the movement control order (MCO) (Bernama, 2020). One of the worst-hit tourism segments is theme park business as people were advised to avoid crowded places to break the chain of the infection. Due to the increase cases of COVID-19, all prominent theme parks in Malaysia including Sunway Lagoon, LEGOLAND Malaysia, Resort World Genting and A' Famosa Resort were forced to shut down their operation, which caused them to face financial loses and lead to a high unemployment rate (Ganesan, 2020).

Therefore, to revitalize the economy of the nation, the Senior Defense Minister, Datuk Seri Ismail Sabri Yaakob, has gradually announced the re-opening of business activities prioritizing the essential services and manufacturing of critical product. Theme park business are finally on the list to be re-opened to public starting from 1st of July 2020 (Terrence Tan, 2020). Expectedly, the permission of re-opening the theme park is coupled with a list of Standard Operating Procedures (SOPs) and guidelines, which are assessable on the Malaysian National Security Council's (MKN) website and the Ministry of Tourism, Arts and Culture's website. The obligation to follow the SOPs and guidelines are compulsory as a preventive action to avoid the spread of COVID-19 in Malaysia. Learning on lesson happened to the famous Disney Theme Park, Malaysian theme park occupier should rethink a proper operation plan or standard of care base on valid sources to be followed. Risk to reclose after reopen will haunt our local big player in this industry as long as COVID-19 still exists.

Following the risk to reclose theme parks after its reopening, the paper presents a discussion on the standard of care during post Movement Control Order SOP among theme park occupiers from the legal perspective, and by drawing on selected Malaysian legal cases. Specifically, the discussion was guided by two research questions: (1) What standard of care is required on an occupier to avoid negligence of SOP? and (2) What happens to an occupier if he fails to follow the standard of care required?

METHODOLOGY

This study reviews the cases taken from English Common Law and Malaysian Law. As the law in Malaysia are mainly base on the English Common Law, it becomes predominant source of Malaysian law.. Cases were chosen bases on the keyword ***negligence***, ***occupier liability*** , ***standard of care* and *duty of care*** as it lead to the discussion on the standard of care on the occupier. The searching process for cases were done using two difference sources; first website search namely The Malayan Law Journal and Current Law Journal. Second source referred to is from books namely Law of Torts in Malaysia 3rd Edition and Book Nathan of Negligence and Book Law of Tort in Malaysia 3rd Edition. For website search, 143 hits are found pertaining to the subject matter but only 5 cases were selected. On the other hand for books, 41 hits are found and 12 cases were selected.

Table 1 List of Selected Cases to Review

No.	Case Title	Year	Volume	Source	Page
1.	Caswell v. Powell Duffryn Associated Collieries Ltd	1939	3	All ER (All England Report), Book; Nathan on Negligence	722
2.	Ch'ng Chong Shong v. Lok Chen Chong & Yong Ah Jun	1991	1	CLJ (Current Law Journal)	515
3.	Cunard & Anor v Antifyre Ltd	1932	-	All ER (All England Report), Book; Nathan on Negligence	558
4.	Donaghue v. Stevenson	1932	-	AC (Appeal Court), Book; Nathan on Negligence	562
5.	Ee Lau & Sons Realty Sdn Bhd v. Tan Yah & Ors	1983	1	LNS (Legal Network Series), Current Law Journal	175

6.	Hall v Brooklands Auto-Racing Club	1933	1	KB (King Bench), Book; Law of Torts in Malaysia	205
7.	Hawkins v Couldson & Purely Urban District Council	1954	1	QB (Queen Bench) Book; Law of Torts in Malaysia	319
8.	Harris v. Birkenhead Corporation	1976	1	All ER (All England Report), Book; Law of Torts in Malaysia	341
9.	Kimber v. Gas Light & Coke Co Ltd	1918	-	All ER (All England Report), Book; Nathan on Negligence	123
10.	Lau Tin Sye v. Yusuf bin Muhammad	1973	2	MLJ (Malayan Law Journal)	186
11.	London Graving Dock Co v. Horton	1951	-	AC (Appeal Court) Book; Law of Torts in Malaysia	737
12.	MacLenan v.Segar	1917	2	KB (King Bench) Book; Nathan on Negligence	328
13.	Ramsay v Appel	1972	46	ALJR (Australian Law Journal Report) Book; Law of Torts in Malaysia	510
14.	Shanta Manickam v. Teik Joo Chan Sdn bhd & Anor	2015	8	CLJ (Current Law Journal)	611
15.	Stampark Place Sdn Bhd v. Liu LI (f) [2017] 1 LNS 320	2017	1	LNS (Legal Network Series), Current Law Journal	320
16.	Sutton v Bootle Corporation	1947	1	All ER (All England Report), Book; Nathan on Negligence	92
17.	Wheat v Lacon & Co. Ltd	1966	1	All ER (All England Report), Book; Law of Torts in Malaysia	582

Source: The Malayan Law Journal, Current Law Journal, Law of Torts in Malaysia 3rd Edition, Book Nathan of Negligence and Book Law of Tort in Malaysia 3rd Edition.

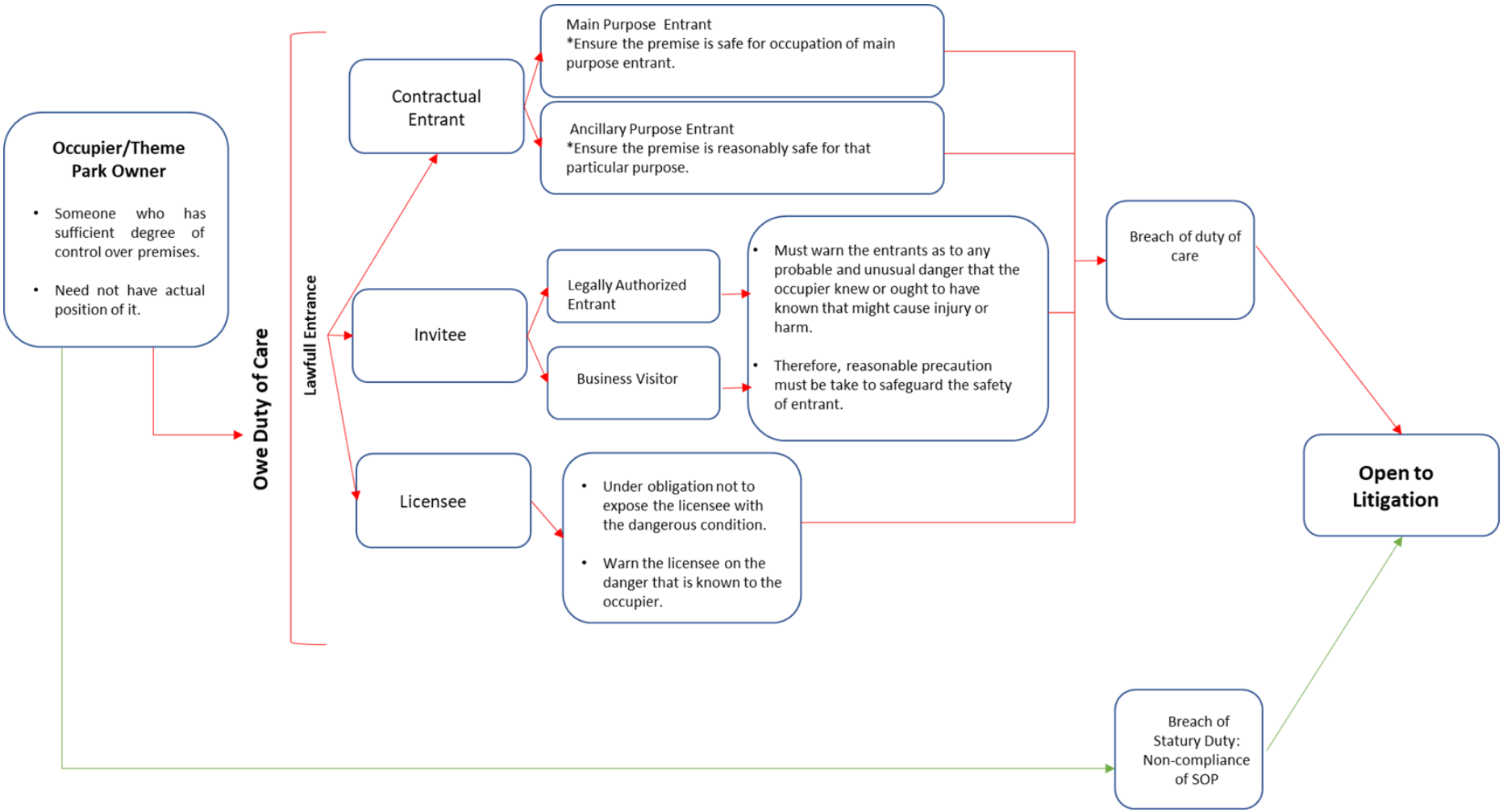
Discussion

Body of the text should be in 12pt Times New Roman. Figures and Tables should be numbered as follows: Figure 1:, Figure 2: .. etc., Table 1:, Table 2:,.. etc. Texts are justified. Negligence is a breach of duty to take care that a reasonable and prudent man would take depending on those particular circumstances (Cunard & Anor v Antifyre Ltd ,1932). There is no uniform standard on what constitutes duty of care as it may vary according to the circumstances, the place, the parties involve and time (Caswell v. Powell Duffryn Associated Collieries Ltd,1939). In measuring the standard of care, an assessment on whether the damage is reasonably foreseeable must be taken into consideration. Under the law, the occupier owes a duty of care towards anyone who comes and visits his premise. If a visitor suffers injury due to negligence on the part of occupier in failing to provide a safe premise or failing to observe standard procedures before carrying any activities on the premise, the occupier may face legal action under the torts. An occupier is defined as someone who has sufficient degree of control over premises. Therefore, he need not have an absolute control over it (Wheat v.Lacon & Co. Ltd [1966] 1 All ER 582,HL)nor actual possession of it (Harris v. Birkenhead Corporation [1976]

1 WLR 279,[1976] 1 All ER 341,CA). As long as he has power to permit someone to enter or forbidding someone from entering the respective premise, he is considered as an occupier and thus owes a duty to use reasonable care toward visitors entering the premise. A person who has parted with possession of the premise is no longer liable to the visitors but if he retains the right to control over the premise, he still owes a duty of care towards the person visiting the premise (Shanta Manickam v. Teik Joo Chan Sgn Bhd & Anor, 2015). Unlike England that has enacted the Occupier's Liability Act 1957 and Occupiers' Liability Act 1984, the law on occupier's liability in Malaysia is based on common law principles.

According to the common law, the standard of care required by law differs in accordance to types of entrants to the premise. They are **contractual entrants, invitees, licensees** and **trespasser**s. The scope of our discussion is only on the standard of care required towards legal visitors, which exclude **trespassers**. Framework 1 summarizes the standard of care based on the cases that have been reviewed in the present study.

Framework 1: Standard of Care of Theme Park based on Cases Review



Source: Extracted and modified from The Malayan Law Journal, Current Law Journal, Law of Torts in Malaysia 3rd Edition, Book Nathan of Negligence and Book Law of Tort in Malaysia 3rd Edition.

For **contractual entrants**, it can be further divided into two namely main purpose entrant and ancillary purpose entrant. An occupier under a duty to ensure the premise is safe for habitation of main purpose entrants. Therefore he must exercise care and skill in safeguarding the safety and interest of the contractual entrant in accordance with the purpose for which it is contracted out (MacLenan v.Segar,1917). On the other hand, for ancillary purpose tenant, the occupier owes a duty to ensure the premise is reasonably safe for that particular purpose (Hall v Brooklands Auto-Racing Club,1933). The standard of care for contractual entrants is higher compare to the other types of entrants.

When a person enters into certain premise with the authority of the occupier such as police officer, he is regarded as an invitee (Talib, 2011). **Invitees** are also divided into two, namely, legally authorized entrant and business visitor. The law requires the occupier to warn and use reasonable care for both categories of entrants as to any probable and unusual danger of which the occupier knew or ought to have known that might cause injury to the invitee (Stampark Place Sdn Bhd v. Liu LI(f),2017). An unusual danger is one that is extraordinary which is not common and usually found for the purpose of entering the premise or for that particular invitee (Ee Lau & Sons Realty Sdn Bhd v. Tan Yah & Ors,1983). Therefore, a reasonable precaution must be taken in safeguarding the safety of the invitee on the premise especially on the conceal danger that the occupier knew or ought to have known. However, no absolute duty to prevent danger is impose upon the occupier. As long as the occupier ensure that the premise is safe and is least dangerous as it reasonably be, he has fulfilled his obligation (Lau Tin Sye v. Yusuf bin Muhammad, 1973).

As for **licensee**, a licensor is not liable for injury sustained by the licensee if the injury caused by dangers of which the licensor ought to have known. Therefore, the occupier is under obligation not to expose the licensee with the dangerous condition and to warn him on the danger that actually known to the occupier (Sutton v Bootle Corporation,1947). The licensee thus cannot presume that the premise is free from any dangers. To constitute an actual knowledge of the danger, it is sufficient for the occupier to realize the existence of physical object that might cause harm to others and that a reasonable man having that particular knowledge would have appreciated the probable risk and danger connected with it (Hawkins v Couldson & Purely Urban District Council,1953). In other words, the licensee who has suffered injury due to unsafe premise may succeed in his claim once it is proven a reasonable man would have appreciated the risks of the danger even if the occupier does not appreciatingappreciate it. It is worth noting that the duty owes by the occupier is higher towards children licensee as the child is unable to appreciate nor aware on the dangerous condition that might be transparent to an adult (Ramsay v Appel,1972).

APPLICATION AND RECOMMENDATION

The unprecendented situation caused by COVID-19 had severely impacted the tourism industry in Malaysia, including theme parks. Nevertheless, the Senior Defense Minister, Datuk Seri Ismail Sabri Yaakob, had announced that the businesses in this sector might resume its operation starting from July 1, 2020. The reopening, however, is subject to strict compliance and adherence of the SOPs specified by the government. Despite the clear instruction given by the government, there were stull cases of non-compliance to the SOPs as reported by the media in recent months. On July 10, 2020, for instance, 36 people were caught, detained and fined by the court for violating the regulations under the Restricted Movement Control Order (RMCO). Those detained were found to have committed various offences, which include gathering in large number beyond permissible number and taking part in sport activities without following the SOPs (Zolkipli,2020). Similarly, police have detained 286 individuals on August 16, 2020, also due to violation of the SOPs (Radhi,2020). The examples show that there is a probability

that the same scenario of non-compliance to the SOPs could be observed at theme parks upon its reopening.

As discussed above, a person who knowingly creates a dangerous conditions on his own premises,or he sees such dangerous condition has the possibility to expose either himself, his staffs and visitors to the danger, he is under a duty to give warning to the respective parties (Kimber v. Gas Light & Coke Ltd,1918). Failure to take reasonable care may open a door to a litigation. The duty arises where an injury is reasonably foreseeable and the relationship between the defendant and claimant are so close that the negligent on the part of the defendant might cause harm to the claimant(Donaghue v. Stevenson,1932). To make the occupier liable for an action under a tort, there is certainly a grey area for the lawful visitors who claim that they got infected by COVID-19 at the respective premise. The visitors need to prove that the contraction of COVID-19 is at the location of the premise and the location is within the occupier's liability to take reasonable care. The claimants must also prove that it is reasonably forseeable for the occupier to see the danger that might harm the viristors and that their relationship with the occupier is close that the occupier is under obligation to take reasonable care to ensure his safety by providing relevant measures such as signage on the newly adopted SOPs and relevant rules that need to be observed by the respective visitors. However, it is worth noting that to bring an action under a tort, the court faces difficulty in order to determine the burden of liability because standard of care depends on classification of lawful visitors entering the premises. As there is no single standard of reasonable care towards the lawful visitors, technical arguments might hinder the swiftness of due process of laws.

Contributory negligent on the part of the visitor in non-compliance with the SOPs can be a common defence for the occupier for the damage or injury suffered by the claimant. It occurs when there has been an act or omission committed by the visitor, which has contributed to a damage suffered by him (Ch'ng Chong Shong v. Lok Chen Chong & Yong Ah Jun,1991). It would certainly lessen the burden of the occupier if the visitor also carefully and obediently adhere to the respective SOPs. If the occupier observes measures such as social distance practice, and the order to wear a face mask and to provide hand sanitizer, then certainly no legal liability can be brought against the occupier even if the claimant can prove that he was infected with COVID-19 during his visit at the respective premise.

However it should be noted that not only an action can be brought under a tort, an action can also be brought against him for breach of statutory duty in non-compliance of the SOPs. Thus, a failure to observe the relevant rules and regulations as provided by the ministries and authorities is sufficient for a legal action to be brought,without any proof of negligence.

In summary, the occupiers of theme park owe duty of care on contractual entrants, invitees and licensees during the reopening of their operations during the period of COVID-19 pandemic outbreak. Despite the different duty of care required for different types of entrants, the occupiers are urged to comply with the SOPs specified by the government. Among others, the occupiers must adopt MySejahtera Apps and put it up at the main entrance so that the entrants can easily scan it for registration purposes; provide and display a guideline on the "Dos" and "Don'ts" on COVID-19 prevention measures at strategic locations within their premises as a reminder and an easy reference to the entrants; and ensure only limited number of entrants are allowed at any one time. The full list of the SOPs, which is available at the National Security Council's website, must be observed by the occupiers to eliminate the grey area in which they can be sued for breach of duty of care and non-compliance of the SOPs.

CONCLUSION

Tourism industry has once again opened its door to visitors in the era of COVID-19 with strict compliance to the SOPs provided by the government. Theme parks, which are part of the industry, are no exception. Adherence to the SOPs is necessary in ensuring the safety of the visitor and instilling visitors' confidence to visit the respective premise. Although such policy has been set up, there will always be cases of non-compliance among the premise entrants, especially the visitors. To minimize the legal risk due to the grey areas, the occupiers of the theme parks are advised to adopt and adhere strictly to the existing SOPs provided by the government. By doing so, they can run their businesses without much adversity.

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