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Problems of investigation of medical crimes in Ukraine

ПРОБЛЕМИ РОЗСЛІДУВАННЯ МЕДИЧНИХ ЗЛОЧИНІВ В УКРАЇНІ

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Abstract

In the article, the authors identified the main reasons for the low level of investigation of medical crimes in Ukraine based on the analysis of 78 criminal cases of medical malpractice considered by courts since 2013, the study of statistical information, scientific literature on the problems of investigating medical crimes, national legislation. It was concluded there are significant problems with the investigation of medical crimes in Ukraine. Less than one percent of the number of initiated criminal cases is sent to court. Most of the cases sent to court end with a guilty verdict, however, medical workers are released from real deprivation or restriction of freedom for various reasons. According to the specialties of medical workers, the most criminogenic are obstetrics and gynecology, surgery, anesthesiology, and emergency care for injuries and internal diseases. Methods of committing medical crimes are associated with using incorrect methods of providing medical care and with the untimely or incorrect diagnosis of the disease. The problems of investigating medical crimes in Ukraine are due to a number of reasons, including the closeness of the results of the post-mortem examination of the corpse to relatives of the deceased, the lack of independent forensic medical examination institutions in Ukraine, and gaps in the legal regulation of the protection of medical records from unauthorized access. This greatly complicates the establishment of a causal relationship between the actions or inaction of medical workers and the negative consequences that have occurred.

Keywords: Medical errors. Medical crimes. Medical malpractice. Problems of proving medical malpractice. Investigation of medical crimes.

Анотація

У статті автори визначили основні причини низького рівня розслідування медичних злочинів в Україні на основі аналізу 78 кримінальних справ щодо медичної недбалості, розглянутих судами з 2013 року, вивчення статистичної інформації, наукової літератури з проблем розслідування

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медичних злочинів, національного законодавства. Зроблено висновок, що в Україні є суттєві проблеми із розслідуванням медичних злочинів. З-поміж розпочатих кримінальних справ до суду направляють менше одного відсотка. Більшість справ, направлених до суду, закінчуються обвинувальним вироком, проте від реального позбавлення чи обмеження волі медичних працівників звільняють з різних підстав. За спеціальностями медичних працівників найбільш криміногенними є акушерство та гінекологія, хірургія, анестезіологія та надання невідкладної допомоги при травмах та внутрішніх хворобах. Способи вчинення медичних злочинів пов'язані з використанням неправильних методів надання медичної допомоги та з несвоєчасною чи неправильною діагностикою захворювання. Проблеми розслідування медичних злочинів в Україні зумовлені низкою причин, серед яких закритість для близьких померлого результатів патологоанатомічного дослідження трупа, відсутність в Україні незалежних установ судово-медичної експертизи та прогалини у правовому регулюванні питань захисту медичної документації від неправомірного доступу. Це значно ускладнює встановлення причинно-наслідкового зв'язку між діями або бездіяльністю медичних працівників і негативними наслідками, що настали.

Ключові слова: Медичні помилки. Медичні злочини. Медична недбалість. Проблеми доведення медичної недбалості. Розслідування медичних злочинів.

Introduction

Unskilled criminal actions of medical workers, negligent attitudes to the life and health of patients, and careless performance of professional duties, unfortunately, remain quite common. According to Ukrainian legislation, medical crimes include a wide range of torts provided for by various articles of the Criminal Code of Ukraine. Among them, in investigative and judicial practice, the most common crimes are related to medical malpractice, that is, intentional or reckless socially dangerous acts that violate the rules for providing medical care established by regulations in the performance of professional or official duties and entailed death or other serious consequences for life and health of the patient. The acts under Art. 140 of the Criminal Code of Ukraine "Improper performance of professional duties by a medical or pharmaceutical worker", based on statistics, occupy the most significant share in the structure of crime in the medical field.

Medical crimes are among the most difficult criminal cases to investigate. This is primarily due to the specifics of the mechanism of offenses. They are committed to the field of professional activity of medical workers, which, in turn, is aimed at helping a person with various diseases, injuries, and physiological processes. The problem of detecting medical crimes is exacerbated by the fact that a significant part of medical procedures leads to the risk of an unfavorable outcome for the patient, regardless of the doctor's fault (Hārātāu A., 2017, p. 171). Therefore, in most cases, it is difficult to identify and establish a causal relationship between the actions or inaction of physicians and the resulting harmful consequences for the life and health of the patient. The problem of prevention and investigation of medical crimes is global and requires constant attention from those sciences that develop methods for their prevention, detection, and investigation.

There is a significant level of latency of medical crimes, low efficiency in the investigation of revealed facts, as well as cases of unreasonable closure of criminal proceedings and failure to bring medical workers to criminal liability in Ukraine. For example, according to official statistics for 2021, 565 criminal cases were registered in Ukraine on the facts of improper performance of official duties by a medical or pharmaceutical worker (Article 140 of the Criminal Code of Ukraine). Of these, suspicion was reported to two persons, no cases were sent to the courts with an indictment, the proceedings on 310 cases were discontinued, and investigations on the rest are ongoing. Thus, the effectiveness of the work of law enforcement agencies in conducting a quick and objective investigation of such criminal offenses cannot be called high. Therefore, for investigative practice, it is important to find out the typical difficulties and obstacles inherent in this type of criminal proceedings and to determine ways to overcome them. Today, investigators need to develop and use a methodology for investigating medical crimes, which includes algorithms for establishing circumstances proving or refuting the guilt of a medical worker, a list of medical documents necessary for proving, determining the range of questions that need to be answered by forensic experts, tactical features of conducting investigative actions, etc.

Literature Review

Research has been carried out in Ukraine to determine the demographic and occupational profile of healthcare professionals who have been prosecuted for medical crimes, as well as to obtain information about the criminal penalties applied to them (Franchuk & Trach Rosolovska, 2018; Danchenko & Taran, 2020).

To improve the situation of bringing medical workers to criminal liability for improper performance of their professional duties, it was proposed to develop a legal mechanism for investigating cases of medical malpractice (Gutorova, Zhytnyi & Kahanovska, 2019).

Also, domestic scientists developed the basics of a forensic methodology for investigating medical crimes (Danshyn et al., 2019; V.V. Topchiy, 2020).

In addition, the problematic issues of appointing and conducting forensic medical examinations in criminal cases of iatrogenic crimes were considered in the scientific literature (Grynko et al., 2018).

The previously obtained research results require further development to determine the most criminogenic areas of medical care, typical ways of committing medical crimes, systematizing the main reasons that make it difficult to prove in criminal cases, and possible ways to eliminate them. This should contribute to the development of effective measures to improve the situation with the detection and investigation of this type of crime.

Methodology

According to the subject of the study, we analyzed and statistically processed open data on 78 criminal proceedings on medical malpractice for the period January 1, 2013, to August 1, 2022, of the state database, which contains records of all decisions of the courts of Ukraine (the Unified State Register of Judicial Decisions). Statistical information on the state of crime posted on the website of the Office of the Prosecutor General of Ukraine was also analyzed. In the course of the study, the data obtained were systematized into groups: the identity of the offender, the consequences that occurred, the method of the offense, the means of proof used, investigative errors, etc. The following data were collected: the number and date of the judgment, the date of death or injury, the characteristics of the medical malpractice, the medical specialty of the defendant, the length of the trial, and the outcome of the trial.

Domestic and foreign literature on the content and causes of medical crimes, the features of their investigation, the classification of medical errors, and the commission of which leads to negative consequences for the patient were studied. The criminal law, forensic and medical regulations of Ukraine were analyzed.

Results and discussion

An analysis of literature data and judicial practice has shown that the most common causes of medical crimes are medical errors and malpractice of medical personnel.

Medical error is defined by the US Institute of Medicine as "failure to perform a planned action for its intended purpose or use the wrong plan to achieve a goal", i.e. planning or execution error (Institute of Medicine (US) Committee on Quality of Health Care in America, Kohn, Corrigan & Donaldson, 2000). Despite the best efforts of healthcare institutions, the prevalence of medical errors is still high (Tsigengagel et al., 2020, p. 157).

There is no unambiguous interpretation of medical errors in the domestic literature. Without going into a discussion about this concept, we note that only errors caused by subjective reasons lead to criminal liability when there is an unreasonable deviation of a medical worker from medical standards, an unreasonable risk of treatment, poor-quality examination, incorrect interpretation of clinical and laboratory data, not accounting or reassessment of the results of consultations of other specialists, etc. Malpractice, in turn, characterizes the subjective side of a criminal offense, which is a careless form of guilt and manifests itself in the criminal arrogance or criminal malpractice of a medical worker. Thus, an important problem in the investigation of medical criminal offenses is to establish the cause of death or harm to the health of the

victim, which could be the result of a medical error of subjective origin or the malpractice of a medical worker.

It should be recognized that most medical errors remain latent. Scientists point out that known court verdicts may represent only a small fraction of cases where the medical practice has been proven to be substandard in medical care (Dettmeyer, Egl & Madea, 2005). Proving the guilt of medical workers in committing medical errors is characterized by lengthy lawsuits, a significant number of acquittals, and almost zero punishment of doctors in the form of imprisonment (Wu et al., 2016). Although there are exceptions, such as in Japan, which traditionally has a higher level of court convictions than the rest of the world in all categories of crimes, including cases of medical errors (Starkey & Maeda, 2010, p. 4).

The investigation of medical crimes in Ukraine has some peculiarities. According to the previously published results of the analysis of the judicial practice of Ukraine in cases of medical malpractice for the period from 2007 to July 2019, it was found that in 96% of cases a sentence of imprisonment was not imposed, or medical workers were released from serving their sentences (Gutorova et al., 2019, p. 2165). The most severe was the punishment of a doctor in 2016 who was sentenced to imprisonment for a term of three years and deprivation of the right to practice medicine for two years (Danchenko & Taran, 2020, p. 256). According to our data, for the period January 2013 - July 2022, out of 78 criminal cases considered by the courts on the improper performance of professional duties by a medical or pharmaceutical worker, 12 (15.38% of the total number) acquittals were issued. Thus, the majority of sentences for medical workers were convictions. However, it should be taken into account that most of the investigated criminal cases do not reach trial. They are closed or remain for a long period at the stage of pre-trial investigation. In particular, during the specified period, according to official statistics, 5551 criminal proceedings were initiated in Ukraine on the facts of medical malpractice. Of these, only 33 (0.59% of the total) criminal cases were sent to the courts, 2,754 cases (49.61%) were terminated at the stage of pre-trial investigation, and the investigation continues in other cases. This testifies to the big problems in proving that do not allow investigators and prosecutors to conduct investigations within a reasonable time and send cases to courts with indictments.

Statistics show that the consequences of the events under investigation in 80.77% of cases were the death of the patient and in the remaining 19.23% serious harm to health. But among the guilty verdicts, punishment in the form of real deprivation or restriction of freedom was imposed in 16.67% of cases. In the remaining 83.33% of cases, the courts most often also imposed deprivation or restriction of liberty as the main punishment, but released the convicts from it before the end of the probationary period or after the statute of limitations for the crime expired, or applied amnesty acts.

Criminal cases of medical crimes are characterized by long periods of investigation and trial. Scientists have noted that from the moment the investigation is started to the final verdict in the case, on average, more than 7 years pass (Giraldo P. et al., 2016; Wu et al., 2016). According to our data, in Ukraine the duration of criminal proceedings was: up to 1 year - 5.3%, from 1 year to 3 years - 38.46%, from 3 to 5 years - 25.64%, from 5 to 7 years - 15.38%, more than 7 years - 15.38%. This does not mean that medical crimes are investigated faster in Ukraine than in other countries. It is necessary to take into account a significant number of criminal cases that are at the stage of pre-trial investigation.

The scientific literature presents the results of studies aimed at determining the professional scope of medical workers who are held criminally liable for errors and malpractice. With some differences in different countries, surgery, therapeutic areas (internal medicine, family medicine), emergency medical care, obstetrics and gynecology, anesthesiology, pediatrics, etc. are considered to be the most criminogenic. (Cakmak et al., 2017, p. 446-448; Alkhenizan, & Shafiq, 2018, p. 1078; Chen et al., 2019).

In Ukraine, in terms of medical specialties, age characteristics, and work experience, doctors who are held legally liable for medical errors are in line with global trends (Franchuk & Trach Rosolovska, 2018, p. 5). According to researchers, in 2020, obstetricians-gynecologists were prosecuted - 33%; surgeons - 20%; anesthesiologists - 12%; ambulance workers (paramedics) - 7.5%; paramedics - 5%; other specialties - 17.5% (Danchenko & Taran, 2020, p. 256). According to our data, the courts considered criminal cases on charges of doctors - 92.3%, nurses and paramedics - 7.7%. Among doctors, obstetricians-gynecologists - 28.21%, surgeons - 20.51%, anesthesiologists - 11.54%, traumatologists - 8.97%, general practitioners and family doctors - 7.69%, paramedics - 6, were brought to criminal responsibility. 41%. In other rare cases, infectious disease specialists, urologists, bacteriologists, psychiatrists, and neuropathologists were judged.

Despite some differences in the specialties of medical workers accused in court, there is a tendency for the greatest criminality in the areas of obstetrics and gynecology, surgery, anesthesiology, as well as emergency care for injuries and internal diseases.

According to studies conducted in Spain and the United States, the most common medical errors are the erroneous or late diagnosis of a patient's illness (Giraldo et al., 2016). Turkish scientists who have studied court decisions have found that the two most common causes of medical errors are the choice of the wrong method of treatment and surgical errors (Cakmak et al., 2017). Based on the results of our analysis, we state that in Ukraine the methods of committing medical crimes are most often associated with the use of incorrect methods of providing medical care to patients (54.68%) and with the untimely or incorrect diagnosis of the disease (34.64%). There were also cases of violation of the rules for the use of drugs (5.34%), leaving the patient without proper medical care (4%), and failure to establish an appropriate treatment regimen for a patient suffering from a mental disorder (1.34%). It should be noted that, based on the results of numerous observations in the scientific literature, the relevance of analyzing not only the risk factors for medical errors or medical malpractice but also the prosecution of a doctor for conflicts with patients is emphasized (Bernain, Rodríguez, Tissie & Gómez, 2019, p. 112).

We agree that the process of litigation of possible medical errors is the key to establishing fair, prompt, and effective access to justice (Alkhenizan & Shafiq, 2018, p. 1075). Therefore, the pre-trial investigation and trial of the facts of probable medical error and malpractice must be carried out within a reasonable time, as objectively, fully, and comprehensively as possible. This means that it is necessary to take into account the typical difficulties, mistakes, and blunders of the investigating authorities, which lead to delays in the pre-trial investigation and trial in such cases, as well as outline ways to overcome them.

Griffiths and Sanders (2012) analyzed the reasons for the low efficiency of the criminal investigation of medical crimes in the UK. They noted a large number of criminal cases closed by the police without collecting evidence, and only 5% of cases where the investigation was fully completed, but only half of them resulted in a conviction. Among the reasons for this situation, the authors name the lack of a medical worker's obligation to exercise caution in a certain professional situation; the inability of the investigation to establish a causal relationship between the act of a medical worker and the ensuing consequences, as well as to establish a "gross" threshold of gross malpractice (Griffiths & Sanders, 2012, p. 31-45).

Difficulties in investigating medical crimes in Ukraine are due to similar reasons. Some differences are due to the specifics of regulating the issues of professional and criminal liability of medical workers for the improper performance of their duties, the peculiarities of criminal law regulation, and criminal procedural proof under national legislation.

Almost always, a criminal investigation of medical crimes in Ukraine begins with complaints of inadequate medical care received from the victims or their relatives. There are few cases when the reason for starting an investigation is the reports of the health authorities based on the results of a post-mortem examination of the corpse of a deceased patient. This situation is explained by corporate solidarity in the healthcare sector and highlights the shortcomings of the domestic system for detecting and preventing medical malpractice at an early stage. At the same time, it is believed that post-mortem autopsies are quite a sufficient method for detecting cases of medical malpractice (Burkhard & Preuß, 2009).

In Ukraine, after the death of patients, routine autopsies are performed by regular pathologists at medical institutions. In general, this departmental procedure is regulated by the order of the Ministry of Health of Ukraine. At the autopsy, the attending physician or another representative of the department where the patient died is always present. The presence of relatives and friends of the deceased is prohibited. Based on the results of the autopsy, a protocol for a pathoanatomical examination is drawn up, in which the pathoanatomical and final clinical diagnoses are indicated, and the presence of discrepancies in them and their causes are assessed. This protocol and related documents are stored in the archive of the healthcare institution (Order No. 1877, 2021). Interested parties from the side of the deceased patient are not provided with them. If based on the results of the autopsy, signs of a possible medical error or malpractice are revealed, a commission is appointed with the participation of health officials to assess the guilt of medical workers through a departmental investigation. This happens extremely rarely, which is largely due to the corporate solidarity of doctors.

As a rule, the described procedure for post-mortem autopsy in the event of a conflict situation regarding the adequacy of medical care does not inspire confidence among the relatives of the victims, primarily because of its closeness. It contributes to the formation among interested parties of the belief in the bias of pathologists and other doctors, the inability to find out the true cause of death without contacting law enforcement agencies. The result of the described procedure is a significant number of applications for medical criminal offenses in their actual absence.

It is also important to note that the documents drawn up based on the results of a post-mortem autopsy are subsequently important sources of evidence in the investigation of medical crimes. Therefore, the consequences of their falsification are very difficult to overcome and restore the true picture of the event.

In this matter, we consider the experience of Japan to be useful, where a model for investigating a possible medical error has been in place since 2005. After the autopsy of the corpse, an assessment commission from among medical specialists draws up and submits a report on the causes of death of the patient and the necessary preventive measures to the medical institution and the family of the deceased. The report with the edited identifiers is then published (Leflar & Iwata, 2005, p. 223). Improving the domestic system of departmental investigations of possible cases of medical errors or malpractice by ensuring the openness of the results to interested parties, in our opinion, would help reduce the number of unreasonable appeals to law enforcement agencies about medical crimes. It could also increase public confidence in the quality of medical care.

Based on the results of the analysis of criminal cases on medical crimes, it can be stated that investigators and prosecutors in all cases carry out such actions as demanding and analyzing documents, interrogating witnesses, victims and suspects, and involving forensic medical experts.

In 97.44% of cases, suspected medical workers do not admit their guilt in committing an error or malpractice. They explain the resulting harmful consequences for the victim by unforeseen reactions of the body, atypical symptoms, violation of the prescribed regimen by the patient, imperfect equipment, violations by other medical workers involved in the provision of medical care, etc. Therefore, the investigation process implies the need for a thorough check of the arguments of the defense and is accompanied by the resolution of disputes of a professional nature both in the field of organizing the work of medical workers and regarding the direct provision of medical care in specific situations.

First of all, for the effective investigation of this type of crime, the investigator (prosecutor) needs to know the specifics of the functioning of the sphere of medical services, namely: what specific legal acts and rules governing the professional activities of a medical worker have been violated; what specific negative consequences were caused by errors or actions (inaction) of a medical worker; what is the mechanism for the development of an unfavorable process that arose as a result of an error or actions (inaction) of the subject; what is the nature of the cause-and-effect relationship between the factors that caused the onset of negative consequences, etc. When solving these issues, the investigators experience significant difficulties, which adversely affect the criminal-legal assessment and collection of the necessary evidence.

In each investigation of a medical crime, two types of legal documents that regulate the performance of professional duties by medical workers must be analyzed. These are the standards and protocols of medical care applied to a specific situation and the job descriptions of a suspected medical worker. The rules established in these documents are mostly general and are not always clear concerning the obligatory actions of a doctor in a given situation. It is practically impossible for an investigator, without the help of a specialist in the field of medicine, to assess whether the action or inaction of a medical worker complied with the established rules. Moreover, it is impossible to make an unambiguous conclusion about whether there is a direct causal relationship between the act of the subject and the socially dangerous consequences that have occurred without a specialist. It is noted that a causal relationship is more difficult to prove than the very fact of a violation of official duties by a medical worker, due to the uncertainties inherent in medical practice (Merry, 2009, p. 2165). With this in mind, the legal acts on forensic medical examination in Ukraine provide for a mandatory commission to conduct it in all cases of professional violations of medical workers (Order No. 6, 1995).

In general, the specific difficulties of the investigation force the investigator to shift the assessment of the collected evidence to medical professionals, and the main source of evidence of the guilt or innocence of a medical worker is the results of a forensic medical examination.

To draw reasoned conclusions about the guilt or innocence of a medical worker in each specific case of medical care that had adverse consequences, knowledge of the treatment process for a particular pathology is necessary. In the procedural form, this knowledge, as mentioned above, is implemented by the investigator, and the court in the form of the appointment of forensic medical examinations. It is possible to identify a number of typical problems that arise in the appointment and conduct of forensic medical examinations in the investigation of medical crimes.

So, the presence of the so-called "medical (corporate) ethics" causes the concealment of illegal acts of some doctors by others, as a result of which some examinations are carried out incompletely, not according to all medical documents, questions put to the permission of experts are not deeply and unscientifically investigated. The analysis showed that two or more forensic medical examinations were carried out in all criminal cases. Quite often the conclusions of different examinations contradicted each other, which hindered the possibility of deciding the case on the merits.

The Bureau of Forensic Medical Examinations of the Ministry of Health of Ukraine is a communal institution financed from the regional budgets. This circumstance may indirectly indicate the incomplete independence of a forensic expert conducting research on criminal proceedings against a colleague working in the same region, and even more so in a state medical institution. According to our observations, in cases where employees of commercial medical institutions were accused of medical malpractice, the conclusions of the forensic medical examination were more specific and confirmed the malpractice of the suspects. Therefore, an urgent issue for Ukraine is the creation of independent institutions for forensic medical examination. In turn, in today's conditions, when there are no such institutions, the investigator must take into account measures to ensure the objectivity of the expert's conclusions. To do this, scientists recommend appointing an examination to institutions of another region, attracting foreign experts to the commission, not allowing attending physicians, employees of the medical institution where the event occurred, and specialists participating in the internal investigation to participate in the examination (Grynko at al., 2018, p. 176-177).

The quality of a forensic medical examination harms the lack of methodological recommendations on the formulation of questions for experts and the list of documents required for a forensic medical examination. As a rule, the investigator, investigating the facts of improper provision of medical care, initially sends for examination as an object of study only medical documents filled out by medical workers whose actions will be evaluated. However, these records in some cases are added or rewritten by interested parties after the offense has been committed. There are also cases of destruction of medical records to prevent seizure by law enforcement agencies. In the forensic literature, measures are proposed to improve industry legislation aimed at minimizing the facts of falsification of medical records (Khizhnyak at al., 2018, p. 565-566). For an investigator and prosecutor in a specific criminal investigation, it is tactically correct to immediately seize all "medical" material at the disposal of a medical institution.

Conclusions

There are significant problems with the investigation of medical criminal offenses in Ukraine. Less than one percent of the number of initiated criminal cases is sent to court. The rest, in approximately equal proportions, are stopped or considered for a long time at the stage of pre-trial investigation. Most of the cases sent to court end with a guilty verdict, however, medical workers are released from real deprivation or restriction of freedom for various reasons.

In the specialties of medical workers accused in court, there is a tendency for the greatest criminality of obstetrics and gynecology, surgery, anesthesiology, and emergency care for injuries and internal diseases. The methods of committing medical crimes are most often associated with the use of incorrect methods of providing medical care to patients and with the untimely or incorrect diagnosis of the disease. In addition, medical malpractice is manifested in actions (inaction) that violate the rules for the use of medicines, leaving the patient without proper medical care, and failure to comply with the proper treatment regimen for the patient.

The problems of investigating medical crimes in Ukraine are due to the following reasons: the specifics of the mechanism of offenses that are committed in the field of professional activity of medical workers aimed at helping a person with various diseases, injuries and physiological processes; closeness for relatives and relatives of the deceased of the results of the post-mortem examination of the corpse with a possible medical

error; the lack of proper knowledge of investigators about the mechanism of medical crimes, which leads to low efficiency in the collection and evaluation of evidence; denial by medical workers of their guilt and shifting it to unforeseen reactions of the body, symptoms, violation of the prescribed regimen by the patient, imperfect equipment, violations by other medical workers, etc.; the presence of corporate opposition of doctors who are involved as forensic experts or witnesses in the case; the absence in Ukraine of independent institutions of forensic medical examination and gaps in the legal regulation of the protection of medical records from unauthorized access. These reasons exacerbate the difficulty of establishing a causal relationship between a medical error, actions, or inaction of medical workers and the resulting negative consequences for the life and health of the patient.

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