PhD Izabela Jankowska-Prochot
associate professor at WSB University in Warsaw
ORCID: 0000-0001-7252-2623

THE POSITION AND ROLE OF THE EXPERT WITNESS IN THE ANGLO-SAXON AND ADVERSARIAL CRIMINAL PROCEDURE

Summary
This paper outlines the position and role of the expert witness in common law legal systems in providing evidence in criminal cases. The author also presents existing guarantees of his or her impartiality. This is an extremely interesting issue because in the adversary system unlike then in inquisitorial system litigation adversaries represent their parties case or position before an impartial judge or jury who attempt to determine the truth and pass judgment according. That's why the influence on expert-witness opinion has got a significant impact on the process.
Keywords: the adversarial system of justice, expert witness, opinion, impartiality

Anglo-Saxon model in criminal proceeding

In common law countries, the criminal lawsuit is predominantly relying on adversarial system. Its form has been consolidated through the centuries of practice and enrooted in the fundamental assumption of a dispute between equal parties, resolved by an impartial arbiter, which is an independent court. Thus, in contrary to the inquisitorial system considered as the opposite one and prevailing on the European continent, the procedural body is not required to be active, as it is the responsibility of both parties[1].

Before further argumentation, the above remarks should be complemented by pointing out that nowadays neither the adversarial nor the inquisitorial model can be encountered in its pure form. In common law countries, the court has the right to take evidential initiative in outstanding situations, which include, among others, the right to appoint a single joint expert in place of private expert witnesses representing

[1] I.K.E. Oraegbunam, *The jurisprudence of adversarial justice,* "A New Journal of African Studies" 2019, vol. 15, p. 28; A. Ashworth, M. Redmayne, *The Criminal Process,* Oxford University Press, Oxford 2005, p. 65 and following.

the parties. In contrast, in the so-called civil law countries, a number of elements of adversarial system have been introduced[2].

While addressing the characteristics of the adversarial system, the first distinctive feature should be emphasized, i.e. the clear separation between the trial functions performed by the prosecution, the defense and the independent court. Hence, the body conducting the proceedings focuses exclusively on the adjudicatory role, the prosecution plays its prosecution function, whereas the defense attempts to improve the procedural position of the defendant by providing a competent and necessary assistance in the effective exercise of his or her rights[3].

A manifestation of the adversarial proceeding rests also in the legal and genuine procedural equality of arms. The legal nature of this principle means that the prosecution, as the subject of the criminal-procedural relationship, supports the accusation, and in turn, the defense needs to address and challenge the charges against the defendant. Both parties also have the same rights and obligations. The factual nature, in turn, implies the right to take of the evidence on its own initiative. Thus, while in the continental system the place for procedural parties is *de facto* non-existent, as the search for material truth and the examination of the case belongs exclusively to the trial authority, in the adversarial process, at least in theory, procedural opponents represent equal parties which compete against each other by leading the dispute in order to establish the truth[4].

A notable feature of adversary system is also the fact that in principle both parties have the exclusive initiative of taking the evidence and only they can request the admission of certain evidence to be put before the Court. The parties are also the only ones who can examine witnesses including the ones appointed by the opposing party, in the form of cross-examination. This means that in order to reach a favorable outcome, the defense and prosecution must be very active in gathering the evidence and deciding which facts need to be proven.

The principle of the disposition of parties regarding the subject matter of the dispute is also of great importance. In practice, it means the liberty of disposition of their rights with its crucial implication, meaning that dropping the charges by the prosecutor or the defendant's pleading guilty is binding on the court and terminates the trial at any stage. Consequently this means that the parties can affect the course of

[2] It is reported in the following legal literature in Poland: A. Lach, *Zasada kontradyktoryjności w postępowaniu sądowym w procesie karnym de lege lata i de lege ferenda,* „Palestra" 2012, no. 5–6, p. 126; K. Witkowska, *Kontradyktoryjność w postępowaniu przygotowawczym*, „Wojskowy Przegląd Prawniczy" 2010, no. 3, p. 31. See also D. Nelken, *Comparative Criminal Justice: Making Sense of Difference,* SAGE, London–Thousand Oaks, CA 2010, p. 63 and following.

[3] C.M. Bradley, *Book Review. The Convergence of the Continental and the Common Law Model of Criminal Procedure,* "Maurer School of Law: Indiana University" 1996, vol. 7, no. 2, p. 473 and following.

[4] M.K. Block, J.S. Parker, O. Vyborna, L. Dusek, *An experimental comparison of adversarial versus inquisitorial procedural regimes,* "American Law and Economics Review" 2000, vol. 2, pp. 170–194.

the trial and decide on its termination[5]. Importantly and significantly, the disposition of the parties is practically absent in a procedural law system based on the dominating inquisitorial elements, where all decisions are issued by the procedural body. This, in turn, means that the litigation parties in principle remain passive and expect the court to hear the evidence, explain all the circumstances of the case and pass the judgement.

An important element of the process in question, and at the same time the consequence of the disposition characterized above, is its consensual character. This is manifested by the possibility of concluding consensus-based agreements by the accused with the prosecutor, the victim and even the Court. These agreements, by virtue of the principle of equivalent of service, involve conventional "plea bargains" and the practice of sentencing without trial[6].

And last but not least, in an adversarial process, the judge is an impartial arbiter, not involved on either side, and his duty is to preside during the trial, direct order by giving the floor to participants of the trial, or ensure whether the parties have fulfilled their obligations. The court, while not being equipped with inquisitorial tools, does not act *ex officio*, and has no authority to control the dispositions of the parties. Nevertheless, in certain cases the court may not allow a witness called by a party to testify. In general, this happens when the witnesses make their own statements, unrelated to the evidential thesis for which they were appointed to testify[7]. In this type of criminal procedure, the judge as a rule does not decide whether the defendant is guilty or not guilty, as this is the responsibility of the jury[8].

A trial jury, on the other hand, is composed of the individuals selected randomly or by other non-discriminatory manner from a larger group of citizens aged between 18 and 70 years. Selected individuals are then summoned to appear in court on a specific date and are selected by voting procedure. The jurors convene in a separate room in absence of the judge or other entities, and their verdicts are independent. The decision of the jury on being guilty or not guilty are binding to the court, which issues a final judgement. The decision of the jury may be appealed to the Supreme Court on the grounds of violations of law, incorrect application of criminal law or violation of the rules of procedure[9].

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[5] B. Bieńkowska, *Dyspozycyjność stron w procesie karnym na tle zasady kontradyktoryjności,* "Przegląd Sądowy" 1994, no. 3, p. 3.

[6] G. Goodpaster, *On the theory of American adversary criminal law,* "The Journal of Criminal Law and Criminology" 1987, vol. 78, no. 1, p. 120 and following; R.G. Johnston, S. Lufrano, *The adversary system as a means of seeking truth and justice,* „The John Marshall Law Review" 2002, vol. 35(2), pp. 154–161.

[7] S. Landsman, *The Adversary System: A Description and Defense,* American Enterprise Institute for Public Policy Research, Washington 1984, pp. 44–46; 48 and following.

[8] N. Vidmar, *Expert evidence, the adversary system and the jury,* "American Journal of Public Health", July 2005, p. 4.

[9] Ibidem.

The role of expert witness in Anglo-Saxon criminal procedure

he witness expert institution has been known in common law system for more than 250 years. The first case where this type of evidence was formally used was Lord Mansfield's Folkes v. Chadd case of 1782, also referred to as the Wells Harbour (Wells Harbour Case)[10].

The issue to be settled involved the determination whether sea dikes and other embankments contributed to the silting up and subsequent obstruction of Wells-next--the-Sea harbor in Norfolk County, England. Over a two-day trial, a series of witnesses and experts spoke on the issue and were brought forward to the courtroom to testify before the jury[11].

They were to present an opinion indicating what they believed had led to the silting up of the port and the resulting problems with transportation of grain from Norfolk. The common opinion was proclaimed, namely that the problem was a consequence of the construction of the massive embankments and recultivation of the harbor channel by local landowners. This view was also shared by the witnesses called by the plaintiff, namely pilots, mariners, seamen and men who had lived in the port for many years. They all unanimously stated that, in their opinion, it was necessary to remove the dikes and embankments, since, according to their many years of observation, these were the ones that led to the "degradation of the harbor"[12]. Another viewpoint on this matter was presented by the lawyers of the defendant, Sir Martin Browne Folkes. They presented just one witness, the Fellow of the Royal Society and the owner of a reputable engineering and architectural company in London, Mr. Robert Mylne. This witness firmly and in authoritative tones, dismissed the cause of the reduction in the water level i.e. the embankments. In his view, the problem was the effect of wind and sea tides, which had carried estuarine sediments along the Norfolk coast and into Wells Harbor, and any contrary interpretation was said to be illegitimate. Awed by the expert's dignity and authority, the jury was convinced by his claims and rendered a verdict in favor of the defendant.

Outraged by this decision, the local community strongly opposed the verdict. In particular, the locals found it difficult to accept that the single opinion of a London expert, based on a short examination of less than an hour, could carry the day over the life experience of local observers. Due to a quite limited possibility of appealing the jury's verdict to a court of second instance, they sought the relevant permission from the Court of Kings Bench. Although the agreement was granted, the plaintiffs faced the need to appoint new experts, as the court established a crucial precedent for obtaining evidence. The Bench ruled that "in matters of science the reasonings of men of science can only be answered by men of science".

[10] *Folkes v Chad* 99 E.R. 686 (1783) 3 Doug. K.B. 340, https://vlex.co.uk/vid/folkes-v-chad--and-802475217 (accessed 18.08.2022). It is worth mentioning here that the case was first examined in 1782, however a written report on the proceedings was not ready until 1831.

[11] See more in: D. Sammut, Ch. Craig, *Bearing witness*, "Chemistry in Australia", September/ October 2018, p. 18 and following.

[12] Ibidem, s. 18.

In the second instance proceedings, both sides sought professional expert reports prepared by experts in river navigation, canal thwarting or drainage. This time the defendant was represented by George Hardinge, a Barrister of the Middle Temple. The jurist decided to submit the expert written opinion of another Fellow of the Royal Society of London, as well as a prominent English engineer and the highest authority on harbours, Sir John Smeaton. The case was brought to court in July 1782, and the main point of argument was the admissibility of Smeaton's testimony. Trial opponents challenged this evidence, claiming that appealing to an authority external to the trial who had not seen the harbour is a certain abuse, and hence the evidence should be excluded. As an additional argument, they cited the fact that Smeaton's opinion was supposed to be based on theoretical explanations, and according to common law principles, is the matter of opinion, which could be no foundation for the verdict of the jury[13].

Other decision was issued by the Chief Justice of the King's Bench Lord Mansfield, who, hearing an appeal against the verdict, stated that the objections to the engineer's opinion as being unsupported by facts are groundless and that the opinion submitted in the case was very proper evidence[14].

According to the jurist, although Smeaton did in fact state his opinion, the opinion was deduced from undisputed and scientific facts such as the location of the seashore, the course of the tides, the speed and intensity of the winds, and the shifting of the sand. Basing on the analysis of these factors and facts, Lord Mansfield also concluded that while shore landslides could contribute to the damage, it would not be of a significant nature. The judge also ruled that in all matters directly or indirectly related to science, no other witnesses can be called than those having the knowledge in the specific field. And Mr. Smeaton, the engineer who understands the construction of harbours, the causes of their destruction and how they can be remedied was undoubtedly a proper person in this respect

Up to now, the Mansfield's decision has served as the foundation of the rules governing expert evidence and at the same time a principal precedent for expert testimony in Anglo-Saxon legal system[15]. The verdict also laid the foundations to the principle that it is not the role of the court to question or challenge the expert witness opinion, but to incorporate the opinion into the trial. In turn, the role of the party is to point to vulnerable areas during cross examination and convince the jury of its low evidential value[16].

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[13] *Folkes v. Chad* 99 E.R. 686 (1783) 3 Doug. K.B. 340, op. cit.

[14] T. Golan, *Revisiting the history of scientific expert testimony,* "Brooklyn Law Review" 2008, vol. 73(3), *Symposium A Cross-Disciplinary Look At Scientific Truth: What's The Law to Do?,* p. 887.

[15] A. Kenny, *The expert in court,* „Law Quarterly Review" 1983, no. 99, p. 197.

[16] Opinions based on scientific facts were formulated by court experts in the nineteenth century at several occasions, and each time their scientific foundations were accepted. An example can be, among others, the case of Beckwith v. Sidebotham of 1807 relating to the navigability of the Earl of Wycombe ship; Lord Ellenborough, who adjudicated it, stated that in cases

The above judgement and the resulting legal tradition provide an important reference point for the contemporary status and role of the expert. Hence, by analogy to past centuries, in common law systems the expert opinions continue to be elaborated on the request of a party, rather than the trial body, as this is the case on the continent.

In practice, this means that the parties gather the evidence before trial, which is then presented to the jury and the court. Therefore, on the one hand, an expert appointed in a case is a right-hand to the court whose responsibility is to provide new information or clarify issues of a specialized nature, and on the other hand, is a person chosen and paid, usually quite generously by the party who expects the expert to present certain points when applying special knowledge. Thus the role of an expert naturally encompasses the need to balance the expectations of the requesting party with the obligation to maintain objectivity[17].

It is also worth mentioning that in countries with Anglo-Saxon legal tradition the categorization of evidence into a witness testimony, the explanations of the defendant or the expert witness opinions is not valid, as all these parties are called witnesses. This means that an expert is a witness with special knowledge (expert witness). His

where specific scientific knowledge is required, the jury should be supported by the opinions of persons having special knowledge in this field. This knowledge can be the result of both academic education and the profession. The judge also acknowledged that due to uniqueness of this knowledge even if the expert opinions do not bring anything exceptional to the case, they should be admitted as evidence (*As the truth of the facts stated to them was not certainly known, their opinions might not go for much; but it was admissible evidence*). See more in: L. Hand, *Historical and practical consideration regarding testing testimony,* "Harvard Law Review" 1901, vol. 15, no. 1, p. 49 and following. Also in the M'Naghten case of 1843, where the decision concerning the insane perpetrator of a criminal act was considered absolutely crucial, Judge Lord Tindall stated that the role of a medical expert is very important when dealing with the perpetrators suffering from mental disorder See. M'Naghten (1843) 8 E.R. 718, https://www.casemine.com/judgement/uk/5a938b3d60d03e5f6b82b976 (accessed 18.08.2022). It is also worth referring to the case of R. v. Turner of 1975, in which Judge L.J. Lawton stated that before the court could evaluate the evidential value of an opinion, they need to know the facts on which it was based. And if the expert was misinformed or took into account irrelevant or omitted essential facts, the opinion is likely to be valueless. Therefore, during the examination-in-chief ask his witness, the defense attorney should demand that the facts on which the opinion was based be presented, as it would be wrong to leave the other side to elicit the facts by cross-examination. In particular, this is the expert opinion which is evaluated and which must be in line with the standards adopted in a given field of expertise. Since 2008, the Forensic Science Regulator (FSR) has been operating in England, providing consultancy to courts and publishing recommendations on what should be recognized as standards regarding the activities of experts or methods of examination (R. v. Turner, [1975] 1 All ER 70, in: Ch. Allen, *Practical Guide to Evidence, Routledge,* London–New York 2008, p. 74).

[17] K.J. Figueroa, F. Hoag, *Use and misuse of expert evidence,* "Construction Law International" 2019, vol. 13(4), p. 13 and following.

or her opinion differs from other personal sources of evidence by relating to the issue relevant to the determination of the subject of the tria[18].

Despite the absence of uniform legal procedures and solutions for expert witnesses in common law countries, it is generally accepted that in a procedural sense an expert witness can be a person with appropriate qualifications or extensive experience in the field that is the subject of the opinion. He or she is also required to meet not quite specified conditions of ethical nature. So much for the theory, as in practice neither the knowledge, nor the experience, nor finally high ethical standards of experts are verified in any particular way. This is due to the lack of appropriate tools for reliable evaluation and also quite diverse areas of research.

Unlike in Poland, the expert witness status is not granted or approved by the court, and the conditions for admitting expert evidence include the following:

1) Expert opinion evidence is admissible to assist the tribunal of fact in forming the basis of judgment or in deciding an evidentiary fact when it is outside the scope of ordinary experience of the tribunal to draw a conclusion.

2) An expert is a witness who is qualified to testify to speak on facts whose evaluation requires specialized body of knowledge beyond the knowledge and experience of the tribunal of fact.

3) Although there is no *numerus clausus* of the field of knowledge in which expert witnesses may be appointed, not every field of knowledge can be the subject of expertise unless it can be described as an organized branch of knowledge.

4) An expert may be qualified to issue the opinion through the education, formal qualifications or direct experience.

5) An expert, as a special source of specialized knowledge, may only testify to opinions which are within the scope of witnesses field of expertise.

6) The quality control and evaluation of evidential value of the expert witness opinion in the context of a particular case is carried out by the tribunal of fact, depending on the type of trial or by a jury or a professional judge.

7) The provision of a robust opinion takes precedence over any obligation to the party requesting the opinion, hence the court expert should disclose any version of the facts and explain the way in which the application of specialist knowledge led to draw observations and conclusions.

8) Any theoretical basis for the opinion and the circumstances relevant to the resolution of a particular issue must be made clear to the court; they must be capable of proof by admissible evidence. The opinion should include justification for observations and conclusions.

9) If the parties have presented conflicting expert opinions, and the evidence gathered in the case as well as the confrontation of experts, does not give grounds for one choice, the dispute may be resolved by the tribunal of fact appointed to evaluate the facts, that is, either a jury or a professional judge.

[18] M. Rochester, *Duties and responsibilities of an expert witness,* „The Arbitrator and Mediator", March 2001, p. 7.

10) Under the ultima issue rule, an expert cannot give opinion evidence upon the ultimate issue lor determination by the tribunal of fact. In practice, this means that it is beyond the competence of the expert under any circumstances to make legal evaluation or to speak on the guilt or innocence of the defendant, but to clarify the facts from the point of view of his or her specialized knowledge, taking into account the evidence collected and made available[19].

The specific recommendations for expert witnesses formulated on the basis of ruling in *National Justice Compania Naviera SA v. Prudential Assurance* case of 1993 constitute supplementary information to the above principles[20]. They include the following expert obligations:

1. To present their opinion to the court in objective and coherent manner. It has been stated that the specifics of adversarial system cannot undermine confidence in the knowledge and impartiality of the expert[21].

2. To support the adjudicating team to the extent that requires special knowledge. The experts must not act as advocates, representatives or contractors, nor replace judges by taking over their judicial function[22].

3. To provide all the evidence, facts, issues, assumptions and methods used for the analysis on which the expert based his opinion. Judge J. Creswell of the House of Lords also added that an expert opinion should, in principle, be based on the evidence already gathered in the case[23].

4. Omission of significant fragments, as well as drawing conclusions or formulating opinions that go beyond the expert knowledge is prohibited[24].

5. The obligation to indicate when the examination of a given case goes beyond the expert's knowledge and previous experience.

6. Obligation to indicate the incomplete or provisional nature of the opinion in the absence of a complete set of required data.

7. Obligation to immediately inform the other party or parties to the proceedings and the authority of any change of opinion.

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[19] See more: R.E. Cooper, *Federal Court expert usage guidelines,* "Australian Bar Review" 1998, vol. 16, p. 203 and following.

[20] *National Justice Compania Naviera SA v. Prudential Assurance Co Ltd* (The Ikarian Reefer) Queen's Bench Division (Commercial Court) [1993], 2 Lloyd's Rep. 68, https://vlex.co.uk/vid/national-justice-compania-naviera-806447657 (acessed 2.09.2022). See more in: I. Jankowska-Prochot, *Model funkcjonowania instytucji biegłego. Proces przeobrażeń irlandzkiego prawa dowodowego,* in: R. Cieśla (ed.), *Problematyka dowodu z dokumentu,* Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław 2019, p. 192 and following.

[21] *Whitehouse v. Jordan (1981),* 1 WER 246, https://www.casemine.com/judgement/uk /5a8ff8db60d03e7f57ece8a2 (accessed 2.09.2022).

[22] See *Polivitte Ltd V. Commercial Union Assurance Co. Plc* (1987), 1 Lloyd's Rep. 379, https://www.i-law.com/ilaw/doc/view.htm?id=150639 (accessed 2.09.2022).

[23] Re J (1990) FCR 193 https://swarb.co.uk/re-j-1990/ (accessed 2.09.2022).

[24] Ibidem.

8. To ensure the access to photographs, plans, calculations, reports, opinions or survey reports to all parties to the proceedings[25].

The above remarks should be supplemented by pointing out that both the recommendations of Judge Richard E. Cooper and the guidelines developed by Judge J. Creswell are presently considered as valid standards for the performance of expert witnesses in civil and criminal litigation.

Summary

In conclusion, it should be noted that although the role of an expert witness in the Anglo-Saxon model of criminal trial is merely the same as in the continental model and relies on providing objective and impartial assistance to the court in establishing facts of particular legal validity, the procedural status of the expert is quite different. The expert witness is not a "quasi-state official," but a "qualified witness" appointed and paid by the party[26]. This, in turn, means that, unlike in an inquisitorial process, the party appointing the expert has a significant influence not only on the selection of the evidence submitted in the case, examined in terms of specific evidential assumptions and facts to be presented to the court, but also indirectly on the content of the opinion. ultimately it cannot be excluded that the party interested in reaching a favorable verdict will seek to obtain not only one, but several expert opinions, and the opinion which is most relevant for the party will be presented during the trial instead of the professional and comprehensive one.

The specific collision between the duties of an expert and a trial body representing a certain party is also relevant to the issue in question. While the task of the former is to maintain impartiality and objectivity when assisting the court in reaching the material truth, the purpose of the professional activities undertaken by the latter is to protect the interests of his or her own client. This, in principle means that the legal representative of the party will seek an expert supporting that client.

A separate issue concerns the fact of renumeration for expert opinion, which is paid by the party to the proceedings. In turn, this gives rise to the not always justified belief that the expert witness is instructed by his client as to what specific evidence should be presented. One of the most important consequences of that rule is the tendency for perceiving the expert as a "partisan advocate" rather than an "disinterested adviser"[27]. In this regard, another cliché is the fact that an expert who drafts an opinion presents only the issues indicated by the principal, and uses such methodology that is most suitable for reaching favorable conclusions. The parties, on the other hand, will not present the opinion evidence that contradicts their assumptions.

Furthermore, it cannot be denied that the appointment of expert witnesses and their oral and written testimony sometimes is the part of the "tactical play" used in

[25] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd,* op. cit.

[26] Both terms quoted after: *Kompetencje biegłych sądowych – oczekiwania i kryteria oceny. Przegląd rozwiązań stosowanych w różnych państwach i systemach prawnych*, „Forensic Watch 2014–2015", p. 5.

[27] M. Rochester, op. cit., p. 11.

litigation. In such a case, the parties and their attorneys, in a way, pursuit shopping of recognized specialists in the field, often with scientific titles and degrees, who will support a favorable ruling with their expert reports[28]. In contrast, this procedural pathology affect the less affluent part of society, who cannot afford the assistance of such prominent specialists. Ultimately, the use of expert opinions can be a tool that allows the "more resourceful" party to take advantage of the litigation opponent's shortage of financial resources or not knowing relevant facts, thus winning the dispute.

Such a position as expressed by the author of this paper, also prevails in Anglo--Saxon doctrine and jurisprudence. By way of example only, the opinion formulated on the role of experts in the Anglo-Saxon criminal process more than 130 years ago by the President of the Court of Appeals and Superintendent of the Judicial Archive in Great Britain Master of the Rolls), Sir George Jessel should be quoted: "In matters of opinion, I very much distrust expert evidence for several reasons. Firstly, although the evidence is given on oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to the matter of opinion. Secondly, even if these persons does not live on advisory activity they are always paid for the testimony they provide. Thirdly, the expert witness unlike ordinary witness is not awarded equivalent for costs incurred, but is employed and paid in a sense of gain. It is natural that his mind, however honest he may be, should be biased in favor of the person who calls him. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you"[29].

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[28] Ibidem.

[29] *Lord Abinger v. Ashton* (1873) LR Eq 358, in: ibidem.

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