

On the Application of Assumption of Risk Regulations and Equitable Liability Principle in Cases of Injury Caused by Recreational and Sports Activities

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Abstract

Through empirical research and comparative analysis of cases, it is found that there is a contradiction between the common application or separate application of assumption of risk regulations and equitable liability principle in dealing with cases caused by recreational and sports activities, as well as a dispute on how to distinguish the application, which leads to different judicial decisions. In this regard, it should be clear that in dealing with cases caused by recreational and sports activities, the assumption of risk regulations and equitable liability principle are applicable, and the relationship between the two should be an alternative application. Generally, assumption of risk regulations should be directly applied. In informal recreational and sports activities that cause serious injury or death of participants, the application of equitable liability principle should be affirmed in order to realize the substantive justice.

Keywords

The Civil Code; Recreational and Sports Activities; Assumption of Risk Regulations; Equitable Liability Principle.

1. Introduction

In recent years, the state has strongly supported the development of recreational and sports activities, the number of people participating in recreational and sports activities is increasing, and accidents caused by recreational and sports activities are frequent, which also leads to the rise in the number of cases caused by recreational and sports activities. The facts of such cases are relatively simple. Usually, in the process of activities, the behavior of one participant caused the damage of the other participant, and the victim brought a lawsuit for the defendant to seek compensation with the direct perpetrator. For the legal application of such cases, before the promulgation of the civil code, courts often invoked the equitable liability principle to share losses fairly between the victim and the perpetrator. After the promulgation of the civil code, first, the equitable liability principle was adjusted from the original provision of "sharing the loss by both parties according to the actual situation" to "sharing the loss by both parties according to the law", which strictly limited the application of the equitable liability principle; The second is to add the provisions of the assumption of risk regulations, "if you voluntarily participate in recreational and sports activities with certain risks and suffer damage due to the acts of other participants, the victim may not ask other participants to bear tort liability, except for other participants who have intentional or gross negligence in the occurrence of damage." In this case, the court ruled that the infringement cases caused by recreational and sports activities have undergone major changes, and most of them directly invoke the assumption of risk regulations to completely exempt the infringer from liability. However, in judicial practice, most courts still believe that the victim is willing to risk, but invoke the equitable liability principle to share the loss or directly apply the equitable liability principle to share the loss. It

can be seen that the application of the two principles in judicial practice is still controversial, which inevitably leads to different judicial decisions.

Theorists have also debated the applicable relationship between the assumption of risk regulations and the equitable liability principle in cases of injury caused by recreational and sports activities. The first view is that in cases of injury caused by recreational and sports activities, the relationship between assumption of risk and equitable liability should be an alternative application, and generally, the assumption of risk regulations should be applied, and the possibility of applying the equitable liability principle can only be reserved in extreme cases that lead to the death of the parties.[1] The second view is that it should be applied according to the different types of assumption of risk behavior: if there is damage in spontaneous outdoor tourism or other outdoor exploration activities, the assumption of risk regulations should be applied, except that the initiator or other participants of risk activities have intentional or gross negligence; Professional and commercial occupational sports injuries can apply the assumption of risk regulations, and the perpetrators need not bear responsibility; Amateur and recreational sports injuries, with clear perpetrators, should not apply the assumption of risk regulations, but should apply the equitable liability principle, with the perpetrators and victims sharing the damage.[2] The third view is that it should be applied according to the different risk types of recreational and sports activities: for high-risk extreme sports such as rock climbing and boxing, participants should have a full understanding of the behavior before the activity, and the assumption of risk regulations should be applied in the event of an accident, and the actor should not bear tort liability; For risk movement, it is necessary to comprehensively consider the specific behavior of the actor to determine the loss sharing. Generally, the assumption of risk regulations should be applied; In general sports, the application of the assumption of risk regulations should be limited. [3] The fourth view is that the equitable liability principle has its application space, but in the field of recreational and sports activities, because the law does not clearly stipulate that the loss can be shared by the victim and the actor, there is no room for "equitable liability ". [4]

To sum up, both practical and academic circles have actively and beneficially explored the applicable relationship between assumption of risk regulations and equitable liability principle in cases of injury caused by recreational and sports activities, but at present, there is no clear applicable standard, which is lack of practical operability. At present, it is still necessary to clarify the relationship between the two in combination with reality, and refine the clear applicable standard, so that the assumption of risk regulations and the equitable liability principle can really play a role in cases of injury caused by recreational and sports activities, promote the unification of judicial adjudication.

2. Two Principles for Handling Cases Caused by Recreational and Sports Activities: The Assumption of Risk Regulations and the Equitable Liability Principle

The equitable liability principle is a supplementary principle for dealing with civil infringement disputes in China for a long time, and the assumption of risk regulations is a new exemption defense in the civil code. In the case of injury caused by recreational and sports activities, there is a huge dispute about the applicable relationship between the two parties without subjective fault.

2.1. Overview of the Assumption of Risk Regulations

Assumption of risk refers to the behavior that the actor voluntarily participates in dangerous recreational and sports activities without knowing in advance that recreational and sports activities may be accompanied by certain risks, but not based on legal or professional

obligations, nor is he coerced or deceived, and agrees to bear the damage consequences that may be caused by other participants' unintentional or gross negligence.

Assumption of risk originates from the principle of "the establishment of the willing to block the infringement" in the source of Roman law. Its essence is the behavior of people exercising the right of free disposal, which reflects the law's respect for individual freedom of behavior. [5] In other words, the reason why assumption of risk can produce the effect of exemption is that the victim's willingness blocks the perpetrator's illegal behavior, which does not constitute infringement, and naturally there is no assumption of responsibility. Therefore, assumption of risk is first of all the embodiment of autonomy of will. On the one hand, the actor can decide to participate in recreational and sports activities with high risk according to his independent will, or decide to participate in recreational and sports activities with low risk or even not to participate. His will is not interfered and dominated by others. If he voluntarily participates in the decision and faces risks, he should bear the possible damage by himself, which is in line with the general concept of justice in society. On the other hand, the actor participates in recreational and sports activities with certain risks according to his own independent will. Everyone is not only a danger maker, but also a potential bearer of the danger. It shows that he is willing to bear the possible risk and realize it by himself, which meets the requirements of the principle of good faith. In case of damage, the victim shall bear the responsibility by himself according to the principle of good faith.

It can be seen that the establishment of the assumption of risk regulations is first of all to remind people to treat risks carefully in civil activities and participate in dangerous recreational and sports activities carefully. At the same time, it is conducive to clarifying the responsibility boundaries of event organizers and participants, dispersing social risks, and enabling activities with certain risks to be carried out normally.[1] Secondly, the legislator stipulated the assumption of risk regulations in the civil code based on the consideration of specific social interests. On the one hand, the assumption of risk regulations contains the value of social fairness and justice, which is not only manifested in respecting the actor's independent decision-making power, but also breaking the previous judicial practice of "as long as there is damage, there is compensation", not excessively protecting the rights and interests of victims, and emphasizing the rational distribution of risks. On the other hand, it is of great significance to stipulate the assumption of risk regulations at the legal level and exempt the perpetrator from tort liability under general negligence for encouraging and promoting the public to eliminate concerns, actively participate in recreational and sports activities, especially sports competitive activities with certain risks, and improve people's physical quality.

2.2. Overview of the Equitable Liability Principle

The equitable liability principle refers to that when the perpetrator and the victim have no fault for the occurrence of damage, and the perpetrator of the act cannot be attributed according to the liability without fault, if it is unfair for the victim to bear the loss by himself, the court shall, in accordance with the provisions of the law, make all parties reasonably share the loss on the basis of considering the degree of damage of the victim, the economic situation of both parties and other relevant circumstances.

According to scholars' investigation of legislative historical materials, the equitable liability principle can be traced back to articles 41 to 44 of the Prussian civil code in 1794, "violations against children and mental patients can constitute sufficient reasons for liability based on special considerations of fairness or equity". The equitable liability principle stipulated in Article 132 of the general principles of civil law of China is the socialist fair principle implemented by the introduction of the revision of the Yugoslav debt law. [6] Therefore, the establishment basis of the equitable liability principle is first based on China's traditional moral concept of "helping the poor and the weak", that is, "the strong should give way to the weak,

and those with superior economic status should compensate the weak." Its legal value lies in that it can make up for the deficiencies of the social security system to a certain extent, and solve the problem of special liability distribution when the victim cannot obtain damage relief according to the principle of no fault liability and the principle of fault liability, thus falling into a significantly unfair situation of the case. Secondly, the establishment of the equitable liability principle is based on the consideration of economic analysis cost-benefit. Its legal value lies in that after the damage occurs, the damage sharing itself will produce social costs. Transferring the accident risk from those with weak affordability to those with strong affordability will increase public welfare, while transferring the risk from those with strong affordability to those with weak affordability will reduce the overall welfare of society. [3]

3. The Current Situation of the Application of the Assumption of Risk Regulations and the Equitable Liability Principle in Cases Caused by Recreational and Sports Activities

In order to fully grasp the application of the assumption of risk regulations and the equitable liability principle in cases of injury caused by recreational and sports activities after the implementation of the civil code, the case retrieval was carried out through the China judicial documents network, and a total of 67 judicial documents were obtained this time. Among them, there are three ways for the court to deal with cases caused by recreational and sports activities: first, directly apply the assumption of risk regulations to exempt other participants from responsibility; Second, the court found that the victim was willing to take risks, but considering that the damage of the victim was related to the perpetrator, it decided that the perpetrator should bear part of the responsibility according to the equitable liability principle; Third, the court did not mention the situation that the victim was willing to take risks, and directly applied the equitable liability principle to judge that the plaintiff and the defendant shared the losses. The specific situation of the application of the assumption of risk regulations and the equitable liability principle in dealing with cases caused by recreational and sports activities in judicial practice is shown in Table 1.

Table 1. Specific Application of the Assumption of Risk Regulations and the Equitable Liability Principle in Cases Caused by Recreational and Sports Activities

Applicable mode	Number of judgment documents (piece)	Proportion (%)
Assumption of risk regulations	54	80.6
Assumption of risk regulations and equitable liability principle	9	13.4
Equitable liability principle	4	6.0

3.1. Exemption from Liability for Direct Application of the Assumption of Risk Regulations

In case of injury caused by recreational and sports activities, the court directly invokes the assumption of risk regulations to exempt the defendant from liability is the most common way to deal with it. When the court invokes the assumption of risk regulations to reason, it will first make it clear that the victim participated in recreational and sports activities with certain risks. Secondly, it will deduce the risk of the victim's cognitive activities from the victim's civil capacity and typical situation of recreational and sports activities, but voluntarily participate in them. Thirdly, from the existing evidence, it cannot be determined that the perpetrator had intentional or gross negligence in the damage, so it does not support the victim's claim. For example, in the case concluded by Tianjin Jinnan District People's court, the court held that: "As

a typical antagonistic sports event, football has a relatively prominent risk, that is, physical contact between participants leads to falls and knocks. Plaintiff volunteered to participate in football. He should be aware of the risk of football event, but if he still volunteered to participate in the game, it should be recognized as assumption of risk behavior. According to the video records, it cannot be recognized that the perpetrator has committed violations beyond the scope of football, and it is not enough to determine that the perpetrator has intentional or gross negligence. The plaintiff's claim lacks factual and legal basis and is not supported. "[7]

3.2. Determine that the Victim is Assumption of Risk and Apply the Equitable Liability Principle to Share the Loss

In cases of injury caused by recreational and sports activities, this kind of treatment is also common. Usually, the court first determines that the victim voluntarily participates in recreational and sports activities with certain risks, which is an act of assumption of risk, and other participants do not have infringement fault. Secondly, combined with the facts of the case, considering that the damage of the victim is indeed caused by the perpetrator, it finally applies the equitable liability principle to decide that other activity participants will give the victim certain compensation to share part of the loss. For example, in the case concluded by the people's Court of Yangshuo County in Guangxi Zhuang Autonomous Region, the court held that: "Although the victim of this case is a minor, he should know that there are hidden dangers in swimming in natural waters according to his identification ability suitable for his age, intellectual status and education. The victim made an appointment with others to swim in natural waters without safety facilities and rescue personnel. His behavior is assumption of risk behavior, and other swimmers in this case did not deliberately or grossly negligently damage the victim, so the damage consequences arising from this shall be borne by himself. However, considering that the death of the victim caused great pain to the plaintiff, the court ruled that the defendant should give the plaintiff certain economic compensation in accordance with the principle of fairness. "[8]

3.3. Directly Apply the Equitable Liability Principle to Share Losses

After the entry into force of the civil code, the court generally tends to directly apply the assumption of risk regulations in the judgment of cases caused by recreational and sports activities. In a very few cases, it will also be considered that neither the perpetrator nor the victim is at fault for the occurrence of damage, but after all, the losses suffered by the victim are caused by the perpetrator, so the principle of fair responsibility is directly applied to allocate responsibility to maintain socialist fairness and justice. For example, in a case concluded by the people's Court of Juancheng County in Shandong Province, the court held that "playing basketball is a highly antagonistic sports activity, physical contact is inevitable, and active fighting is a legitimate competitive behavior. As for playing basketball, the perpetrator has no intention and gross negligence, and according to the principle of fairness, the defendant can make appropriate compensation for the plaintiff's losses."[9]

4. Analysis and Suggestions on the Application of the Assumption of Risk Regulations and the Equitable Liability Principle in Cases Caused by Recreational and Sports Activities

4.1. Analysis on the Application of the Assumption of Risk Regulations

The introduction of the assumption of risk regulations to take risks into recreational and sports activities is fully justified, which reflects the concept that the law respects individual freedom and reasonably distributes risk responsibilities, and is conducive to promoting the rational and active participation of the whole people in recreational and sports activities, and improving the

efficiency and quality of activities. According to the provisions of article 1176 of the civil code, it can be concluded that the applicable elements of the assumption of risk regulations mainly include the following four points.

4.1.1. The Scope of Application must be in the Field of Recreational and Sports Activities with Certain Risks

First of all, for the category of recreational and sports activities, some illegal gambling, illegal racing, fighting and other activities should be excluded,[10] As well as trading activities in the fields of good intention riding together, joint drinking, students fighting with each other, and non- infringement. Secondly, for the applicable occasions of recreational and sports activities, in addition to formal competitions or activities, rehearsals, teaching, spontaneously organized recreational and sports activities, as well as some special recreational and sports activities, such as actors competing to throw volleyball like basketball or playing a discarded cans like football, we should also affirm the application of the assumption of risk regulations.

4.1.2. The Participants Recognizes the Risks of Recreational and Sports Activities and Voluntarily Participates in Them

The participants' cognition of the risk of recreational and sports activities is one of the preconditions and subjective conditions that constitute assumption of risk. This element emphasizes that the actor himself knows the existence of the risk with certainty, or can infer the existence of the risk according to the ability of ordinary people. Civil capacity can be used as a judgment factor to determine the actor's cognitive activity risk, but the subject involved here does not have to be a person with full civil capacity. If the cognition of people with limited civil capacity to the risk of activities can be inferred in combination with their age, intelligence, professional level of recreational and sports activities, types of recreational and sports activities and risk level, the assumption of risk regulations can also be applied. For the person without civil capacity, if his guardian can recognize the risk of the activity and clearly agree to his participation in the recreational and sports activities, he should affirm the application of the assumption of risk regulations.

4.1.3. Damage Must be Caused by Other Participants

Long term single player sports such as weightlifting and diving also have the risk of physical function damage, but it is not caused by other activity participants, so the assumption of risk regulations should not be applied. Spectators, referees and photographers are not directly involved in the activity, and do not belong to the participants of the activity. If they are injured or injured by mistake due to recreational and sports activities, the assumption of risk regulations should not be applied. Some scholars believe that spectators or others should apply assumption of risks when entering the competition venue without permission, [11] However, it is obviously unfair for athletes to be injured and cannot seek legal relief due to assumption of risk. Therefore, this situation can be directly applied to general tort liability, and the assumption of risk regulations should not be applied.

4.1.4. No Intentional or Gross Negligence Subjectively Caused by the Aggressor

First of all, in recreational and sports activities, the perpetrator's behavior that conforms to the principles of recreational and sports activities is the basis for the normal conduct of the activities. If the perpetrator's behavior conforms to the principles of recreational and sports activities, it cannot be identified as intentional or gross negligence of infringement. [12] Secondly, the offenders who cause reasonable damage should be recognized as no intentional or gross negligence. In tort law, the premise for the perpetrator to bear tort legal liability is that the perpetrator has a subjective fault that causes damage, while the violation may cause damage to other participants or may not cause damage. Obviously, the violation cannot reflect the perpetrator's subjective fault that causes damage, so all violations should not be recognized as intentional or gross negligence. If the reasonable damage caused by the violation conforms to

the actor's cognition and expectation of the activity risk, and does not exceed the tolerance scope that the recreational and sports activities can carry, the application of the assumption of risk regulations should be affirmed.

4.2. Analysis on the Application of the Equitable Liability Principle

According to the provisions of article 1186 of the civil code, the applicable elements of the equitable liability principle are as follows.

4.2.1. Neither the Victim nor the Perpetrator is at Fault for the Damage

The primary condition for the application of the equitable liability principle is that both the actor and the victim have no fault. If either party has fault, the equitable liability principle is not applicable. It includes the situation that the actor is objectively without fault and cannot be determined that the actor is at fault. This often happens in practice, that is, due to various reasons, it is difficult for the plaintiff to provide evidence on the defendant's fault. For example, in a basketball game, if a teammate of the same team passes a ball and injures the victim, it is not caused by the perpetrator's subjective intent, and the victim cannot prove that the perpetrator has intentional or gross negligence. The application of fault liability is bound to violate fairness and justice, and the equitable liability principle can be applied.

4.2.2. The Application of the Equitable Liability Principle Requires Clear Legal Provisions

Article 1186 of the Civil Code stipulates equitable liability as "the loss shall be shared by both parties in accordance with the provisions of the law", which strictly limits the application of the equitable liability principle. However, the amendment of the civil code to equitable liability does not mean that the equitable liability principle is prohibited in cases of injury caused by recreational and sports activities. On the one hand, from the perspective of the system positioning of equitable liability in the civil code, it is located in Chapter II "compensation for damage" of the "tort liability series", which is different from the position of Chapter I "General Provisions" where the principle of fault liability and the principle of no fault liability are located, which makes it clear that article 1186 only bears the function of sharing losses in compensation for damage, and does not belong to the principle of imputation.[1] On the other hand, the "legal provisions" in article 1186 of the civil code is not limited to laws in a narrow sense. The way of compensation in cases of injury caused by recreational and sports activities is monetary payment, and the legislative authority to impose property liability on citizens is not limited to the legal documents formulated by the National People's Congress and its Standing Committee, but also includes the legal documents with legal effect, such as judicial interpretations, departmental rules, local government normative documents, etc. Therefore, although the civil code strictly restricts the application of equitable liability, it is not absolutely prohibited, and there is still a possible application space in the cases of injury caused by recreational and sports activities.

4.2.3. Causal Relationship between the Behavior of the Perpetrator and the Fact of Damage

On the one hand, the premise of applying the equitable liability principle to share losses is that there is damage, and it is real damage. The shared losses are mainly property losses, that is, property losses caused by harming personal and property rights and interests. The purpose of sharing is to balance the property status and property losses between the parties, and to reasonably distribute the unfortunate losses between the parties, and strive to restore the balance of the damaged property interests. On the other hand, there should be a causal relationship between the victim's damage and the perpetrator's behavior, because from the perspective of social policy and effect, if the elements of causal relationship are not required,

people's lack of stable expectations for the legal consequences of the behavior will greatly weaken the safety value of the legal system, leading to personal insecurity.

4.3. Suggestions on the Application of the Assumption of Risk Regulations and the Equitable Liability Principle in Cases of Injury Caused by Recreational and Sports Activities

When dealing with cases caused by recreational and sports activities without fault of both parties, we need to choose specific applicable legal norms according to the details of the facts of the case, combined with the applicable conditions of the assumption of risk regulations and the equitable liability principle, and weigh the interests of both parties. However, the factors that need to be considered in such cases are more complex. In practice, the factors emphasized by different judges and their understanding of these factors are different, which leads to the disunity of the judgment. Therefore, it is necessary to classify the cases according to the key factors involved in such cases, clarify the application of the two principles under different categories, and then unify the judgment standards.

4.3.1. Clarify the Relationship between the Two and the Alternative Application in the Cases of Injury Caused by Recreational and Sports Activities

According to the above analysis of the equitable liability principle, the scope of application of equitable liability is not limited to legal special circumstances, but also has the possibility of application in general types of infringement cases. Cases caused by recreational and sports activities should be of general tort type. If fault liability cannot be applied for attribution, it can also be applied if the conditions for the application of equitable liability are met. Therefore, the application of equitable liability in this field does not exceed its scope of application. Moreover, in the field of recreational and sports activities, the law should limit the responsibility of the actor as much as possible, so as to protect the freedom of action of the participants, but in some cases, it is also necessary to provide necessary relief to the victims. Therefore, it is unfair to completely abandon the application of equitable liability in the handling of injury cases caused by recreational and sports activities, which is equivalent to completely depriving the victims of the opportunity to obtain relief. Although the application of assumption of risk guarantees the freedom of behavior, it is not conducive to the realization of damage relief, and it is against human nature and the substantive justice of the law to let the victim bear all the risks. The most important condition for the application of equitable liability is that both parties have no fault, and the assumption of risk just excludes the establishment of the actor's fault and thus exempts the liability, which just provides the most important condition for the application of equitable liability. In this case, the court is easy to blindly apply the assumption of risk, and then apply the equitable liability with the actor without fault. At this time, the assumption of risk becomes a simple tool to identify the fault, which cannot limit the application of equitable liability, but may play a role in fuelling the abuse of equitable liability. In this case, the application of assumption of risk in the field of recreational and sports activities is unnecessary and unreasonable. Therefore, in view of the dispute over the applicable relationship between assumption of risk and equitable liability in cases of injury caused by recreational and sports activities, it should be clear that both of them have the possibility of application, and it is an alternative relationship.

4.3.2. The Assumption of Risk Regulations is Directly Applicable Generally

The assumption of risk regulations is a special principle for dealing with cases caused by recreational and sports activities. Generally, as long as the circumstances of the case meet the applicable elements of the principle of assumption of risk, it should be directly applied, and the voluntary participants should bear the responsibility for the damage and exempt other participants.

4.3.3. The Equitable Liability Principle Shall be Applied in Case of Serious Injury in Informal Recreational and Sports Activities

First of all, when the degree of damage is serious injury or death, it cannot be considered as the assumption of risk. In recreational and sports activities, if the general degree of injury is caused by normal sports behavior, most risk and damage participants can expect and voluntarily bear by participating in the behavior, so the victim should bear all the damage results. However, in recreational and sports activities, the victim can only foresee the damage results that match the nature of recreational and sports activities. For long-term or permanent serious injury or death results, it should not be considered that ordinary people can foresee, otherwise it is extremely unfair to the victim. Therefore, if the result of serious injury or death occurs in informal recreational and sports activities, even if the parties have no intention or gross negligence, the equitable liability principle should be applied to provide relief to the victims of serious injury. Secondly, when the degree of damage is serious injury or death, it is necessary to apply fair liability to the victim for relief. For recreational and sports activities, the damage result of serious injury or death is beyond the general acceptance of the public. At this time, if the victim is allowed to bear all the damage results, it may be criticized by the public because of the social concept of public order and good customs. Unlike professional sports athletes, participants in informal sports activities do not belong to any organization. They participate in activities as individuals and usually cannot obtain relief from work-related injuries, insurance and other means. When serious damage brings heavy economic burden to the victims and their families, the victims or their families can only bear all the losses alone, which is obviously unfair. In this case, the court ruled that the perpetrator's compensation for the victim is also accepted by the society. Ordinary people are also willing to give money out of morality to comfort the victim or his family spiritually, which to a certain extent is not only conducive to promoting the realization of social fair value, but also conducive to encouraging the actor to get rid of concerns, actively participate in recreational and sports activities, and promote the benign development of recreational and sports activities.

5. Conclusion

In the future, more and more people will participate in recreational and sports activities, injury accidents will inevitably occur, and more similar disputes will be brought to the court in the future. In the adjudication of such cases, the application of the assumption of risk regulations and the equitable liability principle has been recognized by many courts. However, due to the different understanding of the two principles by different judges, the judicial decisions are different. In the future, when dealing with cases caused by recreational and sports activities, the court should make it clear that the assumption of risk regulations and the equitable liability principle are applicable, and cannot be applied at the same time. When the parties are not at fault, one of the two principles should be applied. Generally, the assumption of risk regulations should be directly applied, and the equitable liability principle should be applied in the case of serious injury or death in informal recreational and sports activities, so as to achieve substantive justice.

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