

Beach law

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Summer's here and it's time to head for the beach. But beware! The water can be dangerous, and when tragedy strikes the finger-pointing starts and, sometimes, so do the court cases...

But when people take personal risks, shouldn't they also take personal responsibility? Is it fair to expect local governments and surf life saving clubs to bear the blame?

And what about overseas tour groups? They assume they're being shepherded to safe water...what happens if they're simply dumped on the sand -- outside the flags?

Transcript

This transcript was typed from a recording of the program. The ABC cannot guarantee its complete accuracy because of the possibility of mishearing and occasional difficulty in identifying speakers.

Damien Carrick: Welcome to the Law Report. It's summertime and many of us are looking forward to some beachside R and R. But we'd better be careful. Because of course accidents do happen, and sometimes when tragedy strikes, there's finger-pointing.

Just last month lawyers from around the country gathered in Surfers Paradise for a conference devoted to Beach Safety and the Law. One of the conference organizers was Dr Jeff Wilks, strategic director of Surf Life Saving Australia. He says during a staged demonstration the conference delegates witnessed a real-life fiasco.

Jeff Wilks: The biggest concern, and it happened during the summit, we had all of the delegates to the summit out on the beach at the end of the first day to see a helicopter rescue; so the Westpac helicopter and our support services, jet skis and others, actually did mock rescues for the benefit of the delegates. While we were there, several tour groups pulled up to watch, and actually went into the water and had to be directed back to the flags by the guards on duty. A number of the delegates laughed and said 'Did you set this up for our benefit?' but it wasn't set up at all.

Damien Carrick: So what you saw was several groups of Asian tourists being directed into the water by their tour operators, into areas which actually weren't between the flags?

Jeff Wilks: Well they were close to the flags, but as they moved out of that area, it became the responsibility of the guards on duty to try to direct them with bull-horns and go down to the beach and bring them back into the area. Because I guess it's a case of, in many cases, near enough is close enough. And there have been a couple of cases recently where the flags are positioned in the best spot on the beach, but right next to those flags may be a dangerous area. And all of our rescue data from Queensland show that in many cases people are rescued in fairly close proximity to the flags. And so that being close is not good enough, you need to be within the flags where the guards can look after you.

Damien Carrick: Justice McMurdo, you spoke at a recent conference on Beach Safety and the Law, but your interest in the area isn't purely professional, you have a personal reason for appreciating the work of the surf lifesavers.

Margaret McMurdo: Oh yes Damien, I do. About 35 years ago in the summer holidays, my mother was then aged about 58; well she was rescued by the surf lifesavers off Point Lookout on North Stradbroke Island. I think a lot of us have many reasons to be grateful to the surf lifesavers.

Damien Carrick: Justice Margaret McMurdo, president of the Court of Appeal at the Queensland Supreme Court, who we'll hear more from a little later.

Her Mum, now 93, is one of over 530,000 Australians who've been rescued by surf life savers over the past 100 years. Each year there are about 10,000 rescues; lives that might otherwise be lost.

But tragedy does occur. Each year there are about a dozen drownings at the beach, and each year, beachgoers do sustain serious injuries. And sometimes they sue local authorities who have control of the beach.

One of Australia's most famous court cases is Guy Swain and the Waverley Municipal Council. Justice Anthony Whealy of the New South Wales Supreme Court followed that case closely, as it wound its way up through the courts, all the way to the High Court.

Anthony Whealy: It is a famous case, that's so. It's probably famous for the wrong reasons, but Guy Swain was a young man who just went to Bondi Beach for a swim on a nice day. He swam between the flags, he was about 15 metres from the shore, he did something that many divers do, or swimmers, he attempted to dive through a wave that was coming in, but he struck the face of a sandbar, which was hidden from his view, and suffered very serious spinal injuries. So he sued Waverley Council for negligence, and the trial was heard before a four-person jury and went for quite a few days. Acting Justice Taylor was the Presiding Judge and the jury found for the plaintiff, although it reduced his damages for contributory negligence.

So quite a few years later the High Court decided that the jury – it was open to the jury to find that the council had been negligent. I think the important point about it is that it created a lot of adverse publicity. The media seized upon it as an entirely irresponsible and unreasonable result, and I think that the test of that can be seen in, for example, the interview with David Power of the Gold Coast City Council that was held very shortly after the High Court's decision.

Mr Power said during the interview, 'Now we are responsible for shifting sands underneath the ocean's surface, I think that our insurers in London will be taking a long, hard, close look at this. I shudder what this will do to our surf clubs. Clearly you can't warn every single person that comes to every patrolled beach that the sand underneath the ocean's surface may be shifting'. This I think is the misapprehension that was apparent in the media at the time, a case had not being decided on the basis of a failure by the council to warn that sandbanks shift, or that sandbanks form – it was really about whether the council had acted negligently on the day in putting the flags where they did. And secondly, whether the council may have been negligent in not moving the flags when they appreciated that the sandbank was in place. And it was a very unusual case, because the council called very little evidence before the jury, and the strong feeling I get from reading all of the reports, this was really a case where the council's failure to call evidence may have been seen by the jury as an admission by it that it had in fact been negligent.

Damien Carrick: So potentially, had the council given evidence as to the practicality or not of moving the flags, and the kinds of dilemmas that are faced in making those decisions, had they presented that evidence, then the decision of the jury might have gone the other way.

Anthony Whealy: I think it might have, because there's a respectable body of lay opinion about where you should place the flags on a beach, that suggests that it's appropriate to put it in a position where there's a sandbar. The reason being that often when there's a sandbank close to the shore, it means that young people and the infirm can get up onto the sandbank and stand there safely without the water being too deep. But no evidence of that kind was called.

Damien Carrick: And had there been evidence that they were making decisions based on

reasonable grounds, they would not have been found to have been negligent.

Anthony Whealy: I think that's quite possible.

Damien Carrick: Well it's fascinating because of course the Guy Swain case captured the public imagination, the zeitgeist of the time, which was that the courts were out of control and handing exorbitant amounts of money to people who didn't really deserve it.

Anthony Whealy: Exactly. And of course the point that always struck me as ironic was that it wasn't a judge who'd made the decision that the council was negligent, it was the jury. In other words, four members of the public who presumably express contemporary attitudes about things, and are not arguably out of touch as judges are often thought to be.

Damien Carrick: Over the years, a number of water injury cases have reached the High Court. Many of them relate to signage; whether or not there were signs which informed people of hidden dangers. The latest decision concerning a Philip Dederer was handed down in August.

In 1998 when he was 14 years old, Philip Dederer chose to dive off the Forster-Tunccurry bridge, and suffered severe injuries. His lawyer is Michelle Lawrence, who works at the Cessnock office of Emery Partners.

Michelle Lawrence: On that day Philip was fourteen and a half years of age. He was on holidays with his family. They'd been to the Forster area on numerous occasions from when Philip was a young boy. Over those years, he'd seen numerous children and adults jump and dive off the bridge. I think anyone who's ever been to Forster-Tunccurry in the last 20 years has probably seen somebody jump off that bridge; it's a regular occurrence. On 30th December, the day before this incident, Philip jumped off the bridge, suffered no damage on that occasion. The next day he was up there again planning on jumping. At the very last minute for some unknown reason, he decided to dive. The distance from the bridge to the water is about 9 metres; he dived into about 2 metres of water, struck his head on a sandbar and was rendered a paraplegic.

Damien Carrick: Now the Dederer case came through the courts after the tort law reforms of a few years ago. By this stage the states and territories had passed Civil Liability Acts which stated the plaintiffs couldn't sue local councils if they were engaging in high risk

activities where the danger was obvious. For this reason Philip also sued the Road Traffic Authority, the organisation which controlled the bridge.

Justice Margaret McMurdo says the case centered around whether or not the RTA breached its duty of care to those who use the bridge. As she explains, the trial judge found in favour of Philip, describing the bridge as 'an accident waiting to happen'.

The judge said the bridge's horizontal railings were almost an invitation to climb up and jump into the water. And while there were 'No Diving' signs at either end of the bridge, this wasn't enough.

Margaret McMurdo: The trial judge found that the Traffic Authority knew the bridge was regularly used by young people for jumping and diving. The Traffic Authority breached its duty by not providing signage and information, either with pictures or in writing.

Damien Carrick: There were picturegraphs though, at either end of the bridge.

Margaret McMurdo: Yes, but the trial judge said what they needed to do was to explain the prohibition, especially the shifting sands below, and that this made entering the water from the bridge dangerous, particularly by diving.

Damien Carrick: So there was no explanation, there were simply signs prohibiting diving without offering any explanation or identification of the danger?

Margaret McMurdo: That's right.

Damien Carrick: But the majority of the High Court found that the RTA was not liable. What was its reasoning?

Margaret McMurdo: Well in a 3-2 decision in the High Court, they overturned the New South Wales Court of Appeal decision, which also had been a split 2-1 decision. And the High Court concluded instead that the Traffic Authority had responded in a reasonable way to a foreseeable risk in providing warning signs of the dangers of jumping and diving, and that it was unreasonable to require more of the Traffic Authority.

Damien Carrick: So essentially, by putting up the signs, they had satisfied their duty of care to people crossing the bridge or seeking to use the bridge in inappropriate ways?

Margaret McMurdo: That's right. But I do emphasise it was a very close run thing, 3-2 in the High court, 2-1 in the Court of Appeal the other way.

Damien Carrick: The High Court ruled that even though the RTA knew that kids were jumping off the bridge all the time, they had taken all the necessary steps to avoid legal liability. Justice Anthony Whealy.

Anthony Whealy: A point anyway, that seemed to be very significant to the High Court of Australia was that while it was true that thousands of people had probably jumped off this bridge over the years, no-one had ever been hurt before, and they thought that that was a significant factor in analysing whether the RTA was in breach of its duty of care.

Damien Carrick: So certainly people listening to this would be thinking why on earth, if somebody chooses to jump off a bridge, and there are obvious dangers inherent in that decision, why should somebody who controls a bridge be held liable?

Anthony Whealy: Yes, well I think that that question's a fair one, and the High Court in this particular case, obviously agreed with that question. But I suppose there is scope for another argument; namely that when you're dealing with a 14-year-old boy, you know, you're not dealing with an adult. What if it had been a 12-year-old boy, or an 11-year-old boy? In other words, do councils have an obligation to take extra steps, bearing in mind that people often act in a foolhardy way, or even a stupid way. And there's a respectable body of opinion that suggests that it's a question that still remains to be answered in any particular case.

Damien Carrick: I've spoken to the lawyer of Philip Dederer, and she informs me that the bridge has now very much changed, and I think there is now even a covered pathway.

Anthony Whealy: There is, yes there is. I went up for a holiday myself to Forster, not for this purpose, but I walked across the bridge because I was interested, and I was quite struck by the changes that had been made to it. And I think it would be pretty hard to get up there and jump off it now. There's also some sort of cover at the top of it, that would make it hard to clamber around and then jump into the water.

Damien Carrick: Today we're wading carefully through some turbulent and murky legal waters.

Spending some time at the beach is a quintessential Australian pastime. As poet Judith Wright points out in her famous poem 'The Surfer', for many, surfing is the ultimate buzz, but there are dangers.

He thrust his jaw against the weight of the sea,
Climbed through, slid under those long banks of foam,
Hawthorn hedges in Spring, thorns in the face stinging.
How his brown strength drove through the hollow and coil of green
Through weirs of water.
Muscle of arm thrust down long muscle of water.
On the other hand, the dread of the dangerous sea.
From the sand, the grey wolf sea lies snarling.
Cold twilight winds flits the waves' hair and shows the bones ... from 'The Surfer' by Judith Wright

Brisbane lawyer Mark Williams, a partner with King & Company Solicitors, does a lot of work for local governments in Queensland. He says beach injury litigation isn't confined to issues around adequate signage or, as in the Guy Swain case, where flags are placed. If authorities erect flags and take responsibility to patrol a stretch of beach, they have to carry out that responsibility. If they don't, they could be liable.

Mark Williams: There was one decision of Glasheen and the Council of Waverley. That involved a young girl who was swimming between the flags, and she was rendered a quadriplegic when she was struck either by a surfboard or when she struck her head on the ground after being hit by a surfboard. Now that surfboard was being used by someone within the flagged area;

Damien Carrick: Where they shouldn't have been.

Mark Williams: That's right. There were council inspectors on site, had they observed that surfboard rider, then they would have moved that rider out of the flagged area. In that case though, it was the downside of the holiday season, inspector numbers had been reduced, and at the time of the incident, it was lunchtime, one inspector was off on lunch, the other inspector was up the other end of the flagged area of the beach, and he didn't observe the surfboard. And as a result, the council was found to be liable in that decision because he should have been closer

to the action, observing the surfers, and observing the people within the flagged area.

Damien Carrick: So the council was held to be in breach of its duty of care to look after the flagged area, because in fact they weren't on the job at the time.

Mark Williams: That's right.

Damien Carrick: But on the other hand, there was another decision, I think it's the Kukovec decision, which went the other way, and it had somewhat similar facts.

Mark Williams: Yes, that's right. That involved an incident on a much busier beach. There were also a lot more life savers on hand on that occasion. There were about 18 members of the local life saving club. Now in that decision, a man was visiting the beach with his two young children. He was in the flagged area, a boy was observed to be heading towards him, within the flagged area with his surfboard under his arm. He threw the surfboard out in front of him with the intention of jumping on to it, the surfboard then flicked up and hit Mr Kukovec in the head and caused some very severe injuries.

Now in that decision, the council wasn't found to be liable, because there was no evidence to suggest that that surfboard rider had been within the flagged area for any sufficient length of time for him to be moved on, and also there was actually no evidence to suggest that he was actually going to go and ride that surfboard within the flagged area. He'd simply been walking along with it, and at the last minute had thrown it down with the intention of jumping onto it.

Damien Carrick: So the council and the surf life saving club were deemed to be not liable because the surfer was not within the flags for a long period of time before the accident. So the club and the council wouldn't have had sufficient time to notice him inside the flags, they wouldn't have had time to do their job which they'd set themselves up to do.

Mark Williams: That's correct. Certainly there was no evidence to suggest that the person was in the flagged area for a sufficiently long period of time. It's not known whether he was or not, but the evidence before the court was that it was therefore a fairly short period of time at least. And it's an important thing to remember with these decisions, that councils aren't insurers of people who use their areas. Councils' duty is to act reasonably; in this case reasonable action was simply to monitor the area. If they saw someone in there that had

been in there for a sufficiently long period of time that they should have been seen, then they should be moved out. But if someone just strays in and the accident occurs straight after that, then that won't result in liability.

Damien Carrick: So far, we've only been discussing public authorities. But they aren't the only ones in the firing line. Trevor Atherton is a tourism law expert and author of the book *Tourism, Travel and Hospitality Law*. He says a few years back there was a case against a beach resort.

Trevor Atherton: Mr Enright was a senior lawyer with a global company.

Damien Carrick: Pepsi, wasn't it?

Trevor Atherton: I think it was Pepsi, that's right. And he came to the Coolum Resort for a conference. So he arrived after a long flight, and on the drive from the airport to the resort, he asked the driver to take him past the surfing beaches, and he expressed a keenness to go surfing. And the driver, had the good commonsense to warn him that you just couldn't go surfing anywhere he wished.

Nevertheless, went to the resort and 4.30 finished the conference, and was still determined to go surfing, so he got a mate from the conference and they both headed off for the surf. The resort itself had fairly good risk management systems in place, and they had a secure Beach Activities Centre on the beach where surfing could be supervised by the resort. But unfortunately, that closed at 4.30. And also unfortunately for Mr Enright, he didn't seek any information from the information desk, and he didn't take the track that led to their beach facility, which had warning signs about the surf and those sorts of things. He took a different track, and he entered the beach some hundreds of metres away from the resort, and the resort's supervised area, even though it was closed.

And they commenced to surf, and they surfed for quite some time. And the conditions were quite rough and dangerous and they continued to get rougher and more dangerous as time went on. And eventually the colleague of Mr Enright said, 'Well let's go home now, we've had enough'. And he said, 'Let's just catch one more wave'. So they faced out to sea and they were waiting for that perfect wave just to finish off the day and then they turned around and saw that they'd been carried out some 100 or so metres out from the shore, and they were both quite exhausted, because they were not that fit,

and they had been surfing for quite some time, and Mr Enright particularly being on a long flight, and he was unable to swim back himself; his friend had the terrible decision to save himself – he wasn't able to save both of them, and so he had to leave his friend and he just got to shore himself, then he went for help, and eventually help came, but by that time Mr Enright had drowned.

So his estate, his depends, sued the local authority, the council, who was responsible for the beach, and the resort owner and the resort operator, claiming that they'd breached the duty of care to him, in that they failed to properly warn him about the dangers of the surf.

Damien Carrick: How so? How was it claimed that they failed in their duty of care?

Trevor Atherton: Well particularly there should have been a warning sign at this particular track leading down to the beach. Now this particular track leading to the beach is well away from the resort.

Damien Carrick: And what did the court find?

Trevor Atherton: This was an obvious risk. To go surfing on an unpatrolled beach at that hour of the day in dangerous conditions, rough conditions, was an obvious risk, particularly because he did have some experience in surfing and the risks of surfing from the US, and also he had been told about the dangers of surfing on an unpatrolled beach, and in the evening. And the court said well you know, if there's an obvious risk and the person chooses to take the obvious risk, they then can't hold other people liable when the obvious risk materialises.

Damien Carrick: What does this decision tell us about the legal obligations on accommodation providers?

Trevor Atherton: Well that's right. So at first blush you would say, Well, OK, the hotel or resort's responsibility stops at the gate, but I don't think it's quite as simple as that. This reasoning that there's no duty to warn people of an obvious risk, and there's no responsibility for the materialisation of an obvious risk of course, has now been enshrined in the Civil Liability Law Reform Acts around the country. And so these principles, which emerged in Common Law, are reinforced now by that legislation.

But if you think about those principles carefully, particularly in relation to a resort and the customers of a resort, I think they

don't apply as simply as may appear from Mr Enright's case, because what's obvious to a local, and the measures taken to bring the dangers of the beach to the attention of locals and to train locals in handling those dangers, are quite different from the situation of a visitor. And so I think in relation to guests of a hotel or a resort in a beach situation, I think there is a higher duty, if you like to put it that way, to make greater efforts, I think, to make sure their guests are aware of the dangers of the surf.

Damien Carrick: Trevor Atherton says there have been cases in the USA where beach resorts have been held liable. In one case the resort's advertising boasted of having miles of safe beaches and yet made no mention of the actual dangers.

International tourists are a particularly vulnerable group. In 2006/2007 in Queensland, they accounted for 40% of beach-related deaths, and 50% of coastal drownings.

Remember the story you heard about the Asian tourists at Surfers Paradise. Well earlier this year, inbound tour operators received a sharp jolt when a Northern Territory court handed down a decision involving a Swiss tourist. Jeff Wilks.

Jeff Wilks: The Northern Territory case of Preti and the Conservation Land Corporation is probably one of the few recent Supreme Court cases that's dealt with a tour operator's responsibilities, and in that case it was the death of a visitor on a tour in the Northern Territory using a rope to swing out over a water hole. And the courts there said well look, what sort of signage should you have had? What sort of warnings? And I mention that this is on appeal, it's not settled law.

Damien Carrick: He was part of a tour group that was swimming at the Ellery Creek waterhole, and he died when another tourist swinging from a tree rope caused him to lose balance and fall.

Jeff Wilks: That's right. And so it drew attention to what sort of responsibilities the tour operator has in terms of duties to warn.

Damien Carrick: Sahara Tours, I think the tour operator in that case, was found liable. On what basis?

Jeff Wilks: On the basis that they should have, according to the court, informed all members of the tour group not to dive into the water because of the dangers of the submerged

rocks and obstacles. And that picks up on other earlier Australian cases where people have jumped into water and struck rocks, but warn and remind the group members that they shouldn't stand in the path of people attempting to swing on the rope. So again, fairly obvious warnings, and assistance, but given that they were a tour group, they weren't local people, this was not a familiar activity, tourists are a vulnerable group and they need that additional level of legal assistance, in terms of signage and in terms of warnings.

Damien Carrick: So far we've spoken about I guess legal obligations towards tourists and beachgoers which arise out of the common law. There has, in Queensland been some interesting legislation, the Tourism Services Act 2003 – what's that all about?

Jeff Wilks: Tourism Services Act, Damien, was introduced as a piece of consumer legislation to look after the interests of international visitors, particularly in terms of unconscionable behaviour. And it started off, because of some shopping practices, particularly on the Gold Coast, where international groups were bussed to certain shops or warehouses, and they were taken there for sort of exclusive shopping. And in many cases they were not told that similar goods could be purchased elsewhere, they weren't given freedom of choice, and there are some cultural reasons for that. The tour guides would argue that they know what their customers want in terms of product, and they were taking them to the places where they could obtain that. But in terms of fairness...

Damien Carrick: So they were taking tours to rip-off joints, and not letting them know that they could buy the same souvenirs at a fraction of the cost somewhere else?

Jeff Wilks: In some cases. They were taking them at least to affiliated retail outlets, where they had a relationship.

Damien Carrick: And commissions.

Jeff Wilks: And commissions. And that sort of behaviour, the Queensland government said No, that's not fair, you should have freedom of choice, and we'll step on that. So this legislation is an attempt to lift the quality of services that are being provided, and to protect the consumer. It has been suggested, Justice McMurdo picked it up at the Summit, that this legislation might also avail itself to beach safety, because the requirements of responsibility for your customers extend from retail opportunities to activities such as going to the beach. There have been some reports a year or so ago of some of these rogue operators charging their customers up to \$100 for a beach walk. So taking them to the beach and saying, 'Well, you've got an hour to walk on the beach, and enjoy yourselves and come back here', and they've charged them \$100 for that.

Damien Carrick: For the privilege of stepping onto the sand?

Jeff Wilks: For the privilege of being on a public beach which shouldn't have attracted any charge at all. So there are some unconscionable practices out there, and this legislation is in place, and it's a fairly unique piece of legislation. It has the potential to be extended to beach safety, where operators should be very much aware of where to take their customers, to bathe between the flags, and their responsibilities to warn them of the dangers of the beach.

Damien Carrick: I'm wondering when you're on a plane coming in to Australia – we're always given a card about what we carry in our luggage, perhaps we should also be given another card, and especially overseas tourists, especially they need a card in their own language, stating what the dangers are of our coastlines here in Australia, and some simple tips about what to do and what not to do.

Jeff Wilks: A very good idea. And we actually do that at Coolangatta Airport on the Gold Coast. In the last ten years surf lifesavers in uniform have greeted planes arriving at Coolangatta, handing out safety sheets, which are a nice balance. We've handed out more than 10 million of these sheets, and they have local information about dining and banking and what to wear etc, but also the positions of all the surf clubs on the Gold Coast, and where the flags are, where you should go, and some safety tips. They're in seven languages, and they're very, very effective.

In terms of international inbound in to say, Sydney or Melbourne, we have talked to the industry over the years, and there's a bit of a block in the dialogue from a tourism point of view, and I am a tourism person – you need a balance, you don't want to scare your customers and tell them all the terrible things that might happen to them while they're here. So a balance is needed. When you talk to the safety people they want to drum home the safety messages. So the materials that have been compiled – there's videos and handouts and booklets in multiple languages available at the moment – the tour operators don't use them because they're all about safety, they're not balanced. So I think we need to return to that very, very positive part of the safety net, and look at how we can convey a message of welcome along with safety tips, and that's road safety as well as beach safety.

Damien Carrick: Dr Jeff Wilks, strategic director of Surf Life Saving Australia.

That's The Law Report for this week. Starting next week, we bring you some of our favourite programs from 2007. Wishing you a very safe holiday season. Do stay safe at the beach and also on the roads. Before I go I'd like to say a big Thank You to my colleague Anita Barraud who presented the program for two periods in April and June this year, and she presented some truly wonderful programs.

Guests

Mark Williams,

Partner King & Company, Brisbane

Jeff Wilks,

Director of strategic development, Surf Life Saving Australia

Justice Margaret McMurdo,

President, Court of Appeal, Supreme Court of Queensland

[Michelle Lawrence,](#)

Lawyer, Emery Partners, Cessnock office

Justice Anthony Whealy,

Supreme Court of NSW

Trevor Atherton,

Tourism law expert, co-author *Tourism, Travel and Hospitality Law*, Published Law Company, 1998

Further Information

[Beach Safety and the Law National Summit, 2007](#)

[Surf Life Saving Australia](#)

Publications

Title: *Tourism, Travel and Hospitality Law*

Author: Trevor Atherton, Trudie Atherton

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Presenter

Damien Carrick

Producer

Anita Barraud

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