Factsheet 44: The Single Joint Expert

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The joint instruction of single experts is not new, but it has been given fresh impetus by the provisions of the Civil Procedure Rules (CPR). In the two reports he wrote on his Inquiry into the rules and procedures of the civil courts in England and Wales, Lord Woolf argued that the use made of experts was a major problem of the system. It contributed to the high cost of litigation, made litigation more complex and frequently resulted in delay. To tackle the problem, he proposed that the calling of expert evidence should be placed under the complete control of the court and that, wherever possible, the evidence should be provided by a single expert.[1]

Initially, at least, litigation lawyers gave only luke warm support to these proposals, and they were downright opposed to the idea, also floated in the reports, that single experts might be appointed by the court. Their objections on that score were eventually reflected in the CPR that gave effect to Lord Woolf's recommendations. Here, the emphasis is on single experts being jointly appointed by the parties.

CPR provisions

Court's power to direct that evidence is to given by a single joint expert

35.7

(1) Where two or more parties wish to submit expert evidence on a particular issue, the court may direct that the evidence on that issue is to be given by a single joint expert.

(2) Where the parties who wish to submit the evidence ('the relevant parties') cannot agree who should be the single joint expert, the court may –

(a) select the expert from a list prepared or identified by the relevant parties; or

(b) direct that the expert be selected in such other manner as the court may direct.

Instructions to a single court expert

35.8

(1) Where the court gives a direction under rule 35.7 for a single joint expert to be used, any relevant party may give instructions to the expert.

(2) When a party gives instructions to the expert that party must, at the same time, send a copy to the other relevant parties.

(3) The court may give directions about –

(a) the payment of the expert's fees and expenses; and

(b) any inspection, examination or experiments which the expert wishes to carry out.

(4) The court may, before an expert is instructed –

(a) limit the amount that can be paid by way of fees and expenses to the expert; and

(b) direct that some or all of the relevant parties pay that amount into court.

(5) Unless the court otherwise directs, the relevant parties are jointly and severally liable for the payment of the expert's fees and expenses.

Although the court's powers under rule 35.7(1) are discretionary, the introduction to the Practice Direction accompanying Part 35 states that:

'where possible, matters requiring expert evidence should be dealt with by a single expert'

When to use a single expert

When, then, might it be appropriate for parties to jointly appoint a single expert?

Lord Woolf recommended that single experts should be used 'wherever the case (or the issue) is concerned with a substantially established area of knowledge and where it is not necessary for the court directly to sample a range of opinions'. This implies that joint instructions might be appropriate when the expert is required to establish the facts, to interpret for the court technical information that is not itself in dispute, or to assist with quantum where there is sufficient agreement as to liability.

Another consideration has to be that of proportionality, i.e. is the size of the claim large enough to justify the cost of instructing more than one expert? It might be reasonable, too, to instruct only one expert where the issue requiring expert evidence is relatively peripheral to the case.

In the October 2009 update to the CPR, the Civil Rules Committee added at paragraph 7 of the Practice Direction specific guidance on when an SJE appoint should be considered:

When considering whether to give permission for the parties to rely on expert evidence and whether that evidence should be from a single joint expert the court will take into account all the circumstances in particular, whether:

(a) it is proportionate to have separate experts for each party on a particular issue with reference to –

(i) the amount in dispute;

(ii) the importance to the parties; and

(iii) the complexity of the issue;

(b) the instruction of a single joint expert is likely to assist the parties and the court to resolve the issue more speedily and in a more cost-effective way than separately instructed experts;

(c) expert evidence is to be given on the issue of liability, causation or quantum;

(d) the expert evidence falls within a substantially established area of knowledge which is unlikely to be in dispute or there is likely to be a range of expert opinion;

(e) a party has already instructed an expert on the issue in question and whether or not that was done in compliance with any practice direction or relevant pre-action protocol;

(f) questions put in accordance with rule 35.6 are likely to remove the need for the other party to instruct an expert if one party has already instructed an expert;

(g) questions put to a single joint expert may not conclusively deal with all issues that may require testing prior to trial;

(h) a conference may be required with the legal representatives, experts and other witnesses which may make instruction of a single joint expert impractical; and

(i) a claim to privilege makes the instruction of any expert as a single joint expert inappropriate.

The decision to add this new guidance now may reflect efforts by the courts to reverse the recent decline in the number of SJE appoints being made. Time will tell if this is the effect.

… and when not to use one

There are, as Lord Woolf noted, in all areas of litigation 'large, complex and strongly contested cases where the full adversarial system, including oral cross-examination of opposing experts on particular issues, is the best way of producing a just result. That would apply particularly to issues where there are several tenable schools of thought… '.

Clinical negligence disputes are a case in point. For them, it is now accepted that the parties and their advisers should be left to decide for themselves whether experts might be instructed jointly, and on what issues.[2] Indeed, the same may be taken to apply to most cases alleging a failure to act in accordance with professional standards. As the official *Chancery Court Guide* observes: 'it will often be of value to the court to hear the opinions of more than one expert as to the proper standard'.

The *Commercial Court Guide* is even more emphatic about this. It notes that cases before that court are frequently of such a size and complexity as to render inappropriate the use of single joint experts (SJEs), and that in such cases parties will generally be given permission to call their own experts. As the *Guide* roundly asserts: 'there is no presumption in the Commercial Court in favour of single joint experts'.

The fact remains, though, that in very many cases it is possible for one individual to provide all the expert evidence required on a particular issue. And it is especially likely that a single expert will be used in those relatively simple cases that are allocated to the fast track.

Have Lord Woolf's hopes been realised, then?

In a preliminary evaluation of the Civil Justice Reforms published in March 2001[3], the Lord Chancellor's Department (now the Ministry of Justice) claimed that the use of SJEs 'appears to have worked well'. In an even more tentative vein, the report stated that 'it is likely that their use has contributed to a less adversarial culture, earlier settlement of cases and may have cut costs'. These assertions were repeated, almost word for word, in a second report issued by the Department in August 2002. Much of the evidence marshalled in support of them was anecdotal in nature and hardly conclusive, but the new report did contain some interesting statistics on the frequency of use of SJEs. They suggest that the Department's confidence is justified, as least as far as county courts are concerned.[4]

The Court Service collects information on cases heard in the county courts by means of a 'Trial Sampler', which the courts are asked to complete twice a year. Data derived from close on 2000 cases in the 12 months ending September 2001 showed that expert evidence was admitted in one-third of them, and that in 45% of these cases it was provided by a single expert.

While it is too early to say with confidence that the use of SJEs has resulted in cases settling sooner and costs being saved, it is quite clear from the official figures that SJEs are being appointed in a substantial proportion of those civil cases requiring expert evidence. It is very desirable, then, that all expert witnesses should be aware not just of the letter of the law governing the appointment and duties of an SJE, but also of the problems that have arisen in interpreting the statutory requirements.

Practical issues

Who may be appointed?

In a formal sense, anyone who is otherwise qualified on grounds of experience and relevance of expertise to be an expert witness may act as an SJE. It is, however, difficult to envisage that a person who is regarded, rightly or wrongly, as a 'claimant expert' or a 'defendant expert' would receive a joint appointment.

For similar reasons, it might also be thought unlikely that an expert retained by a litigant to advise on aspects of a case could then be jointly instructed by both parties once the action commenced. It would appear, however, that this happens quite often. It did so, for example, in 144 of the 2,110 cases covered by J S Publications' survey conducted in February 2001. One explanation could be that in personal injury cases defendant insurers are often less concerned to obtain a medical report of their own than to adduce expert evidence on issues of liability. Unfortunately, though, this does not square with the survey findings, since in 80 of the 144 cases the expert concerned was from a profession other than medicine.

An alternative explanation might be that if the issue on which the court requires an expert report is narrow, the expert who has previously advised one of the parties may be the only one available to prepare it. In such circumstances, though, the expert would need to take good care not to reveal in the report to the court either the instructions received previously from that party or the advice given, since to do so would be to breach the party's legal professional privilege.

How should SJEs be selected?

The CPR are silent about the mechanism to be adopted. For guidance on this one has to turn to the pre-action protocols. Unfortunately, those so far approved suggest rather different methods.

The protocol for personal injury claims is the most specific. It requires that before any party instructs an expert, the party should give the opposing party a list of one or more experts whom it considers suitable to instruct. The opposing party then has 14 days in which to object to any of the experts on the list, after which the first party may instruct an expert who is mutually acceptable. Note, however, that, unlike the situation that pertains when a court directs that an SJE be appointed, the personal injury protocol neither requires nor envisages that an 'agreed' expert selected in this way will be jointly instructed. This has important consequences for the subsequent conduct of the case should the instructing party disagree with the report the expert prepares.

Other protocols are less prescriptive. The protocol for construction and engineering disputes merely requires that if the parties resort to litigation and expert evidence is likely to be required, they should 'use their best endeavours' to agree whether a joint expert may be appointed and, if so, who that

should be – with nothing said about sanctions if these endeavours fail.

It is a different matter, of course, after proceedings have been issued. If, then, a court directs that expert evidence on a particular issue is to be given by one expert only, then the parties have no option but to comply. The method they use to choose that expert is, however, almost invariably left to the parties to decide. The court would certainly want to know, though, if the parties fail to agree on this or on the expert to be appointed – and it has ample powers to penalise by way of costs the party or parties it considers to be acting unreasonably.

Whatever method is adopted for selecting and appointing an SJE, one thing is clear: if the appointment is being made in response to a court order, the litigation clock is already ticking. Any delay at that stage in reaching agreement on who is to be appointed can only serve to reduce the time the expert will have to prepare the report required by the court.

Remuneration

Rule 35.8(3) provides that the court may give instructions about the payment of an SJE's fees and expenses, but it does not have to do so. If it does not, the SJE could well experience difficulty in securing payment for his services, notwithstanding the fact that the instructing parties will normally be jointly and severally liable in that respect.

It is, of course, a fact of life that solicitors may be slow in paying the experts they instruct on behalf of their clients. But where an SJE has to invoice each party separately, the situation can be even worse. In those circumstances the solicitor acting for the losing party may be even less inclined to settle promptly, especially if the solicitor had not wished to see an SJE appointed in the first place. Our survey found that of 35 experts who had frequently acted as an SJE, 30 had had difficulty in extracting payment from one of the parties in at least half of the cases in which they had agreed to invoice the sides separately; indeed, for 11 of the experts that was their invariable experience.

The obvious solution to this particular problem is to have just one paymaster, and experts who are invited to act as an SJE would be well advised to make that a condition of their acceptance of joint appointment. Although it still does not follow that they will be paid promptly, it should at least cut down the amount of payment chasing they have to do.

In the long run, of course, it is likely that one of the parties will end up meeting the entire cost of an expert jointly appointed by them both. Another point to bear in mind, though, is that in making any order as to the costs of the case, the court might still disallow some of those incurred for expert evidence, even though it had been provided by an SJE. For this reason, it would be as well for experts who are asked to accept joint appointment to secure the written agreement of both parties to their normal terms of engagement, included among which should be a clause stipulating that fees and expenses are not subject to assessment but must be paid **in full**.

Note, too, that should the court direct that the parties to a case appoint an SJE to provide evidence on a particular issue, it also has the power to limit in advance the amount the expert is to be paid. Any expert invited to act as an SJE in those circumstances will need to consider very carefully whether the assignment is such that he can afford to accept appointment. At the very least, the expert will have to monitor most carefully the time expended on the case, since over-running the budget set by the court could result in the expert being seriously out of pocket by the end of the case.

Instructions

The Rules provide that 'each party may give instructions'. In fact, it is most undesirable that parties should instruct the SJE independently. When this happens, one set of instructions is almost bound to arrive before the other, and the expert is left wondering how long to wait before chasing for the second set. Furthermore, separate sets are likely to require at least some reconciling, and they may even prove wholly incompatible. Lastly, they often prompt the issue of supplementary instructions by one or both parties. In short, when parties instruct their SJEs independently it can only engender additional correspondence and delay the expert in getting on with the job.

After reiterating the need for parties to develop and agree joint instructions to the greatest possible extent, the CJC *Experts Protocol* at §17.7 also recommends that they endeavour to agree what documents will be included with the instructions and what assumptions the SJE is to be asked to make. This, too, is clearly right, for the SJE's task is made immeasurably harder if there is no agreement between the instructing parties as to the basis on which his report is to be prepared.

While it would appear that joint instruction is now the norm, it still happens quite frequently that parties elect to instruct their SJE separately. Where this happens, delay almost invariably results, for reasons outlined in the next section.

Duties and responsibilities of an SJE

An SJE owes the same overriding duty to the court as any other expert, and the role an SJE performs is governed by exactly the same provisions of CPR Part 35 and its associated Practice Direction. The SJE also owes the same duties of professional competence to the instructing parties as any expert appointed by one party alone. However, the fact that an SJE has more than one instructing party lays on him the additional requirement that in any dealings with them an SJE must conduct himself in a scrupulously fair and transparent manner. This not only places on the SJE the extra burden of keeping each party informed of the progress being made, but requires that the SJE avoids communicating with any of them independently of the others.

There is also the possibility that one or more of the instructing parties may have wanted to instruct their own expert but were not allowed to do so by the court. If that were the case, they might well feel hard done by and, initially at least, fail to cooperate fully with the SJE whom they and their opponents have been told to appoint. Tact and a firm resolve are not the least of the skills required of an SJE if the role is to be fulfilled successfully.

Coping with the instructions

Expert witnesses often find that they need to seek clarification of some aspect or other of their instructions before they can start work. It applies as much to SJEs as to those instructed by one party alone. If, as is to be hoped, the solicitors appointing an SJE have agreed the instructions to be given and which of them is to liaise with the SJE, sorting out such queries should prove no more difficult, although in the nature of things it may take longer to achieve. The SJE should, in any case, copy to the solicitors for the other parties any queries about the instructions that were addressed to the lead solicitor. Doing so should not only help to secure a speedier response but also serve to show all parties that the SJE intends keeping them all fully in the picture.

As already indicated, the real problems begin when the parties have failed to agree the SJE's instructions and have chosen to instruct the SJE independently. Rule 35.8(2) provides that in such circumstances each party giving instructions must at the same time copy them to the other parties. By then, though, the damage will have been done.

Separate sets of instructions almost inevitably require some reconciling, and the expert will need to let the parties know how he intends to achieve this. Even when, say, it involves carrying out more test procedures than any one of the parties had envisaged, the SJE should at least alert them to the fact that more expense will be incurred as a result.

If, however, the separate instructions require the SJE to make different assumptions of fact, then difficulties could begin to multiply alarmingly. In such circumstances there may be no alternative but to produce a report that provides more than one set of opinions on the issue in question, depending on the assumptions the SJE has been instructed to make. It will then be up to the court to decide which set of assumptions it prefers and which set of opinions, therefore, it can accept. Again, though, the SJE should take care to ensure that all the parties are fully aware that by making conflicting demands they are bumping up the cost of the report required by the court.

In extreme cases, it may be that the separate instructions an SJE receives differ so fundamentally that there is no way in which a report can be produced that embraces them all. In that event, the SJE will need to consider whether further directions should be sought from the court or the appointment should be resigned altogether. If the parties allow either to happen, however, they risk incurring the displeasure of the court and being penalised for it as to costs. Accordingly, the mere threat of taking such action may be enough to get the parties to revise their instructions and make them easier to carry out.

Getting at the information

We have already referred to the fact that parties instructing an SJE, whether jointly or separately, may not cooperate with the SJE as whole-heartedly as they might. Nowhere is this more apparent than in the reluctance they can show in releasing all the information the SJE thinks may be needed to carry out the assignment. One in four of the experts who took part in the J S Publications survey in 2001 cited this as a problem they had encountered.

Here again, the SJE has the option of seeking the court's help to resolve the problem, but it is one that should be exercised only as a last resort– as, for example, when all the parties are proving equally uncooperative. In other circumstances, an altogether better method of proceeding is for the expert to send the party that appears to be withholding information a firm letter setting out exactly why it is needed and, as always, making sure that copies of the letter go to the solicitors for the other parties. In other words, leave it to them to sort matters out.

At the end of the day, an SJE should only prepare a report for the court if he is satisfied that all the information required to form an opinion has been supplied or the instructing parties have agreed that the report may be written without the additional information requested by the SJE. In the latter circumstance, of course, the SJE must qualify the opinion given in the report and state there why it was necessary to do so. It will then be up to the court to draw the inferences it chooses from the action of the party, or parties, in withholding the information in the first place.

Meetings with counsel

In addition to preparing evidence for use in court, party-appointed experts are often expected to act in an advisory capacity vis-à-vis the client and any legal advisers. On occasion this can include a conference with counsel. The question arises whether an SJE could ever attend a conference with counsel for just one of the instructing parties without compromising the independence of the role.

The short answer must be that an SJE should only attend such a meeting if the other instructing parties have agreed to the expert so doing. Furthermore, if they do not insist upon it, it would be prudent of the expert to ask that lawyers for the other parties be present at the meeting.

Dealing with questions

Rule 35.6 provides that a party may put written questions to an SJE about his report, just as it may to an expert appointed by another party alone. In both cases the questions may be put only once, must be put within 28 days of service of the report and can only be in clarification of the report – unless, that is, the court gives permission or the instructing parties agree otherwise. The Practice Direction further requires that if a party sends such questions direct to the SJE, it must at the same time copy them to the solicitors representing the other parties.

The difficulties with this provision are two-fold: the meaning of 'clarification' and the lack of any restriction on the number of questions that may be put. Moreover, while these are difficulties that may be experienced by any expert, they are likely to bear more heavily on SJEs, since they are liable to be questioned in this way by both sides. Furthermore, several instances have been reported of SJEs being sent aggressively worded questions in an attempt to bludgeon them into changing their reports to reflect the questioner's viewpoint. Other SJEs have told of their receiving sheaves of questions that could take as much time to answer as the report itself took to prepare.

If an SJE believes that the questions put about the report are seeking more than clarification of its meaning, or if it seems that they are excessive in number, then concerns should be raised with all the instructing parties simultaneously. At the same time, the SJE should provide the parties with an estimate of the number of extra hours of work that answering the questions would entail and remind them of the hourly fee rate. Then, if one party should object to incurring the

additional cost, it can be relied upon to take the matter up with the other parties. In all events, the SJE should not answer the questions causing concern until the agreement of all the parties has been given.[5]

Requests for directions

While all experts are entitled to seek directions from the court to assist them in carrying out their function, it is difficult to envisage many party-appointed experts finding it necessary, or even desirable, to do so. It might be thought, though, that SJEs would be more likely to need the court's help in resolving difficulties arising from their 'pig-in-the-middle' role. It says much, perhaps, for the diplomatic skills of the experts taking part in the 2001 J S Publications survey mentioned earlier that of the 60 who were most experienced in SJE work, only four of them had felt the need to seek directions on any occasion while acting in that capacity.

Loneliness of the SJE

Although the primary duty of all expert witnesses is to the court, those appointed by one party alone may still have the sense of belonging to that party's team – and especially so if they have advised on technical aspects of the case prior to the issue of proceedings. They may, for example, have played a part in formulating the client's statement of case, or the client's response to one, and once reports have been exchanged it is more than likely that they will be asked to comment on the expert evidence produced by the other side. They may also be involved in conferences with counsel, and if the case proceeds to trial, they may be in court to advise even when not required to give evidence from the witness box.

The situation of the SJE could not be more different. In the great majority of instances the SJE would have had no knowledge of the case before being appointed, and thereafter little or no influence in determining the course it takes. Furthermore, throughout the SJE's involvement, he will be expected to maintain a position of strict neutrality vis-à-vis the parties, even to the extent that should one of them make contact for any reason, the SJE would be expected to ensure that the other party knows of it and has a copy of any response. Then again, if an SJE is required to give evidence in court, it is likely that the instructing parties avoid having any contact while there. It is probable that neither side will feel in the least obliged to tell the SJE how the case is going, when the evidence is likely to be called, how long the SJE should remain or, indeed, to inform the SJE subsequently of the case's outcome. Isolation, in a word, is a fact of life for SJEs, and not the least of its tribulations.

Challenging an SJE's report

What can a party do if, having put its written questions and received answers to them, it is still not happy with an SJE's report? From a bare reading of CPR Part 35 it might seem that it was stuck with it. That, at any rate, was the view taken by the judge at first instance in the case of *Daniels -v- Walker*. Not so, said the Court of Appeal, in a judgment which, because it touches on several fundamental issues concerning the use of SJEs, merits a summary here.[6]

The claimant had been struck by a car driven by the defendant, and his injuries were such that he would need some form of care for the rest of his life. Liability was admitted, and the only issue was the kind of care required, and hence the amount of the damages. The defendant's solicitors took the initiative in suggesting that the parties jointly appoint an occupational therapist to report on the care regime needed, and they put forward the names of two such experts. The claimant's solicitors agreed to one of them and wrote the letter of instruction. Although the defendant's solicitors were not happy with the terms of this letter, they did not avail themselves of the right to instruct the expert separately.

The defendant's solicitors were even more unhappy when the expert's report was received, so much so that they asked whether the other expert they had nominated might now examine the claimant. However, the claimant's solicitors objected to this, pointing out that it had been agreed that a joint expert should be instructed. And when the defendant's solicitors applied to the court for an order to the same effect, that, too, was denied them. Specifically, the judge refused permission for the defendant to 'call' further evidence.

The defendant's main ground for appealing that decision was that it failed to have regard to the overriding objective of the CPR, namely, the obligation on the court to deal with cases justly. This argument was accepted by the Court of Appeal. Delivering the judgment of the Court, Lord Woolf said that the fact that the defendant had agreed to a joint report did not prevent him from being allowed to obtain a report from another expert and, if appropriate, to rely on that expert's evidence at trial. The joint instruction of a single expert should be regarded as a first step in obtaining expert evidence. It was to be hoped that in the majority of cases it would also be the last step. If, however, a party was dissatisfied with a joint expert's report, it should be allowed, subject to the discretion of the court, to obtain further information before deciding whether to challenge the SJE's conclusions.

Where only a modest sum was involved, the court might hold that it would be disproportionate to obtain a second report. In *Daniels -v- Walker*, though, a substantial sum was at stake, and the Court of Appeal held that it was perfectly reasonable for the defendant to have sought to have the claimant examined by his own expert. This notably generous interpretation of the Rules has since been followed in a number of other cases where parties have had good cause to challenge the conclusions of an SJE to whose appointment they had previously agreed.

Criteria for granting permission

The corrective steer applied by Lord Woolf was further reinforced in February 2001 by Mr Justice Neuberger when allowing the appeal by the defendants in a boundary dispute against an earlier refusal to let them call their own expert witness. In his judgment in *Cosgrove and another -v- Pattison and another*[7], he listed a number of factors that procedural judges should take into account when considering applications of this kind, including:

- the nature of the dispute
- the number of disputes to which the additional evidence might be relevant
- the reasons for needing another expert
- the amount of money at stake

- the delay that engaging another expert might cause, and, most important of all
- the need to do overall justice to the parties in the context of the litigation.

It is already settled law that the parties in clinical negligence cases should not be denied permission to call their own expert evidence should they wish to do so. On the strength of these two judgments, procedural judges will have to think very carefully before they refuse it in other kinds of litigation.

But apply promptly

However, parties who have reason to be dissatisfied with an SJE's report may have to act quickly if they are to secure permission from the court to instruct another expert. Indeed, if they suspect that such a course may be necessary, they would be well advised to have that expert on call to vet the report for them as soon as it becomes available. That, at any rate, is the lesson to be derived from the decision of the Court of Appeal in yet another case concerning an SJE's report. In *Alderson -v- Stillorgan Sales*, the Court upheld the refusal of the judge below to adjourn trial of the action to enable the claimant to obtain his own report, even though the SJE report to which the claimant took exception had been delivered just 5 days before the trial was due to take place.[8] Clearly, obtaining permission to instruct another expert is not as easy as all that!

Footnotes

[1]*Access to Justice: Final Report*, Recommendation 167.
[2]See *S -v- Birmingham Health Authority*, LTL 23/11/99 QBD and *Oxley -v- Penwarden* [2001] CPLR 1.
[3]The report, *Emerging Findings – An early evaluation of the Civil Justice Reforms*, published by the Lord Chancellor's Department (now the Ministry of Justice) in March 2001. Available at www.justice.gov.uk.
[4]'*Further findings: A continuing evaluation of the Civil Justice Reforms*', published by the Lord Chancellor's Department (now the Ministry of Justice).
[5]For further information on this topic see Factsheet 48: Answering Written Questions.
[6]*Daniels -v- Walker*, *The Times*, May 17, 2000; [2000] 1 WLR 1382.
[7]*Cosgrove -v- Pattison* [2000] All ER 2007.
[8]*Alderson v Stillorgan Sales* [2001] All ER 104.

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