

Panel No 7

Prise en charge des personnes ayant un problème de santé mentale par le système de justice civile.

Me Lucie Joncas, LLM

Barreau du Québec:

Groupe de travail sur la santé mentale et justice

La mise en contexte

Suite à l'affaire **Marshall**, un jeune présentant une déficience intellectuelle ayant été faussement incriminé, la Bâtonnière du Barreau du Québec a voulu amorcer une réflexion en suggérant d'étudier le traitement que réserve le système judiciaire aux personnes ayant de troubles mentaux ou présentant une déficience intellectuelle.

Le Groupe de travail sur la santé mentale et justice

Le communiqué de presse

« Un événement comme l'affaire Marshall soulève de très nombreuses questions sur la manière dont le système judiciaire traite les personnes les plus vulnérables et qui risquent davantage d'être victimes d'erreurs judiciaires causées par leur condition intellectuelle ou mentale. Dans d'autres provinces, il existe des tribunaux spécialisés pour traiter les causes impliquant ces personnes. Peut-on envisager de faire de même au Québec? »

Me Madeleine Lemieux.

Bâtonnière

30 août 2005

Le Groupe de travail sur la santé mentale et justice

Mandat du Groupe de Travail

Le 20 octobre 2005, le Comité exécutif du Barreau du Québec adoptait une résolution qui attribuait au Groupe de travail le mandat suivant :

« **De RÉFÉRER** la problématique du traitement réservé par le système judiciaire aux personnes atteintes d'un problème de santé mentale ou de déficience intellectuelle aux comités suivants : - Comité sur le droit des personnes; - Comité sur les droits de la personne; - Comité en droit criminel;

De MANDATER les membres de ces comités afin de soumettre dans un seul rapport leurs analyses et leurs recommandations au Comité exécutif du Barreau du Québec. »

Le plan du groupe de travail.

Étant donné l'ampleur du mandat, le Groupe de travail s'est doté d'un plan de travail qui s'est articulé principalement autour des axes suivants :

- L'accessibilité à la justice par ces personnes vulnérables,
- Le traitement que leur réserve le système de justice lui-même, et
- Le rôle du Barreau du Québec quant à la formation et au soutien à accorder aux avocats qui représentent cette clientèle.

Les recommandations générales

Le groupe est arrivé à proposer 17 recommandations

1. Sur la formation des avocat(e)s

Les membres du Groupe de travail ont constaté qu'il y avait lieu de développer les connaissances et les capacités d'intervention des avocat(e)s agissant auprès de personnes ayant des troubles mentaux ou présentant une déficience intellectuelle.

Les recommandations générales

À cet effet, l'École du Barreau, avec la collaboration de certains membres du Groupe de travail, a élaboré du matériel didactique supplémentaire sur la protection des personnes vulnérables.

Parmi tels textes nous retrouvons le **Cahier hors série dans la collection de droit 2008-2009, Justice, Société et personnes vulnérables.**

Les recommandations générales

Le Groupe de travail recommande aussi de prioriser l'offre de cours spécialisés sur la représentation de personnes ayant des troubles mentaux ou présentant une déficience intellectuelle en valorisant une sensibilisation aux caractéristiques de cette clientèle.

Les recommandations en droit civil

1. Sur l'uniformité des procédures et des principes applicables.

Situation

Le justiciable est aujourd'hui confronté à un triple forum en regard des questions liées à la garde en établissement et aux consentements aux soins.

1. La **Cour du Québec** pour ordonner l'évaluation psychiatrique et l'ordonnance de garde en établissement,
2. Le **Tribunal administratif du Québec** pour apprécier la nécessité du maintien de la garde ordonnée par un juge de la Cour du Québec,
3. La **Cour supérieure** pour autoriser des soins et/ou l'hébergement.

Les recommandations en droit civil

Les membres du Groupe de travail partagent l'opinion que la multiplication des juridictions en matière de droit civil fait en sorte que les différents intervenants judiciaires n'ont pas un portrait global de la personne vulnérable.

Les recommandations en droit civil

Il importe de souligner que certaines mesures prises en vertu du droit civil, telles l'ordonnance de garde et les autorisations de traitement, constituent des atteintes très importantes à l'intégrité et à la liberté de la personne.

Les recommandations en droit civil

Le processus décisionnel en pareille matière entraîne des conséquences très graves pour la personne, dépassant même en gravité ce qui peut se passer dans un contexte criminel. Par exemple:

Code criminel=

60 jours (Selon l'Art. 672.58 C. Criminel)

Code civil=

3 ans ou même 5 ans (Selon l' Art. 16 C. Civil et la jurisprudence*)

- CSSS Drummond (Hôpital Ste-Croix) c. C.A., 2009 QCCS 3532 (CanLII) par. 22
- Québec (Curateur public) c. Institut Philippe-Pinel de Montréal, 2008 1 R.D.F. 34 (C.A), par. 38

Le droit d'être représenté par un (e) avocat (e)

Code de procédure civile

(En vigueur depuis le 1er janvier 2016)

- ▶ **Art. 90.-** La représentation peut, tant dans une procédure contentieuse que non contentieuse, être ordonnée par le tribunal, même d'office, si celui-ci la considère nécessaire pour assurer la sauvegarde des droits et des intérêts d'un mineur ou d'un majeur non représenté par un tuteur, un curateur ou un mandataire et s'il l'estime inapte. (voir aussi 160 c.p.c.)

(Anciennement 394.1, c.p.c.)

Code criminel

- ▶ **Art. 672.5 (8),-** Si l'intérêt de la justice l'exige ou lorsque l'accusé a été déclaré inapte à subir son procès, le tribunal ou la commission d'examen est tenu, dans le cas où l'accusé n'est pas représenté par avocat, de lui en désigner un, avant l'audience ou au moment de celle-ci.

Le droit d'être entendu

391. Le majeur ou le mineur apte à témoigner doit, s'il est concerné par une demande qui porte sur son intégrité, son état ou sa capacité, être entendu personnellement qu'il s'agisse de recueillir ses observations ou son avis ou de l'interroger, avant qu'une décision du tribunal saisi ne soit rendue ou, le cas échéant, qu'un procès-verbal de ses opérations et de ses conclusions ne soit dressé par le notaire saisi de la demande.

Il est fait exception à cette règle s'il est impossible d'y procéder ou s'il est manifestement inutile d'exiger les observations, l'avis ou le témoignage du majeur ou du mineur en raison de l'urgence ou de son état de santé ou s'il est démontré au tribunal que cela pourrait être nuisible à la santé ou à la sécurité de la personne concernée ou d'autrui d'exiger son témoignage.
(Anciennement 780c.p.c.)

Dans l'affaire Centre de Santé et Services sociaux de Rimouski-Neigette c. L.L., 2008, QCCCQ 8319, le juge a fait valoir l'importance pour le tribunal d'entendre le témoignage de la personne faisant l'objet d'une requête pour garde en établissement.

Les recommandations en droit civil

Il semble, cependant, que ces dispositions sont sous-utilisées dans la pratique...

Représentation par avocat(e) pour l'ensemble des requêtes de garde en établissement.

Représentée par avocat(e)	n	%
oui	1055	34,9
non	1966	65,1
TOTAL	3021	100,0

Source: *Quand l'inacceptable se perpétue: 18 ans de violation de la loi et des droit fondamentaux des personnes hospitalisées en psychiatrie. Étude sur l'application de la loi sur la protection des personnes dont l'état présente un danger pour elles mêmes ou pour autrui.*(RLRQ Ch. P-38,001), Action Autonomie, Montréal, Décembre 2016, p. 73.

Analyse de la situation décrite

Selon l'information obtenue dans l'étude citée, au total, pour l'année 2014, ce sont donc **1055** personnes qui ont demandé les services d'un (e) avocat (e) sur **3021** audiences de garde en établissement tout type de garde confondu, soit un taux de représentation d'à peine:

34,9 %.

Source: *op cit*, Action Autonomie, Montréal, Décembre 2016, p. 73

Analyse de la situation décrite

Ainsi, malgré le fait que les chercheurs ont constaté un accroissement continu de la représentation par avocat (e) au fil des ans, **passant de 7,1 % en 1999, à 17,7 % en 2004, à 26,24 % en 2008 pour atteindre près de 35% en 2014**, nous sommes tout de même dans une situation où seulement **une personne sur trois est représentée par avocat (e)**, ce qui demeure très faible dans le cadre d'une loi d'exception visant des personnes dans une situation de vulnérabilité.

Source: *op cit*, Action Autonomie, Montréal, Décembre 2016, p. 75

Les recommandations en droit civil

3. Sur le droit de l'information

Une obligation d'information en ce qui concerne la garde en établissement et l'évaluation psychiatrique est prévue dans la **Loi sur la protection des personnes dont l'état mental présente un danger pour elles-mêmes ou pour autrui (Loi 38.001)**

- Au début du processus, l'information sur les droits et recours d'une personne sous garde est verbale et lorsqu'il y a un jugement du tribunal ordonnant la garde suite à l'évaluation psychiatrique, l'avis devient écrit.

Les recommandations en droit civil

Sur le droit de l'information

- En matière de garde préventive, la personne est informée verbalement et lors de la garde provisoire, lorsque son état mental le lui permet.
- Des avis écrits ne sont prévus dans la loi que lorsque la personne a fait l'objet d'un jugement du tribunal ordonnant la garde suite à l'évaluation psychiatrique.

Civil Commitment:

A CROSS CANADA CHECKUP

Danger/Harm and Mental/Physical Deterioration Criteria

If the physician is of the opinion under the legislation in:	That person with a mental disorder is/will:	And is likely to suffer harm of:	
		Mental Deterioration	Physical Deterioration
Alberta Mental Health Act s. 2 b)	A danger to oneself or others	X	X (Serious impairment)
British Columbia Mental Health Act s. 22(3) a) c)	In need of protection	X	X
Newfoundland & Labrador Mental Health Care and Treatment Act s. 3 (a), 17 (1)	Cause harm to oneself or others / result in dangerous behaviour	X	X (Serious impairment)

Danger/Harm and Mental/Physical Deterioration Criteria

If the physician is of the opinion under the legislation in:	That person with a mental disorder is/will:	And is likely to suffer harm of:	
		Mental Deterioration	Physical Deterioration
Ontario Mental Health Act, s. 20 (1.1) a)	Cause bodily harm to oneself or others	X	X (Serious impairment)
Quebec -Civil Code of Quebec (CCQ), S.Q. 1991 Art. 27 - Act respecting the protection of persons whose mental state presents a danger to themselves or to others Arts. 1,7	A danger to oneself or others		

Least Restrictive/Intrusive Alternative

Jurisdiction	Legislation	Least restrictive/intrusive alternative
Alberta	Mental Health Act, R.S.A. 2000, c M-13	s. 28 (4) In order to determine the best interest of the formal patient or the person who is subject to a community treatment order, a person referred to in subsection (1)(a) or (c) shall have regard to the following: (a) whether the mental condition of the patient or the person will be or is likely to be improved by the treatment; (b) whether the patient's or person's condition will deteriorate or is likely to deteriorate without the treatment; (c) whether the anticipated benefit from the treatment outweighs the risk of harm to the patient or person; (d) whether the treatment is the least restrictive and least intrusive treatment that meets the requirements of clauses (a), (b) and (c).
British Columbia	Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996 c. 181	s. 19 (3) When deciding whether it is in the adult's best interests to give, refuse or revoke substitute consent, the person chosen under section 16 must consider:... (e) whether a less restrictive or less intrusive form of health care would be as beneficial as the proposed health care.

Least Restrictive/Intrusive Alternative

Jurisdiction	Legislation	Least restrictive/intrusive alternative
Newfoundland & Labrador	Mental Health Care and Treatment Act, S.N.L. 2006, c M-91	<p>s. 3. (1) The purpose of the Act is as follows:...(c) to provide for the apprehension, detention, custody, restraint, observation, assessment, <u>treatment</u> and care and supervision of a person with a mental disorder by means that are the least restrictive and intrusive for the achievement of the purpose set out in paragraphs (a) and (b)...</p> <p>s. 35 (2) For the purpose of subsection (1), in taking into account the best interests of the involuntary patient, the attending physician or other person shall consider... (d) whether the specified treatment is the least restrictive and least intrusive treatment that meets the requirements of paragraphs (a), (b) and (c)...</p>
Ontario	<p>Health Care Consent Act 1996 S.O. 1996, c. 2, Sch. A</p> <p>Mental Health Act R.S.O, 1990, c. M.7</p>	<p>s. 21 (2) (c) (4) In deciding what the incapable person's best interests are, the person who gives or refuses consent on his or her behalf shall take into consideration...Whether a less restrictive or less intrusive treatment would be as beneficial as the treatment that is proposed.</p> <p>Reference in the community treatment (s. 33.1 (3))</p>

Least Restrictive/Intrusive Alternative

Jurisdiction	Legislation	Least restrictive/intrusive alternative
Québec	Civil Code of Quebec (CCQ), S.Q. 1991, c. 64	<p>16. The authorization of the court is necessary where the person who may give consent to care required by the state of health of a minor or a person of full age who is incapable of giving his consent is prevented from doing so or, without justification, refuses to do so; it is also necessary where a person of full age who is incapable of giving his consent categorically refuses to receive care, except in the case of hygienic care or emergency.</p> <p>The authorization of the court is necessary, furthermore, to submit a minor 14 years of age or over to care which he refuses, except in the case of emergency if his life is in danger or his integrity threatened, in which case the consent of the person having parental authority or the tutor is sufficient.</p>

Criteria for Involuntary Admission Certificate

Jurisdiction	Legislation	Criteria for involuntary admission certificate
Alberta	Mental Health Act, R.S.A. 2000, c. M-13	s. 2 When a physician examines a person and is of the opinion that the person is (a) suffering from mental disorder, (b) likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment, and (c) unsuitable for admission to a facility other than as a formal patient, the physician may, not later than 24 hours after the examination, issue an admission certificate in the prescribed form with respect to the person.
British Columbia	Mental Health Act, R.S.B. 1996, c. 288	s. 22 (3) (c) Each medical certificate...must be completed by a physician... and must set out... a statement...that the physician is of the opinion that the person to be admitted, or the patient admitted... (i) requires treatment in or through a designated facility, (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and (iii) cannot suitably be admitted as a voluntary patient.

Criteria for Involuntary Admission Certificate

Jurisdiction	Legislation	Criteria for involuntary admission certificate
Newfoundland & Labrador	Mental Health Care and Treatment Act, S.N.L. 2006, c M-9.1	s. 17. (1) ...As a result of the psychiatric assessment, he or she is of the opinion that the person who is named or described in the certificate (i) has a mental disorder, and (ii) as a result of the mental disorder (A) is likely to cause harm to himself or herself or to others or to suffer substantial mental or physical deterioration or serious physical impairment if he or she is not admitted to and detained in a psychiatric unit as an involuntary patient, (B) is unable to fully appreciate the nature and consequences of the mental disorder or to make an informed decision regarding his or her need for treatment or care and supervision, and (C) is in need of <u>treatment</u> or care and supervision that can be provided only in a psychiatric unit and is not suitable for admission as a voluntary patient;
Ontario	Mental Health Act, R.S.O. 1990, c M.7	s. 20 (1.1) <u>The attending physician (...)</u> is of the opinion that the patient, (a) has previously received <u>treatment</u> for mental disorder of an ongoing or recurring nature that, when not <u>treated</u> , is of a nature or quality that likely will result in serious bodily harm to the person or to another person or substantial mental or physical deterioration of the person or serious physical impairment of the person; (b) has shown clinical <u>improvement</u> as a result of the treatment; (c) is suffering from the same mental disorder as the one for which he or she previously received treatment or from a mental disorder that is similar to the previous one; (d) given the person's history of mental disorder and current mental or physical condition, is likely to cause serious bodily harm to himself or herself or to another person or is likely to suffer substantial mental or physical deterioration or serious physical impairment; (e) has been found incapable, within the meaning of the Health Care Consent Act, 1996, of consenting to his or her treatment in a psychiatric facility and the consent of his or her substitute decision-maker has been obtained; and (f) is not suitable for admission or continuation as an informal or voluntary patient.

Criteria for Involuntary Admission Certificate

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Jurisdiction	Legislation	Criteria for involuntary admission certificate
Quebec	Civil Code of Quebec (CCQ), S.Q. 1991, c. 64	Art. 27. Where the court has serious reasons to believe that a person <u>is a danger to himself or to others owing to his mental state</u> , it may, on the application of a physician or an interested person and notwithstanding the absence of consent, order that <u>he be confined temporarily</u> in a health or social services institution for a psychiatric assessment...If the danger is grave and immediate, the person may be placed under preventive confinement, without the authorization of the court, as provided for in the Act respecting the protection of persons whose mental state presents a danger to themselves or to others

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
<p>Alberta Mental Health Act R.S.A. 2000, c. M-13</p>	<p>s. 5(1) When a person is conveyed to a facility under section 10, 12 or 24 or detained in a facility pursuant to one admission certificate, the board shall ensure that the person is examined as soon as possible by a physician on the staff of the facility.</p>	<p>s. 4(1) One admission certificate is sufficient authority (a) to apprehend the person named in the certificate and convey the person to a facility and for any person to care for, observe, assess, detain and control the person named in the certificate during the person's apprehension and conveyance to a facility, and (b) to care for, observe, examine, assess, treat, detain and control the person named in the certificate for a period of 24 hours from the time when the person arrives at the facility.</p>	<p>s. 2 When a physician examines a person and is of the opinion that the person is (a) suffering from mental disorder, (b) likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment, and (c) unsuitable for admission to a facility other than as a formal patient.</p>	<p>s. 1 (d) Facility defined in regulations.</p>	<p>s.2 initial examination for 24 hours.</p> <p>s.8 (3) Two renewal certificates are sufficient authority to care for, observe, examine, assess, treat, detain and control the person named in them, (a) in the first case where 2 renewal certificates are issued, for a period of not more than one additional month, (b) in the 2nd case where 2 renewal certificates are issued, for a period of not more than one additional month, and (c) in the 3rd case and in each subsequent case where 2 renewal certificates are issued, for a period of not more than 6 additional months.</p>

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
<p>Alberta Mental Health Act R.S.A. 2000, c. M-13</p>		<p>s. 7(1) Two admission certificates are sufficient authority to care for, observe, examine, assess, treat, detain and control the person named in them in a facility for a period of one month from the date the 2nd admission certificate is issued.</p> <p>s. 8 renewal certificate process explained.</p> <p>s. 27 process for competence to make treatment decisions.</p>	<p>s. 10(1) Anyone who has reasonable and probable grounds to believe that a person is (a) suffering from mental disorder, and (b) likely to cause harm to the person or others or to suffer substantial mental or physical deterioration or serious physical impairment may bring an information under oath before a judge of the Provincial Court.</p>		

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
British Columbia Mental Health Act, R.S.B.C. 1996, c. 288	<p>s. 22 (1) One physician for the initial medical certificate (first 48 hours).</p> <p>s. 22 (2) Another physician completes second medical certificate to detain person longer than 48 hours.</p>	<p>s. 22 Involuntary admission procedures for initial, second and subsequent certificates.</p> <p>s. 24 Review of authority for detention renewal</p>	<p>s. 22 (3) c) Each medical certificate must be completed by a physician who has examined the person... and must set out ... (c) a statement, ... by the physician that the physician is of the opinion that the person... (i) requires treatment in or through a designated facility, (ii) requires care, supervision and control in or through a designated facility to prevent the person's or patient's substantial mental or physical deterioration or for the protection of the person or patient or the protection of others, and (iii) cannot suitably be admitted as a voluntary patient.</p>	<p>s. 22 (7) Must be transferred to a provincial mental health facility or psychiatric unit unless patient discharged or released on leave</p>	<p>s. 23 Detained one month after admission date</p> <p>s. 24 Review of detention after 1 month, 3 months, thereafter every 6 months.</p>

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
<p>Newfoundland & Labrador Mental Health Care and Treatment Act, S.N.L. 2006, c M-9,1</p>	<p>s. 17 (2) A certificate of involuntary admission shall be completed and signed as follows: (a) the first certificate of involuntary admission may be completed and signed by a physician, nurse practitioner or other person authorized by the regulations; and (b) the second certificate of admission shall be completed by a psychiatrist or, where a psychiatrist is not readily available to assess the person and complete and sign a second certificate, by a physician who is a person other than the person who completed and signed the first certificate.</p>	<p>s. 12 Rights of involuntary patients. s. 17 (1) Certificate of involuntary admission. s. 24 Admission on two certificates.</p>	<p>s. 17 (1) (b) (i) (ii) Certificate must contain statement by person who performed assessment that person is suffering from mental disorder, likely to cause harm to oneself or others, mental or physical impairment, unable to appreciate nature of decision, and is in need of care and treatment.</p>	<p>s. 2 (1) (h) "facility" means a place where a psychiatric assessment may be conducted and includes a physicians office;</p>	<p>s. 22 Initial assessment of detained person to occur within 72 hours. s. 28 Can be admitted as involuntary patient detention for not more than 30 days from first certificate. s. 31 Can be detained for 30,60,90 days depending of which certificate; no limits on number of certificates.</p>

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
Newfoundland & Labrador Mental Health Care and Treatment Act, S.N.L. 2006, c M-9,1	S 19 Anyone can apply to judge for involuntary assessment if has reasonable grounds.				

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
<p>Ontario Mental Health Act, R.S.O. 1990, c M.7</p>	<p>s. 15(1) Physician who examines person and has reasonable cause to apply for assessment.</p> <p>s. 16(1) Justice of peace's order for psychiatric examination.</p> <p>s. 17 Police officer's role based on person acting in disorderly manner.</p> <p>s. 21(1) Judge's order for examination where there is reason to believe person is charged with or convicted with offence.</p>	<p>s. 15(1) criteria for reasonable cause to believe person suffers from mental disorder.</p>	<p>s. 20(5) Attending physician, after examining patient, can complete certificate of involuntary admission if of the opinion that person suffers from a mental disorder that will result in serious bodily harm to oneself or to another</p>	<p>s. 18 Psychiatric examination to be conducted at a psychiatric facility or health facility.</p>	<p>s. 20 (4) An involuntary patient may be detained, restrained, observed and examined in a psychiatric facility, (a) for not more than two weeks under a certificate of involuntary admission; and (b) for not more than, (i) one additional month under a first certificate of renewal, (ii) two additional months under a second certificate of renewal, (iii) three additional months under a third certificate of renewal, and (iv) three additional months under a first or subsequent certificate of continuation,</p>

Mental Health Acts and Commitment Criteria

Jurisdiction	Who	What	When	Where	How long
<p>Quebec</p> <p>-Civil Code of Quebec (CCQ), S.Q. 1991.</p> <p>- An Act respecting the protection of persons whose mental state presents a danger to themselves or to others, R.S.Q. c. P-38.001 (Sec)</p>	<p>Art. 27 Application by physician or interested person for temporary confinement.</p> <p>Art. 28 Examination must occur within 24 hours of court order and if confinement necessary the second examination must be within 96 hours.</p>	<p>Art. 26-31 Confinement in institution and psychiatric assessment described.</p> <p>s. 7 Preventive confinement described.</p> <p>s. 15 Duty to inform patient.</p>	<p>Art. 27 Criteria is where court has reasons to believe person is a danger to oneself or to others due to mental state.</p> <p>s. 1 Person whose mental state is a danger to themselves or others</p>	<p>Art. 27 Can be temporarily confined in a health or social services institution for assessment.</p> <p>s. 6 Facilities for preventive or temporary confinement.</p> <p>s. 9 Specifies type of confinement facility</p>	<p>Art. 28 First psychiatric assessment to occur within 24 hours; and second psychiatric assessment within 96 hours.</p> <p>s. 7 Preventive confinement for 72 hours .</p> <p>s. 10 21 days from date of decision, review every three months.</p>

MERCI!

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