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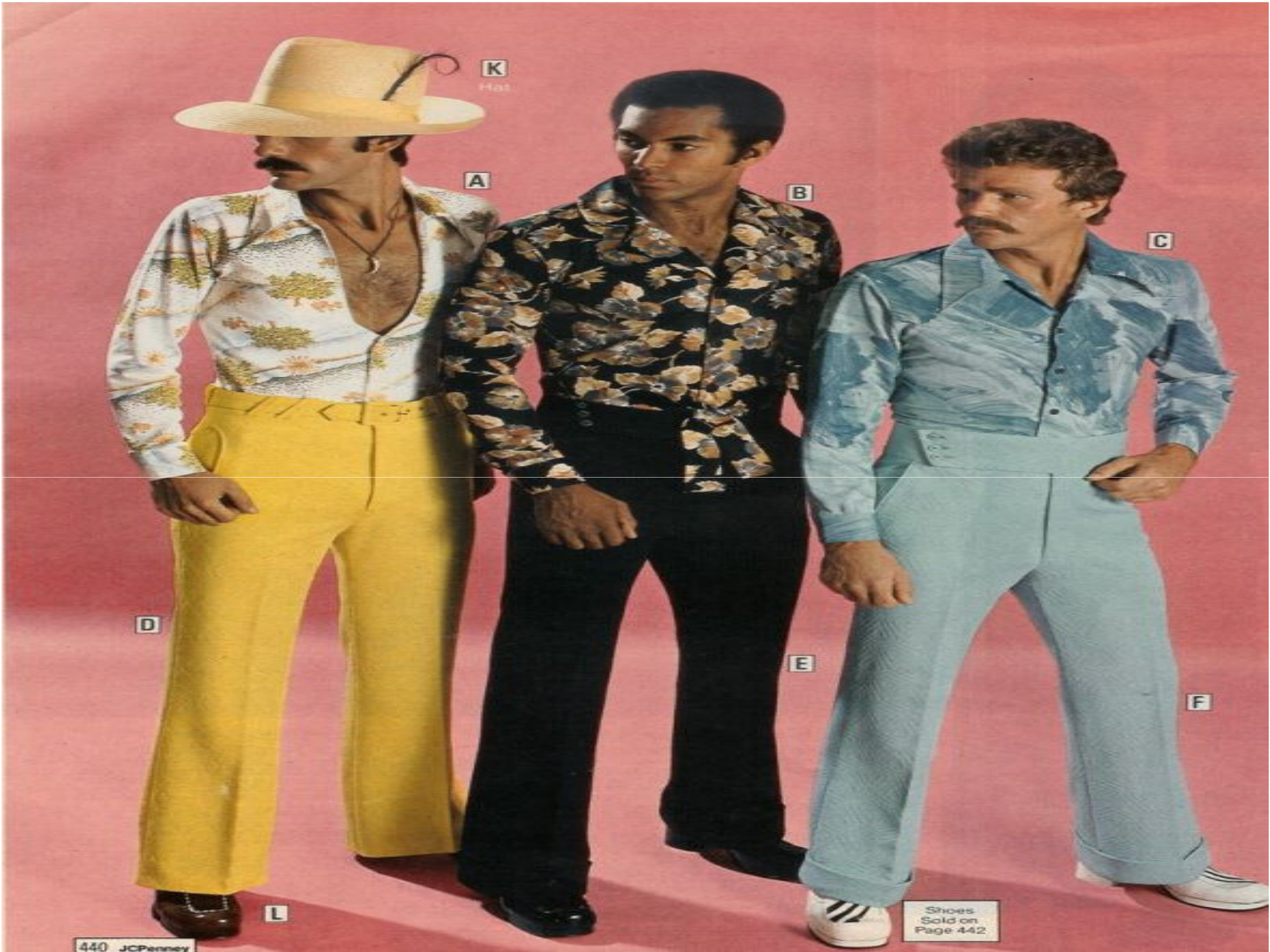


Emerging Litigation 2013

OR

***“As to each, a brief time
in the sun?”***

**David Platt Q.C.
Crown Office Chambers
September 2013**



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Shoes Sold on Page 442



A microscopic image showing numerous vertical, parallel chains of small, spherical mold spores. The spores are light greenish-yellow and have a textured, slightly irregular surface. The chains are densely packed and extend across the frame. The background is dark and out of focus, highlighting the intricate structure of the mold.

Toxic Mold Threatens
Home & Family Health!

Passive Smoking



Acoustic Shock!



“Acoustic Shock”

- (1) Few cases- most fail.
- (2) Considerable difficulties for claimants on medical causation and breach of duty. Does it even exist? Another psychosocial phenomenon?
- (3) ***Goode v. Abertawe Bro Morgannwg University Local Health Board*** (Cardiff CC, 2013, HHJ Bidder)

Mobile Telephone Litigation





The Numbers

- Six of the world's seven billion people have mobile phones.
- Conversely, only 4.5 billion people have a lavatory.



The Numbers

- A study by online address-book site Plaxo suggests that nearly 1 in 5 people accidentally drop their phones into the loo, thus losing all their contacts.



Mobile Phone Litigation

- Exposure to user of radiofrequency (RF) radiation.
- No claims in UK which have been successful.
- Possible claims under the Consumer Protection Act, in contract and in negligence.
- Other RF claims in *Markham v ICI* [2010] EWHC 490 and *Davis v. Balfour Beatty* [2002] EWCA Civ 736 failed on causation.

Mobile Phone Litigation

- Scientific evidence highly equivocal and on balance against.
- Claims generally failed in US (e.g. *Newman v. Motorola*)
- Did succeed in Italy (*Marcolini*, 2012).
- Clearly huge potential if medical or epidemiological evidence develops.

The Main Problems with New Litigation in Most Areas



- The difficulties with causation when at the edge of human knowledge, in particular the burden of proof.
- The uncertainty of many epidemiological studies and the need to increase risk by a factor of 2. The reliance on third parties.
- The great cost of pathfinder litigation.

Growth?



Three Related Growth Areas

- Subtle brain injury. An alleged loss of cognitive function following minor injury or trauma.
- Somatoform and “pain claims” such as fibromyalgia, Chronic Fatigue Syndrome/ME, and Chronic Pain Syndrome.
- Occupational psychiatric claims (e.g. stress at work).



Three Related Growth Areas

- All involve the workings of the human mind and have a psychiatric or psychological element
- All involve self-reporting and the absence of conclusive independent testing of any diagnosis (e.g. by radiology)
- All involve great difficulties with disputation
- Often bolt-ons to simple and minor trauma
- SBI and pain syndromes often iatrogenic.

Birds of a Feather

- The divisions of medical opinion on grounds of principle and the use of favoured experts in cases (e.g. for ME).
- The vulnerability of such claims to the temptations of exaggeration, litigation projection and frank fabrication.
- The interaction with psychiatric or psychological problems. The oft asked question: is the claimant “*Mad or Bad?*”
- The difficulties with observational and conventional challenges to the veracity of the symptoms.
- The difficulties in establishing a true pre-morbid history.

Birds of a Feather

- The consequences of a successfully proved diagnosis:
 - (a) The static nature of prognosis. No “improvement cap” for defendants in SBI and poor with other pain syndromes.
 - (b) Consequential loss of earnings (esp if a professional as in *Clarke v. Maltby*). Once threshold crossed, full loss claim very achievable (esp SBI).
 - (c) The difficulty thereafter in dismissing the symptoms complained of. Inconsistency then has a lesser litigation value.

Particular Aspects of SBI Litigation

- The complexity of the proceedings. The proliferation of the necessary expert evidence (neurologists, psychiatrists, neuropsychiatrists, psychologists and neuropsychologists)
- Often complicated by other concomitant physical injury (esp in RTA claims)
- The length and expense of contested proceedings (*Williams v. Jervis* lasted 16 days)
- Contrast with whiplash claims- both in terms of expert evidence and issues of proof



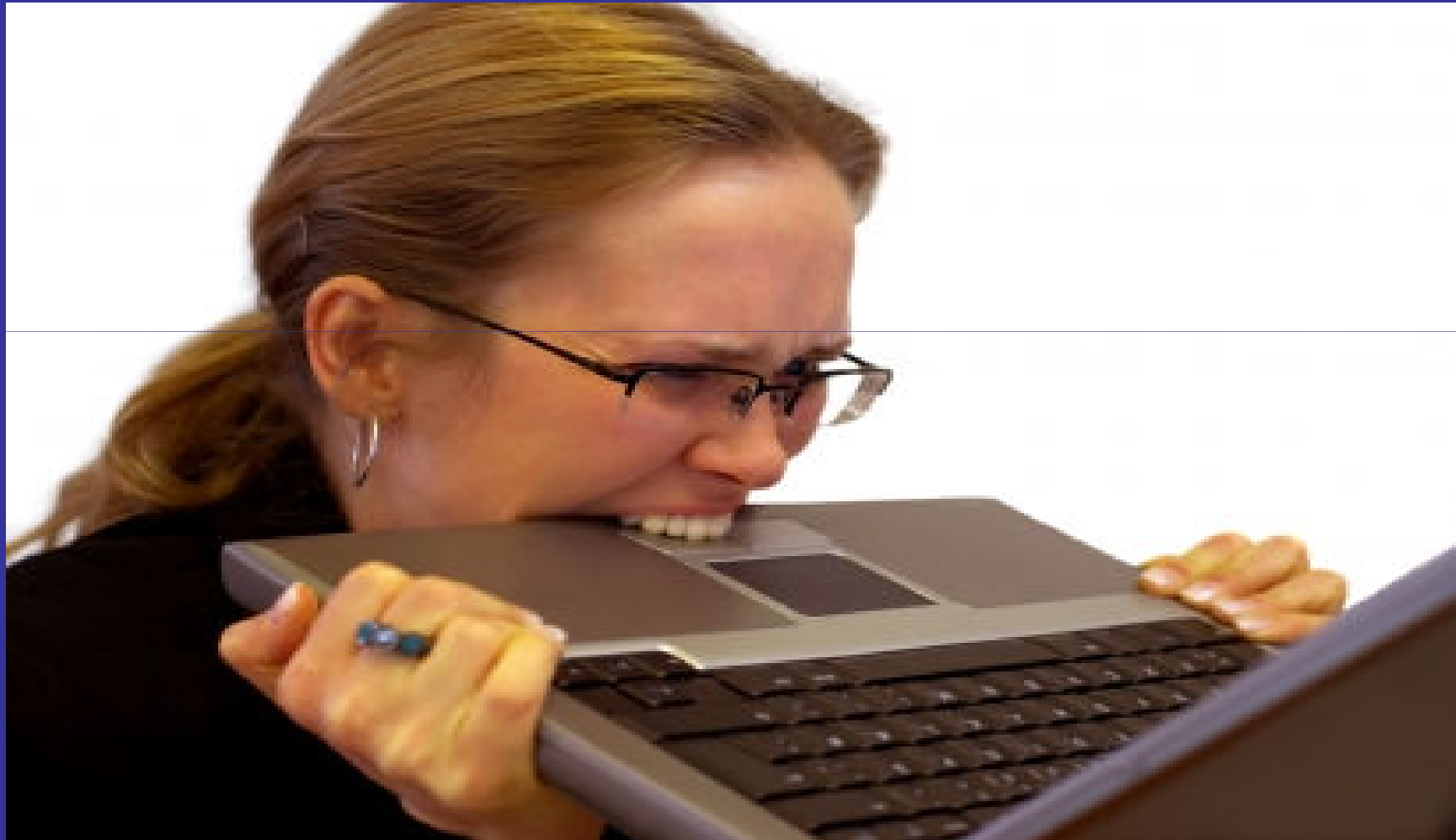
SBI Litigation

- *Hesp v. Willemse* [2002] EWHC 1256 (QB), Leveson J
- *Ball v. LB Southwark* (15/12/03), J Leighton-Williams QC.
- *Van Wees v. Karkour* [2007] EWHC 165 (QB), Langstaff J.
- *Williams v. Jervis* [2008] EWHC 2346 (QB), Roderick Evans J.
- *Clarke v. Maltby* [2010] EWHC 1201 (QB), Owen J.

CFS Litigation

- Most are fact sensitive and rarely contested.
- *Maclennan v Hartford Europe* [2012] EWHC 346
- Occupational stress at work claim claiming CFS as a consequence.
- Failed on causation- but credibility lost on stress element of the claim.

Stress at Work Litigation



Stress at Work Litigation

- Still reasonable numbers of claims- *quaere* what QUOCS will do to the area.
- ***Hatton*** still good law for conventional occupational stress claims.
- *Dowson and Conn* for harassment claims.
- Majority of claims defensible.



Yapp v. Foreign Office [2013] I.C.R. D21

- British High Commissioner in Belize sent home after allegations of bullying and inappropriate sexual behaviour made by politician in the country.
- Subsequently allegations of bullying upheld, but that of sexual misconduct was not.
- Basis for finding in Claimant's favour was that he had not been accorded "fair treatment" by FCO as the allegations were not tested by an investigation prior to withdrawal.



Yapp v. Foreign Office [2013] I.C.R. D21

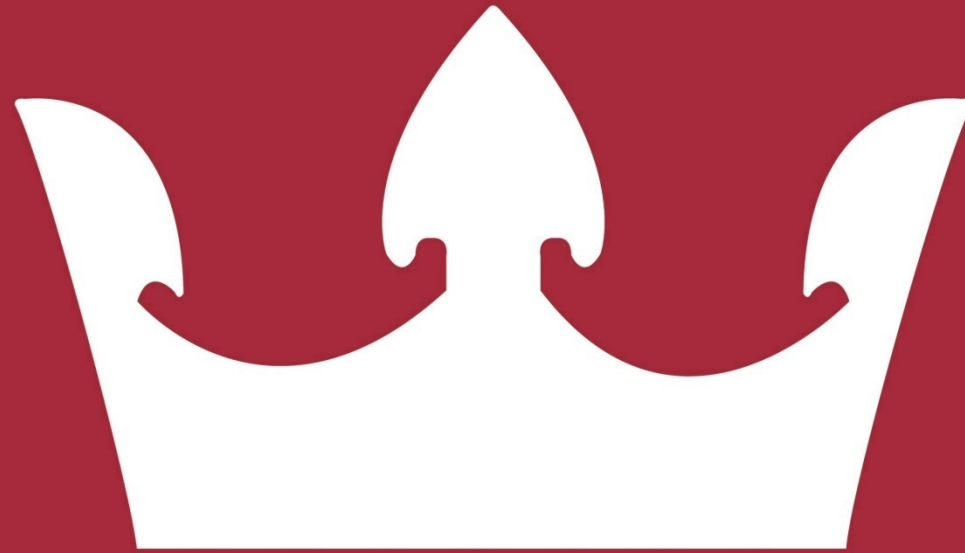
- Claimed he had suffered psychiatric injury as a consequence and was awarded £320,000.
- Allegation at common law essentially failed- his psychiatric injury was not foreseeable.
- However his claim in contract succeeded.
- Suggested foreseeable at time of appointment that would become ill if “kneejerk” decision to send him home was made.



Yapp v. Foreign Office [2013] I.C.R. D21

- How can psychiatric injury be foreseeable in contract and not in tort? Is *Hatton* bypassed?
- Differential dates at which foreseeability determined.
- Claim on appeal to Court of Appeal.





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