

**Liability for Workplace Psychiatric Injury and Vicarious Trauma:
Kozarov v Victoria**

Author

Burns, Kylie

Published

2021

Journal Title

The Sydney Law Review

Version

Accepted Manuscript (AM)

Rights statement

© 2021 Sydney Law Review and author. This is an Open Access article distributed under the terms of the Creative Commons Attribution-NoDerivs 4.0 International (CC BY-ND 4.0) License, which permits unrestricted distribution and reproduction in any medium, providing that the work is properly cited. You may not alter, transform, or build upon this work

Downloaded from

<http://hdl.handle.net/10072/411473>

Link to published version

<https://www.sydney.edu.au/law/our-research/sydney-law-review.html>

Griffith Research Online

<https://research-repository.griffith.edu.au>

Before the High Court

Liability for Workplace Psychiatric Injury and Vicarious Trauma: *Kozarov v Victoria*

Kylie Burns*

Abstract

Work-related psychiatric injury claims are frequent and costly. Workplace psychosocial hazards increase the risk of prolonged workplace stress, which can lead to physical and psychological injury. This article considers the forthcoming appeal to the High Court of Australia from the Victorian Court of Appeal decision in *Victoria v Kozarov*, which concerns a psychiatric injury because of vicarious trauma in the workplace. The appeal raises important issues about the application of principles enunciated by the High Court in *Koehler v Cerebos (Australia) Ltd*. In *Kozarov*, the High Court will consider the test of reasonable foreseeability in a context where an employer had actual knowledge of the risk of psychological injury to all employees as a result of vicarious trauma. Additionally, the appeal raises issues about: the role of employment contracts in determining negligence; the emphasis to be given to issues of privacy and autonomy in defining the scope of an employer's duty of care; inferential factual reasoning in causation; and the interaction between an employer's obligation to enforce a safe system of work and counterfactual causation.

Please cite as:

Kylie Burns, 'Liability for Workplace Psychiatric Injury and Vicarious Trauma: *Kozarov v Victoria*' (2021) 43(4) *Sydney Law Review* (advance).



This work is licensed under a Creative Commons Attribution-NonDerivatives 4.0 International Licence (CC BY-ND 4.0).

As an open access journal, unmodified content is free to use with proper attribution. Please email sydneylawreview@sydney.edu.au for permission and/or queries.

© 2021 Sydney Law Review and author. ISSN: 1444-9528

* Associate Professor, Griffith Law School, Griffith University, Nathan, Queensland, Australia. Email: k.burns@griffith.edu.au; ORCID iD: <https://orcid.org/0000-0001-9303-2252>.

I Introduction

Work-related psychiatric injury claims are frequent and costly.¹ Individual vulnerability of employees is not the only cause of workplace psychiatric injury. Workplace psychosocial hazards increase the risk of prolonged workplace stress, which can lead to physical and psychological injury.² Hazards include long work hours, heavy workloads and job demands, hazardous or high pressure environments, distressed or aggressive clients, exposure to violence and trauma, poor workplace support, and workplace bullying, harassment and sexual assault.³ There are particular risks of vicarious trauma to employees such as lawyers, child protection workers, police, ambulance officers, journalists, and forensic scientists who witness or are exposed to traumas experienced by others.⁴ The Productivity Commission's Mental Health Inquiry,⁵ the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces⁶ and other recent inquiries⁷ have identified the need for employers to take greater steps to prevent and adequately respond to workplace psychiatric injuries.

The High Court of Australia has granted special leave⁸ to appeal the Victorian Court of Appeal decision in *Victoria v Kozarov*,⁹ a case concerning psychiatric injury arising from vicarious trauma in the workplace. The case raises important issues about the application of principles enunciated by the High Court's 2005 decision in *Koehler v Cerebos (Australia) Ltd*.¹⁰ In *Koehler*, which concerned a workplace psychiatric injury caused by overwork, the High Court held that while it may be 'general knowledge that some recognisable psychiatric illnesses may be triggered by stress', it was a 'further and much larger step' to expect that all employers must recognise the risk of psychiatric injury to all employees from stress at work.¹¹ While employers owed a general duty of care to employees to provide a safe system of work, foreseeability of psychiatric harm to particular employees may depend on factors including the nature and extent of the work, and explicit or implicit

¹ Productivity Commission, *Mental Health: Inquiry Report* (Report No 95, June 2020) vol 2, 308–12 <<https://www.pc.gov.au/inquiries/completed/mental-health/report/mental-health-volume2.pdf>>.

² Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties* (National Guidance Material, January 2019) 9–12 <https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf>.

³ *Ibid*.

⁴ *Ibid* 12.

⁵ Productivity Commission (n 1).

⁶ Australian Human Rights Commission, *Respect@Work: Report of the National Inquiry into Sexual Harassment in Australian Workplaces* (2020) Section 5 <<https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>>.

⁷ See, eg Marie Boland, *Review of the Model Work Health and Safety Laws: Final Report* (December 2018) 30–5 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf> ('*Boland Review Report*').

⁸ Transcript of Proceedings, *Kozarov v Victoria* [2021] HCATrans 101, 804.

⁹ *Victoria v Kozarov* (2020) 301 IR 446 ('*Kozarov (VSCA)*') which allowed an appeal by the State of Victoria against the decision in *Kozarov v Victoria* (2020) 294 IR 1 ('*Kozarov (VSC)*').

¹⁰ *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 ('*Koehler*').

¹¹ *Ibid* 57 [34] (McHugh, Gummow, Hayne and Heydon JJ). See also 64–5 [54]–[57] (Callinan J).

signs from the employee.¹² The scope of duty could be constrained by: the employment contract; equitable obligations; coherence with relevant legislative frameworks; and by the employee's own agreement to carry out duties.¹³ Since *Koehler*, additional barriers to recovery in negligence have emerged, reliant on policy considerations of employee privacy, dignity and autonomy.¹⁴ In *Kozarov*, the High Court will consider the test of foreseeability in a context where (unlike *Koehler*) an employer had actual knowledge of the risk of psychological injury to all employees as a result of vicarious trauma and had reflected this in its own policies. Additionally, the case raises issues around: the role of employment contracts in defining the scope of duty of care and negligence principles;¹⁵ the emphasis to be given to issues of privacy and autonomy in defining scope of duty;¹⁶ inferential factual reasoning in causation; and the interaction between an employer's obligation to enforce a safe system of work¹⁷ and counterfactual causation. Broader questions arise about how 'common sense' social facts about the nature and causation of workplace psychiatric injuries affect determinations about scope of duty, breach and causation.¹⁸

II The Facts and Procedural History

The appellant, Zagi Kozarov ('Kozarov'), was employed by the Victorian Office of Public Prosecutions ('OPP') as a solicitor in their Specialist Sexual Offences Unit ('SSOU') between June 2009 and April 2012.¹⁹ She was exposed to sexual offences cases involving children including 'graphic images' of rapes, assaults and child pornography and prepared children for evidence and cross examination.²⁰ She dealt with the 'extremely' distressing aftermath of verdicts including suicidal complainants.²¹ She frequently worked excessive hours.²² She developed work-

¹² Ibid 54 [23]–[24], citing Hale LJ in the English Court of Appeal decision in *Sutherland v Hatton* [2002] 2 All ER 1, 14 [25]–[28]. The High Court of Australia in *Koehler* (ibid [24]) suggested there may be other matters, not explored in argument, that might make the risk of psychiatric injury reasonably foreseeable and that would require 'deeper knowledge' about causes of psychiatric injury than general knowledge.

¹³ *Koehler* (n 10) 53–7 [21]–[25], [28]–[31].

¹⁴ See, eg, *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81-919 ('*Hegarty*').

¹⁵ While *Koehler* raised the content of employment contracts as a relevant factor in determining the scope of duty of care (with other factors), this aspect was not fully evaluated by the High Court which noted that this would have required 'much closer attention to the content of the contractual relationship than was given in the evidence and arguments in the courts below': *Koehler* (n 10) 58 [40]. See also [38]–[39].

¹⁶ This issue has not yet been fully explored in the High Court following the refusal of special leave to appeal *Hegarty* (n 14): see *Hegarty v Queensland Ambulance Service* [2008] HCATrans 121.

¹⁷ *McLean v Tedman* (1984) 155 CLR 306, 313 ('*McLean*').

¹⁸ For discussion of risks in judicial use of common-sense social facts, see Kylie Burns, 'It's not just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21(2) *Torts Law Journal* 73; Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319.

¹⁹ *Kozarov (VSCA)* (n 9) 448 [1].

²⁰ Ibid 452 [18]–[21].

²¹ Ibid 452 [21].

²² Ibid 452–3 [22]–[23]. Evidence from fellow employees suggested heavy workload was common: at 453 [23].

related chronic post-traumatic stress disorder ('PTSD') and a major depressive disorder in 2011–12.²³ There was extensive evidence that the OPP was aware of the significant risks of vicarious trauma to employee health.²⁴ The SSOU manual described management responsibility for risk identification and management and required compliance with Occupational Health and Safety ('OHS') legislation.²⁵ A Vicarious Trauma Policy ('VT Policy') published in 2008 acknowledged the impacts of vicarious trauma on SSOU staff; outlined preventative strategies such as avoiding excessive hours and excessive workload; and specified management options including 'rotations within the OPP, counselling, debriefing, the relocating of files, specific "time outs" and the provision of assistance to staff members'.²⁶ Despite this, Kozarov's managers were 'unaware of these documents'²⁷ and SSOU staff and management knowledge of vicarious trauma was 'desultory'.²⁸

In March 2011, SSOU staff held a staff meeting and wrote a memo on staff-wellbeing to management complaining of work overload and outlining stress-related symptoms.²⁹ In April 2011, a psychologist engaged by the SSOU held a session where staff including Kozarov discussed the impact of work on their private lives.³⁰ In June 2011, Kozarov was allocated an additional file despite her complaints she was already overloaded and working long hours and weekends.³¹ In August 2011, she became unwell at work and was on sick leave for several weeks.³² Upon return to work in late August 2011, Kozarov was involved in a conflict with her manager when he incorrectly assumed she had come into work late. This was followed by a series of lengthy distressed emails from her to her manager.³³ In late October 2011, she attended a meeting with management and raised concerns by junior staff about the confronting nature of SSOU work.³⁴ From September to December 2011, Kozarov continued to experience intense workload.³⁵ She accepted a promotion to a permanent higher-level position before taking recreation leave and long service leave.³⁶ On 9 February 2012, when she was to return from leave, she emailed her managers advising them of the severe effects that exposure to SSOU matters had had on her psychological health and requested an internal transfer.³⁷ Following

²³ Ibid 448 [1].

²⁴ Ibid 453–4 [24]–[25]. Between 2007 and 2009 this included management emails, staff training sessions, an evaluation by a psychologist, a briefing paper about loss of staff, and memo from the SSOU principal solicitor about staff wellbeing, stress and vicarious trauma.

²⁵ Ibid 451 [10].

²⁶ Ibid 451 [12].

²⁷ Ibid 454 [25].

²⁸ Ibid, quoting *Kozarov (VSC)* (n 9) 37 [149].

²⁹ *Kozarov (VSCA)* (n 9) [30]–[34]. A copy of the memo was later sent by the SSOU manager to senior OPP staff with a business case for additional staff: at 457 [36].

³⁰ Ibid 456 [35].

³¹ Ibid 457 [39]–[40].

³² Ibid 458 [41]–[43].

³³ Ibid 458–61 [45]–[48].

³⁴ Ibid 461 [52].

³⁵ Ibid 461 [49].

³⁶ Ibid 461 [53]. She had applied for the promotion on 28 August 2011 while on sick leave: at 458 [44].

³⁷ Ibid 462–3 [54]–[56].

unsuccessful attempts to return her to work in the OPP from February to April 2012, her employment was terminated.³⁸

At trial, Jane Dixon J held that the OPP had breached their duty of care, which caused Kozarov psychiatric injury. Dixon J concluded that internal documents and policies showed the OPP knew of the risks to SSOU staff from burnout, work stress and vicarious trauma.³⁹ The OPP was also aware of specific risks to Kozarov through a combination of ‘evident signs’ of her declining mental health, culminating with the conflict and emails when she returned from sick leave late August 2011 (the ‘sentinel event’⁴⁰).⁴¹ By this stage, her psychiatric injury was reasonably foreseeable to the OPP. Dixon J found that a reasonable employer would have taken a range of steps to ensure a safe system of work including

an active OH&S framework; more intensive training for management and staff regarding the risks to staff posed by vicarious trauma and PTSD; welfare checks and the offer of referral for a work-related or occupational screening, in response to staff showing heightened risk; and, a flexible approach to work allocation, especially where required in response to screening, including the option of temporary or permanent rotation from the SSOU where appropriate.⁴²

‘Poor handling’ of the return-to-work process, which continued to expose Kozarov to sexual offences, was a ‘continuing breach of duty’ that added to the severity of her injury.⁴³

At trial, Kozarov made an alternative contractual claim.⁴⁴ Unlike *Koehler* case, Kozarov’s employment contract had extensive provisions about reasonable workload and OHS obligations and referred to OPP policies including the SSOU Manual. Dixon J found that ‘[u]nlike *Koehler*, the obligations between the parties under the employment contract strengthen[ed], rather than weaken[ed], [Kozarov’s] claim’ and were ‘highly relevant’ to the negligence claim.⁴⁵ Contractual breaches did not, however, raise separate legal issues to the negligence claim and did not result in a separate assessment of damages.⁴⁶ Kozarov also relied initially on a claim of breach of statutory duty arising from breach of the *Occupational Health and Safety Act 2004* (Vic) and associated regulations. ‘[M]inimal attention’ was paid to this claim at trial and Dixon J held that the onus of proof was not satisfied.⁴⁷ Her Honour also found that damages should not be reduced for any alleged contributory negligence.⁴⁸

³⁸ Ibid 463 [58].

³⁹ Ibid 463 [61].

⁴⁰ See *ibid* 450 [7], citing *Kozarov (VSC)* (n 9) 134 [598], 136–7 [609].

⁴¹ *Kozarov (VSCA)* (n 9) 463–5 [62]–[66].

⁴² Ibid 465 [67], quoting *Kozarov (VSC)* (n 9) 155–6 [702].

⁴³ *Kozarov (VSC)* (n 9) 166 [750]. See also 165–6 [734]–[749].

⁴⁴ Ibid 166–9 [751]–[767]. The contract referred to the Victorian Public Service Agreement 2006 (2009 Extended and Varied Version) <<https://www.fwc.gov.au/documents/awards/tracee/agreements/pdf/ag847284.pdf>> and the *Public Service Administration Act 2004* (Vic).

⁴⁵ *Kozarov (VSC)* (n 9) 169 [767].

⁴⁶ Ibid 169 [766].

⁴⁷ Ibid 169 [768].

⁴⁸ Ibid 170–1 [769]–[776].

The OPP appealed to the Court of Appeal of Victoria on two grounds. The first ground, relating to duty of care and breach of duty, alleged error in finding that a sentinel event had occurred and that there were evident signs of Kozarov's psychological injury by the end of August 2011, which warranted response from the OPP. The second ground, relating to causation, alleged error in finding that if there had been no breach, Kozarov's injury would have been avoided. The Court of Appeal dismissed the first ground, but allowed the appeal in relation to causation. It was not satisfied that even if Kozarov had been made aware of her PTSD and continuing risk to her mental health by the end of August 2011, she would have agreed to be transferred or could have been compelled to work in another work unit.⁴⁹ The Court placed particular emphasis on Kozarov's statements in the sentinel event emails defending her work record and indicating her passion for work, and on her decision to later pursue and accept promotion.

Kozarov's first ground of appeal in the High Court relates to causation. Kozarov submits that the Court of Appeal erred by overturning an inference drawn by Dixon J at trial that if the OPP had discharged their duty of care so that Kozarov was aware of her injury, she would have been 'given time away from [her] confronting work, and thereby not suffered [her] injury'.⁵⁰ Kozarov's second ground of appeal relates to coherency between scope of duty and causation. Kozarov submits that the Court of Appeal erred 'in failing to consider the nature and content of the [OPP's] duty of care include[ing] ... a duty to maintain and enforce a safe system of work', when determining counterfactual causation.⁵¹ The OPP raises a further issue by notice of contention concerning duty of care and breach, arguing that the Court of Appeal erred in finding that the OPP was on notice of risk to Kozarov's health by the end of August 2011 so as to require reasonable steps to be taken by the OPP in response.⁵²

III Critique and Commentary

A *Duty of Care, Reasonable Foreseeability and 'Evident Signs'*

The Court of Appeal found that the *Koehler* principles required that in order to engage a duty of care to a particular employee concerning psychiatric injury, 'evident signs' of particular risk of psychiatric illness to that particular employee are required.⁵³ Neither the OPP nor Kozarov challenge the *Koehler* principles in the High Court. There is, rather, a dispute about when evident signs of illness could be reasonably recognised by the OPP. At trial and in the Court of Appeal, it was held that there were cumulative evident signs that Kozarov was at risk of psychiatric

⁴⁹ *Kozarov (VSCA)* (n 9) 478–9 [106]–[110].

⁵⁰ Zagi Kozarov, 'Appellant's Submissions', Submission in *Kozarov v Victoria*, Case No M36/2021, 9 July 2021 [3] <https://cdn.hcourt.gov.au/assets/cases/06-Melbourne/m36-2021/Kozarov-Vic_App.pdf> ('Kozarov's Submissions').

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Kozarov (VSCA)* (n 9) 466 [69].

injury by the end of August 2011.⁵⁴ The OPP argues that a duty of care ‘was not engaged’ until February 2012 when Kozarov notified she was unable to return to work and requested reassignment.⁵⁵ Her injury was not reasonably foreseeable until that late stage. Factually interpreting what ‘evident’ signs of psychiatric injury are and when (in retrospect) those signs would have been obvious enough to a reasonable employer is a fraught and difficult exercise. The *Koehler* principles clearly indicate that the nature of the work itself is an important factor in determining reasonable foreseeability. The OPP’s explicit knowledge of the potential signs and risks of vicarious trauma due to SSOU work are an important framework for interpreting the ‘signs’ of Kozarov’s illness. Given this framework, the Court of Appeal and trial judge’s finding that evident signs were present in August 2011 seems preferable.

There are, moreover, broader issues that may emerge in the *Kozarov* appeal about whether there is a need to clarify or re-evaluate the *Koehler* principles. Is it still appropriate to maintain that the risks of workplace psychiatric injury are not generally reasonably foreseeable to all employers such that focus must be on both the nature and extent of the work done and explicit or implicit signs from each particular employee to trigger a duty of care? This common sense proposition was controversial following *Koehler*.⁵⁶ In 2021, it is incongruous to suggest Australian employers should not be aware of the risks to employee health from workplace psychosocial hazards.⁵⁷ Employers are required by OHS legislation to identify and manage (proactively and reactively) the risks of psychiatric injury in the same way as the risks of physical injury.⁵⁸ There should be coherence between negligence law and OHS legislation. Where an employer foresees and has knowledge of significant particular risks of psychiatric injury to all their employees due to the nature of the workplace, does the test of reasonable foreseeability also require explicit or implicit

⁵⁴ Ibid 466–72 [70]–[84].

⁵⁵ Ibid 463 [57].

⁵⁶ See, eg, Rima Hor, ‘Psychiatric Illness in the Workplace: The Implications of *Koehler v Cerebos*’ (2005) 27(3) *Sydney Law Review* 557.

⁵⁷ The Victorian WorkSafe ‘Stresswise Policy’ was referred to by an expert OHS witness during the trial in *Kozarov v Kozarov* (VSC) (n 9) 143 [634]. Current Victorian resources include: WorkSafe Victoria, Work-Related Stress (Website, 30 August 2021) <<https://www.worksafe.vic.gov.au/work-related-stress>>; WorkSafe Victoria, *A Guide for Employers: Preventing and Managing Work-Related Stress* (February 2021) <<https://www.worksafe.vic.gov.au/resources/preventing-and-managing-work-related-stress-guide-employers>>. Chapter 17 of the *Guide for Employers* deals with trauma exposure injuries. See also the reports referred to above in nn 1–2, 6–7.

⁵⁸ Safe Work Australia (n 2). The *Boland Review Report* recommended amendment of the work health and safety regulations to reiterate the obligations of employers to identify, manage and control psychological workplace injury: *Boland Review Report* (n 7) 30–5. Changes are in the process of being introduced across Australia: see, eg, SafeWork NSW, NSW Government, *Code of Practice: Managing Psychosocial Hazards at Work* (May 2021) <https://www.safework.nsw.gov.au/__data/assets/pdf_file/0004/983353/Code-of-Practice_Managing-psychosocial-hazards.pdf>. The Victorian Government has announced it will also implement new regulations to provide further guidance to employers to protect workers from mental injury: Ingrid Stitt (Minister for Workplace Safety), ‘Keeping Workers Safe from Psychological Harm’ (Media Release, Victoria State Government, 17 May 2021) <<https://www.premier.vic.gov.au/keeping-workers-safe-psychological-harm>>.

signs of injury from a particular employee?⁵⁹ In *Kozarov*, the OPP was actually aware of the significant risk of psychiatric injury to SSOU employees from vicarious trauma. The OPP's VT Policy (which was not properly implemented) specifically identified symptoms and strategies to ameliorate that risk. It seems logically incoherent that a duty of care to take care to prevent an injury, where the high risk of injury is already known by an employer, may arise only after the injury has occurred such as to manifest 'evident' signs.⁶⁰ Such a duty is meaningless, without content and comes too late. For example, requirements to have a safe system of work that includes preventative proactive steps to detect and respond to the risk of psychiatric injury may apply before the duty arises.⁶¹ If a duty of care only arises after an employee is already so ill that evident signs of psychiatric illness have manifested, it also becomes more difficult to satisfy causation. It may be difficult for an employee to show the injury could have been prevented by 'reasonable' employer precautions that only arrive late and reactively.

B Breach, Early Intervention and Privacy

It is significant that the *Kozarov* appeal will consider the role of employee privacy and autonomy in determining scope and breach of an employer's duty of care.⁶² At trial, the OPP was found to have breached their duty of care by failing to provide a safe system of work, which included a failure to make a welfare inquiry or offer occupational screening or follow up measures. The OPP argues in the High Court that this impermissibly formulates an 'unrealistic duty to intrude into an employee's mental well-being'.⁶³ This can be traced to Keane JA's judgment in *Hegarty v Queensland Ambulance Service*, which suggested that an obligation on employers to follow up and intervene may impinge on the dignity of individuals and may intrude on their private life, autonomy and privacy.⁶⁴ The judgment suggested, by way of 'social, economic and legal context', that employees may be 'deeply resentful' if

⁵⁹ There may be an argument that *Koehler*, which concerned work overload and general workplace stress, left this question unresolved and recognised there may be other factors that may make an injury reasonably foreseeable: see *Koehler* (n 10) 54–5 [24].

⁶⁰ See, eg, *Melville v Home Office* (a case concerning a prison officer who had to attend prisoner suicides) heard with other cases in the English Court of Appeal in *Hartman v South Essex Mental Health and Community Care NHS Trust*, where it was held that the employer's knowledge of the risk of significant trauma to its employees evidenced by its own policies was sufficient to satisfy foreseeability without further signs of vulnerability from the employee: *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6. See also discussion by McColl JA in *New South Wales v Briggs* in relation to the foreseeability of injury to employees regularly exposed to trauma due to their occupation: *New South Wales v Briggs* (2016) 95 NSWLR 467, 471–7 [2]–[30] ('*Briggs*').

⁶¹ This was the case in *Kozarov*, where one of the breaches included failures to have a proactive OHS system including staff training to allow early recognition of and response to symptoms: *Kozarov (VSC)* (n 9) 144 [643], 151 [676]–[677].

⁶² See above n 16 and accompanying text.

⁶³ State of Victoria, 'Submissions of the Respondent', Submission in *Kozarov v Victoria*, Case No M36/2021, 6 August 2021, [55] <https://cdn.hcourt.gov.au/assets/cases/06-Melbourne/m36-2021/Kozarov-Vic_Res.pdf> ('Victoria's Submissions'). See also [24], [56]. This was not an issue considered in the Court of Appeal.

⁶⁴ *Hegarty* (n 14) [41]. See also *Briggs* (n 60) 497 [126]–[127] (Leeming JA).

their employers intervened when concerned an employee may be showing signs of mental illness.⁶⁵ Employees may consider this to be ‘a gross impertinence’ and such interventions may lead to employee grievances, industrial issues and potentially defamation actions.⁶⁶ These statements about potential consequence appear to be assumptions of judicial common sense or of judicial notice.⁶⁷

At trial, Dixon J was ‘mindful’⁶⁸ of Keane JA’s comments in *Hegarty* and accepted the ‘the need to avoid unnecessarily impinging on the personal autonomy of professional staff’.⁶⁹ However her Honour found that an employer could not be immune from making proper inquiries about staff welfare when the circumstances warranted and ‘a system of work that openly acknowledged the risks attached to the work and offered welfare inquiries or screening’ would uphold employee dignity and prevent workplace injury.⁷⁰ A welfare inquiry and offer of workplace screening to Kozarov was appropriate given inherent and known risks in the SSOU, general signs of distress in the SSOU and evident signs of Kozarov’s own distress.⁷¹ It was consistent with the OPP’s own VT Policy which indicated that ‘a personal approach needed to be made if vicarious trauma was suspected’⁷² and with the contractual obligations of the OPP as a public sector employer.⁷³ In high risk environments, it was insufficient to place an onus on individual staff to initiate conversations about health concerns.⁷⁴

The approach of Dixon J is the preferable approach. *Hegarty* is distinguishable from *Kozarov*. Both the trial and appellate court in *Kozarov* held that there were clear signs that Kozarov was at risk of psychiatric harm warranting intervention. In *Hegarty*, there were no clear signs that the plaintiff was at risk of any psychiatric harm and it was in that context that welfare inquiries or intervention were held to be unwarranted and overly intrusive.⁷⁵ Policy concerns such as personal dignity, privacy and autonomy may be relevant considerations in some cases in determining the scope of a duty of care or breach. However, ‘[c]are must be taken to ensure that solicitude for an employee’s privacy does not overwhelm those other considerations that give rise to a meaningful duty of care to avoid injury’.⁷⁶ Coherence favours negligence principles that are consistent with legislative OHS requirements that suggest early intervention approaches.⁷⁷ Early intervention conversations can be evidence-based, carried out compassionately with privacy and

⁶⁵ *Hegarty* (n 14) [46].

⁶⁶ *Ibid.*

⁶⁷ See Burns articles cited above in n 18.

⁶⁸ *Kozarov* (VSC) (n 9) 133 [593].

⁶⁹ *Ibid* 150 [670].

⁷⁰ *Ibid* 151 [676].

⁷¹ *Ibid* 150 [670]. See also the discussion of previous cases at 136–9 [608]–[619] where there was found to be absence of notice, which made them distinguishable from *Kozarov*.

⁷² *Ibid* 150 [670].

⁷³ *Ibid* 138–9 [617]–[618].

⁷⁴ *Ibid* 151 [677].

⁷⁵ *Hegarty* (n 14) [97]–[102].

⁷⁶ *The Age Co Ltd v YZ* (2019) 60 VR 189, 216 [131].

⁷⁷ See above n 57.

confidentiality and can support the worker to continue or return to work.⁷⁸ Courts should also be cautious about making personal observations or determining what social interests dictate in workplace psychiatric injury cases based on judicial perception.⁷⁹ Judicial common-sense social fact assumptions about how employees are likely to behave or respond in the workplace may be ill-founded.⁸⁰ Over-focus on ‘privacy’ may foster non-intervention by employers and lack of preventative measures inconsistent with modern workplace management. This may reinforce stigma about mental illness, which increases rates and effects of injury.⁸¹

C Causation of Injury

The critical causation question in the High Court is whether the exacerbation of Kozarov’s injury could have been prevented after August 2011. This raises difficult issues including the role of factual inferences in determining causation and the relevance of employment contracts and an employer’s obligation to enforce a safe system of work to counterfactual causation. At trial, Dixon J was satisfied that if a welfare inquiry had been made by the OPP, Kozarov would have taken up an offer of psychological screening, which would have ultimately resulted in ‘altering work allocation, or arranging time out, or rotation to another role, if required’.⁸² Dixon J found that it was likely Kozarov would have cooperated with change in work allocation away from the SSOU if she had been informed of the rationale.⁸³ The Court of Appeal found that the only response that would have prevented the exacerbation of Kozarov’s injury after the end of August 2011 was rotation, given it was likely she would have been diagnosed with PTSD at that time.⁸⁴ The Court held that there was no suggestion that she could have been compelled to accept a rotation and made the important conclusion (in a single sentence without detailed analysis) that the employment contract would have precluded the OPP rotating Kozarov to another role.⁸⁵ To satisfy causation, Kozarov was therefore required to show that she would have voluntarily accepted that rotation if offered a rotation of role away from the SSOU at the end of August 2011. At trial, Dixon J found that her requests in February 2012 when she advised she was ill and requested a transfer away from the SSOU demonstrated that she would have accepted a rotation in August 2011 if she

⁷⁸ Safe Work Australia (n 2) 23–4.

⁷⁹ *Briggs* (n 60) 477 [30] (per McColl JA).

⁸⁰ See Burns articles cited above in n 18.

⁸¹ Tristan W Casey, Xiaowen Hu, Qian Yi Lee and Clarissa Carden, *Stigma Towards Injured or Ill Employees: Research on the Causes and Impact of Stigma in Workplaces, and Approaches to Creating Positive Workplace Cultures that Support Return to Work* (Report for Safe Work Australia, June 2021) <<https://www.safeworkaustralia.gov.au/doc/research-causes-and-impact-stigma-workplaces-and-approaches-creating-positive-workplace>>.

⁸² *Kozarov* (VSC) (n 9) 163 [733]. See also 163 [734]–[739].

⁸³ *Ibid* 163 [733]. Dixon J noted at 163 [733]–[735] that there was no evidence, including evidence led by the OPP, that suggested Kozarov could not have been rotated to another part of the OPP. ‘No explanation was provided [by the OPP] as why a role entirely away from sexual offences ... was not a viable alternative.’ at 166 [750].

⁸⁴ *Kozarov* (VSCA) (n 9) 478 [106].

⁸⁵ *Ibid*.

was aware at that stage she had PTSD.⁸⁶ However, the Court of Appeal ‘looked afresh’ at the evidence.⁸⁷ It relied on her emails in August 2011 where she ‘reacted strongly’⁸⁸ against any suggestion she was not coping and indicated she was passionate about her work. It also relied on her application for and acceptance of promotion. The Court of Appeal found that on the balance of probabilities it could not be satisfied she would have accepted rotation away from the SSOU.

The *Kozarov* case demonstrates the importance of hypothetical factual inferences in determining the counterfactual in causation; that is, what would the plaintiff have done if the breach had not occurred? Kozarov argues that the factual finding by the Court of Appeal is ‘perverse’⁸⁹ and is ‘contrary to common sense’.⁹⁰ She argues that the Court overlooked that her case was not restricted to rotation as the only option to reduce exposure and that there were other means to reduce trauma exposure suggested by the expert witnesses and accepted by Dixon J at the trial.⁹¹ Additionally, Kozarov submits that the counterfactual has to proceed on the basis of what she would have done if she had been aware at the time of the sentinel events that she had PTSD.⁹² Kozarov also argues that reliance on her statements about her passion for her work and her wish to remain at the SSOU is misconceived given unchallenged expert evidence ‘readily explained’ that dedication to the job was in itself a symptom of and consistent with PTSD.⁹³

The factual inferences drawn by the Court of Appeal should be approached with caution. As a matter of principle, the counter-factual inquiry must proceed on the basis that at the time of the hypothetical decision-making about whether to consent to rotation, Kozarov would have been aware she likely had PTSD if the OPP had not been in breach of their duty. Care should also be taken in making inferences about how Kozarov would have acted based on statements made in a wholly different context (that is, an apparent industrial type dispute). Expert evidence in the case suggested that it is not abnormal for people exposed to vicarious trauma and who are not aware they are suffering PTSD to be dedicated to their jobs — this was reason for extra care to be taken by the employer.⁹⁴ It is also not necessarily inconsistent to want to progress in your workplace through promotion and, at the same time, expect your employer to take steps to prevent known risks to your health. There was no evidence at trial that suggested Kozarov could not be rotated or as to why other preventative steps could not be taken to reduce trauma exposure.⁹⁵ The taking of steps such as rotation or altering work allocation would have been consistent with the OPP’s own VT Policy.

⁸⁶ *Kozarov (VSC)* (n 9) 163 [733].

⁸⁷ *Kozarov (VSCA)* (n 9) 479 [110]. See also 478–9 [108]–[109].

⁸⁸ *Ibid* 478 [108].

⁸⁹ Kozarov’s Submissions (n 50) [21].

⁹⁰ *Ibid* [30], [35].

⁹¹ *Ibid* [32], [35].

⁹² Zagi Kozarov, ‘Appellant’s Reply’, Submission in *Kozarov v Victoria*, Case No M36/2021, 27 August 2021, [4] <https://cdn.hcourt.gov.au/assets/cases/06-Melbourne/m36-2021/Kozarov-Vic_Reply.pdf> (‘Kozarov’s Reply’).

⁹³ Kozarov’s Submissions (n 50) [37].

⁹⁴ *Kozarov (VSC)* (n 9) 146 [652], 158 [714]–[715], 159 [718].

⁹⁵ See above n 83 and accompanying text.

The impact of employment contracts on negligence emerges as a significant issue in the High Court. The OPP argues that a duty cannot be imposed that requires an employer to breach the employment contract by rotating an employee without consent and enforcing a safe system of work cannot be inconsistent with contractual obligations.⁹⁶ The OPP submits that Kozarov's employment contract was to be specifically employed in the SSOU, such that any rotation or employment elsewhere in the OPP would be precluded by contract.⁹⁷ This appears to be a substantially new issue not raised at trial.⁹⁸ Following Kozarov's notification of her injury and request for rotation out of the SSOU in February 2012, she was in fact moved to a range of other areas in the OPP. Kozarov submits that the argument is impermissible as there was a concession at trial that there was nothing in the contract that prevented steps being taken to prevent injury.⁹⁹ As the impact of this aspect of the contract of employment has not previously been fully ventilated, it seems incongruous to explore it for the first time in the High Court. There are aspects of the contract of employment that were not substantively discussed in the Court of Appeal. There are quite complex interactions between written employment contracts, enterprise agreements, public service administration legislation, industrial legislation, and OHS and workers' compensation legislation that were not explored and may affect how the employment contract interacts with negligence principles. For example, employment contracts could not generally exclude obligations or benefits contained in industrial, OHS or workers' compensation legislation.¹⁰⁰ In addition, it is not at all clear that if Kozarov was diagnosed with a psychiatric illness affecting her work, she could not have been lawfully moved out of her role as a result of provisions in public service administration legislation, workers' compensation legislation, OHS or industrial legislation.

A further issue raised by Kozarov is whether the effect of the Court of Appeal's findings on causation negates an employer's obligation to enforce a safe system of work and deprives the duty and standard of care of content and effect.¹⁰¹ Kozarov seeks to apply longstanding principles that the employer's duty extends not just to the establishment of a duty to create a safe system of work, but also to the obligation to maintain and enforce the system.¹⁰² Kozarov argues the OPP cannot be excused from fulfilling their duty of care based on any hypothetical wishes of the employee.¹⁰³ The High Court will ultimately resolve these tensions in light of consideration of the employment contract. However, it appears incoherent with the broader OHS and other legislative context for preventative health measures by employers to be overridden by employee wishes.

⁹⁶ Victoria's Submissions (n 63) [47]–[49].

⁹⁷ Ibid [42].

⁹⁸ See above n 83 and accompanying text.

⁹⁹ Kozarov's Reply (n 92) [5].

¹⁰⁰ See, eg, the National Employment Standards in *Fair Work Act 2009* (Cth) pt 2-2 including maximum reasonable work hours (s 62), which may make some of the findings in *Koehler* outdated.

¹⁰¹ Kozarov's Submissions (n 50) [43]–[48].

¹⁰² Ibid [43]–[48] *McLean* (n 17) 155 CLR 306, 313–14.

¹⁰³ Kozarov's Submissions (n 50) [42].

IV Conclusion

The *Kozarov* appeal raises important issues arising from the application of the *Koehler* principles to workplace psychiatric injury cases, particularly those concerning vicarious trauma. These include the interpretation of reasonable foreseeability in cases where an employer has actual knowledge of the risk of psychological injury from vicarious trauma; the role of autonomy and privacy; how to approach factual inferences in counterfactual causation inquiries; and the interaction between employment contracts and an employer's obligation to enforce a safe system of work, and causation. Reflection on the case demonstrates that there are further areas where the *Koehler* principles could be clarified or reassessed either in the *Kozarov* appeal or in future cases. Is there always a need for explicit signs of psychiatric illness from a particular employee, where the employers have clear knowledge of the risk of psychiatric injury to each and every employee due to the traumatic nature of the work?¹⁰⁴ Is it sufficient for an employer to stand by and do nothing to respond to known risks of psychiatric workplace injury by way of a safe system of work, until it is very obvious that injury is manifesting? Has there been too much focus on individual factors that contribute to employee psychiatric injury and too little on well-known systemic workplace factors?¹⁰⁵ To what extent should judges in negligence cases rely on common sense social facts about what employers and employees know and how they behave? *Kozarov* also raises the need to closely examine employment contracts in light of the complex legislative environment that affects employment, and to give proper consideration to coherence between OHS legislative obligations and negligence. At a conceptual level, it is questionable in light of significant contemporary research, to continue to distinguish between physical and psychiatric injury in the workplace. It would be appropriate to recognise a proactive and reactive duty of care to ensure a safe system of work that responds to both kinds of workplace injury (similar to OHS legislative duties) with issues of appropriate reasonable responses in the circumstances dealt with at the breach stage.

¹⁰⁴ There may be an argument that there is sufficient flexibility in the *Koehler* decision to allow this to occur in appropriate circumstances: see above n 12 and accompanying text.

¹⁰⁵ ACL Davies, 'Stress at Work: Individuals or Structures' (2021) *Industrial Law Journal*, wab006 <<https://doi.org/10.1093/indlaw/dwab006>>.

ADVANCE