HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 09 Jul 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M36/2021
File Title:	Kozarov v. State of Victoria
Registry:	Melbourne
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	09 Jul 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M36 / 2021

BETWEEN:

10

ZAGI KOZAROV
Appellant

and

STATE OF VICTORIA
Respondent

20

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. A solicitor works in the Serious Sex Offenders Unit (**SSOU**) of the Office of Public Prosecutions (**OPP**) where she is exposed to material of a graphic sexual nature, including child complainants. Unbeknown to her, she suffers a psychiatric injury, namely, chronic post-traumatic stress disorder (**PTSD**) and a major
30
depressive disorder. The trial judge finds breach of duty in not altering her work allocation, or arranging time out, or rotation to another role, so as to give her time away from the confronting work. The Court of Appeal draws an inference, from an email and surrounding factors, that she would have continued working in the SSOU even if she had been aware of her psychiatric illness and the risks of continuing with the work.

3. Against that background, there are two issues to be resolved on this appeal which

are reflected in the two grounds of appeal,[1] namely:

(a) ***First***, did the Court of Appeal err in overturning an inference drawn by the trial judge, supported by the unchallenged findings of fact at trial, that if the respondent had discharged its duty of care to the appellant, such that the appellant was made aware of her psychiatric injury, she would have been given time away from that confronting work, and thereby not suffered that injury?

(b) ***Second***, did the Court of Appeal err in failing to consider the nature and content of the respondent's duty of care, including that the respondent's
10 duty included a duty to maintain and enforce a safe system of work?

4. By its notice of contention,[2] the respondent seeks to raise a further issue, namely whether the Court of Appeal erred in finding that the respondent had been placed on notice of a risk to the appellant's well-being from the end of August 2011, so as to require by way of a reasonable response steps including a supportive welfare inquiry, offer of referral for occupational screening and adjustment of work.

5. These submissions deal only with the two grounds of appeal. The appellant will respond to the notice of contention in its reply, once the basis of that ground has been articulated by the respondent.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

20 6. The appellant considers that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Judgments of the Court below

7. The reasons of the Court of Appeal are reported: *State of Victoria v Kozarov* (2020) 301 IR 446 (**VSCA Reasons**).[3] The costs reasons are unreported: *State of*

---

1 The notice of appeal is at [**CAB / Tab 11 / 350-351**].

2 [**CAB / Tab 12 / 353**].

3 [**CAB / Tab 5 / 283-329**]. The medium neutral citation is [2020] VSCA 301.

Victoria v Kozarov (No 2) [2020] VSCA 316.[4]

8. The reasons of the trial judge are reported: *Kozarov v State of Victoria* (2020) 294 IR 1 (**VSC Reasons**).[5]

Part V: Facts

9. The findings of fact made by the trial judge were not disturbed by the Court of Appeal. Save for limited inference drawn by the Court of Appeal which founds the first ground of appeal, no factual issues arise.

10. Between June 2009 and April 2012, the appellant worked as a solicitor in the OPP's SSOU. During the course of this employment, she suffered a psychiatric injury, namely, chronic PTSD and a major depressive disorder.

11. The appellant's work in the SSOU required the appellant to constantly deal with confronting material of a graphic sexual nature, including child complainants.[6] The work exposed the appellant (and others) to cumulative trauma and the risk of mental harm, including PTSD.

12. A vicarious trauma policy (**VT Policy**) applied to work in the SSOU.[7] The VT Policy contained information on vicarious trauma, how to identify it and what responses were required, including rotations, relocating files and time outs.[8] The trial judge described knowledge of the VT Policy by staff and management as "desultory".[9]

13. In April 2011, a joint memorandum on staff well-being was prepared and addressed to the appellant's supervisors, Mr Brown[10] and Ms Robinson. It was

4 [**CAB / Tab 7 / 332-335**].

5 [**CAB / Tab 5 / 283-329**]. The medium neutral citation is [2020] VSC 78.

6 VSCA Reasons, [18]-[23].

7 The VT Policy is extracted in large part in the VSC Reasons, [93]-[100]: [**CAB / Tab 1 / 33-37**].

8 VSC Reasons, [93]-[100]: [**CAB / Tab 1 / 33-37**]; VSCA Reasons, [11]-[12]: [**CAB / Tab 5 / 288-289**].

9 VSC Reasons, [149]: [**CAB / Tab 1 / 52**].

10 A pseudonym.

signed by a large body of the SSOU staff, including the appellant. It was headed "Staff Wellbeing" and expressed several concerns, stress-related symptoms experienced by solicitors in the SSOU and suggestions to improve working conditions and to prevent burnout.[11]

14. On 9 June 2011, the appellant resisted the allocation of a particular case, citing her inability to cope with it due to her current file load, forthcoming trials, and preparation for the next three weeks. Nevertheless, the appellant was required to take that case, which involved two young victims who had been sexually abused by their grandfather. The appellant was subsequently informed in August 2011
10 that one of the girls had attempted suicide.[12]

15. In June 2011, Mr Brown prepared a business case for the executive of the OPP identifying the stress of the employees within the SSOU, looming occupational health and safety issues, pressure building up to breaking point and employees suffering burnout due to the nature of the work, excessive workloads and working on weekends and late evenings.[13]

16. On 11 August 2011, the appellant left work through illness.[14]

17. On 22 August 2011, she attended a general practitioner and was referred to psychologist, whom she saw on 23 and 29 August 2011.[15]

18. The appellant made appointments with a psychologist contracted to the OPP,
20 in each of March and August 2011, but on both occasions she was unable to attend.[16]

19. On 29 August 2011, the appellant returned to work and was involved in a dispute

---

[11] VSC Reasons, [153]-[164]: [**CAB / Tab 1 / 53-56**]; VSCA Reasons, [30]-[34]: [**CAB / Tab 5 / 294-296**]. The joint memorandum is discussed in the VSC Reasons, [153]-[164]: [**CAB / Tab 1 / 53-56**].

[12] VSC Reasons, [249]-[256]: [**CAB / Tab 1 / 80-82**]; VSCA Reasons, [39]-[40]: [**CAB / Tab 5 / 297-298**].

[13] VSC Reasons, [170], [172], [175]-[176]: [**CAB / Tab 1 / 59, 60, 60-61**]; VSCA Reasons, [36]: [**CAB / Tab 5 / 297**].

[14] VSCA Reasons, [41]-[42]: [**CAB / Tab 5 / 298**].

[15] VSC Reasons, [262]-[263], [278]: [**CAB / Tab 1 / 83-84, 89**]; VSCA Reasons, [43]: [**CAB / Tab 5 / 298**].

[16] VSC Reasons, [262]: [**CAB / Tab 1 / 83**].

with Mr Brown. At the time, the appellant had not been diagnosed with PTSD. There were email exchanges between the two.[17] The appellant wrote:

> I want to make it clear that I am passionate about continuing my work in the sexual offences unit and I don't want to leave the unit and don't believe that I should be made to feel that I am not coping when the workload calendar clearly reflects my deadlines and workload. I have kept up to date with my work and always remained committed and dedicated to SSOU.

20. As matters transpired, on 9 February 2012, the appellant emailed the respondent on her return from a period of annual and long service leave, requesting that she be moved out of the SSOU as she then realised the serious effect of child abuse cases on her health.[18] It was the respondent's case at trial, and (it appears by reason of its notice of contention) on this appeal, that the respondent's duty of care to the appellant was not engaged prior to receipt of this email.

Part VI: Argument

21. The overturning of the causation finding by the Court of Appeal, the effect of which was that the Court of Appeal held that the appellant would not have accepted time away from her confronting work – whether by way of reduced exposure to the traumatic work by altering work allocation, arranging time out, or arranging temporary and/or permanent rotation to another role – despite her becoming aware of her psychiatric injury, is perverse. It ought be re-visited by this Court, and overturned.

22. The learned trial judge, having heard the case over 12 days and having all the benefits which are enjoyed by a trial judge, handed down detailed reasons, drawing appropriate inferences based on her primary and secondary findings of fact. That analysis ought to have been upheld, rather than having been overturned based on one inference, the overturning of which was not supported by a "real

---

[17] The emails are set out in the VSCA Reasons, [46]-[48]: [**CAB / Tab 5 / 299-302**]. See also, VSCA Reasons, [108]: [**CAB / Tab 5 / 328**].

[18] VSCA Reasons, [54]: [**CAB / Tab 5 / 303-304**].

review"[19] of the evidence at trial.

Ground (1): The Court of Appeal erred in overturning the trial judge's inferential reasoning

23. The Court of Appeal agreed with two important inferences that had been made by the trial judge, namely that, if offered screening in August 2011:

(a) the appellant would have taken up a welfare enquiry;[20] and

(b) screening by a clinician would likely have revealed the appellant's work-related PTSD.[21]

24. Nevertheless, the Court of Appeal did not accept the basis for the further inference of the trial judge, namely that the appellant would have co-operated with rotation out of the SSOU.[22]

25. To so proceed demonstrates two errors on the part of the Court below.

(a) The ***first*** error was the failure to engage in a "real review"[23] of the evidence, such review demonstrating that there was, in fact, no basis for the overturning of the inference. Rather, that inference had been properly made by the trial judge, on the basis of all of the evidence at trial.

(b) The ***second*** error was that the Court overlooked the fact that the appellant's case was not that rotation was the only option available, rather to modify work exposure to the traumatic material – by only considering rotation, the Court misunderstood the way in which the case was run at trial, and on appeal, and the factual findings actually made by the trial judge as to the availability of alternative means of reducing the appellant's exposure to trauma.

26. It is convenient to deal with the second error first. The trial judge concluded,

---

[19] *Lee v Lee* (2019) 266 CLR 129 at 148 [55] per Bell, Gageler, Nettle and Edelman JJ.

[20] VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

[21] VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

[22] cf. VSCA Reasons, [110]: [**CAB / Tab 5 / 328**].

[23] *Lee v Lee* (2019) 266 CLR 129 at 148 [55] per Bell, Gageler, Nettle and Edelman JJ.

at [733],[24] that screening by a clinician (the occurrence of which was the subject of the second inference accepted by the Court of Appeal[25]), and notification to the employer of that outcome (i.e. that the appellant had PTSD) would have prompted "the taking of steps to reduce a staff member's exposure to trauma by altering work allocation, or arranging time out, or rotation to another role, if required". Plainly, the trial judge did not limit herself to rotation out as being the only way in which the risk of psychological injury could have been adverted. Indeed, her Honour went on to conclude that "if action had been taken to reduce the [appellant's] exposure to vicarious trauma" – again, not limiting the means by 10 which that could have been achieved – "by around the end of August 2011, [the appellant] would not have suffered PTSD of the same severity and chronicity".[26]

27. Those findings having been clearly set out, the Court of Appeal erroneously limited itself to rotation as being the only means of preventing or reducing her exposure to explicit material. That is not a fair, or even open, reading of the trial judge's reasons; it is to ignore the (carefully expressed) findings of fact made by her Honour, and set out in the preceding paragraph. Insofar as this explains the vice in the reasoning of the Court of Appeal – where, at [106],[27] their Honours focussed exclusively on rotation out – it is plain that it involves a misreading of the trial judge's reasons.

20 28. And it is not the evidence that was led from Professor McFarlane and Dr Dharwadkar upon which the Court of Appeal seems to have relied.[28] That evidence, which was accurately recorded at [738] of the trial judge's reasons,[29] was to the effect also explained in the preceding paragraph, namely that if "action" had been to reduce the appellant's exposure to vicarious trauma, she would not

---

[24] [**CAB / Tab 1 / 232**].

[25] VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

[26] VSC Reasons, [738]: [**CAB / Tab 1 / 242**]. See also, [739]: [**CAB / Tab 1 / 232**] ("… a system of welfare intervention accompanied by the offer of occupational screening and flexibility regarding case/work allocation and rotations, if offered in combination, would have prevented the [appellant's] severe and chronic PTSD." (emphasis added)).

[27] [**CAB / Tab 5 / 327**].

[28] VSC Reasons, [690]: [**CAB / Tab 1 / 226-227**]. cf. VSCA Reasons, [106]: [**CAB / Tab 5 / 327**].

[29] [**CAB / Tab 1 / 242**].

have suffered PTSD of the same severity and chronicity. That action was not – and could not – be limited to rotation out. Indeed, the trial judge found, and the Court of Appeal ought to have proceeded upon the basis, that any of the alternative, or cumulative, mechanisms available – namely "by altering work allocation, or arranging time out, or rotation to another role"[30] – would have prevented the appellant's severe and chronic PTSD.

29. Moving to the Court of Appeal's failure to engage in the requisite "real review"[31] of the evidence, the Court engaged in an impermissible form of reasoning, depriving the appellant of the reasoned findings of the trial judge, which was based upon all the evidence, the effect of which was that the respondent was, and ought be, liable for the damages suffered by the appellant by reason of the respondent's negligence.

30. The error of the Court of Appeal is manifest by reason of the contradictions and errors in the Court of Appeal's reasoning, it being contrary to common sense and it being contrary to the unchallenged expert evidence led at trial.

31. The contradictions and errors in the Court of Appeal's reasoning are as follows:

(a) assuming co-operation with a significant step – namely a welfare enquiry leading to screening and thus a diagnosis of PTSD – yet not cooperating with a course of action to relieve the PTSD in circumstances;

(b) the consideration of "a willingness to liaise with [a psychologist] and an HR manager about her future role at the OPP after February 2012" as a basis for supporting the appellant taking up the offer of screening in August 2011,[32] yet nevertheless overlooking the very same consideration when considering whether the appellant would have rotated, or otherwise reduced her exposure to trauma, in August 2011;[33] and

[30] VSC Reasons, [733]: [**CAB / Tab 1 / 240**].

[31] *Lee v Lee* (2019) 266 CLR 129 at 148 [55] per Bell, Gageler, Nettle and Edelman JJ.

[32] VSCA Reasons, [96], [105]: [**CAB / Tab 5 / 322-323, 327**].

[33] VSCA Reasons, [108]: [**CAB / Tab 5 / 328**].

(c) the acceptance of the evidence of Professor McFarlane that the appellant was as early as April 2011 suffering from PTSD but not referring to the unchallenged evidence of Professor McFarlane that "a very significant majority of people", with proper explanation, will heed advice and adopt the available interventions when informed of their diagnosis.[34]

32. The trial judge found, and the Court of Appeal accepted,[35] that the appellant would have taken up the offer of screening but this was not considered in the context of the issue of rotation. That is:

(a) the Court of Appeal, in finding the appellant would not have cooperated, did not refer to evidence that the appellant had previously been outspoken about the impacts of her work in the SSOU at staff meetings and during a resilience training session;[36]

10

(b) the appellant was prepared to accept a referral to a psychologist by her general practitioner when unwell in August 2011;

(c) the appellant would have taken up the offer of "work related occupational screening" because it would have been offered "in the context of an acknowledgement of the known risks for SSOU employees";[37] and

(d) the appellant's conduct after 9 February 2012, as a basis for supporting acceptance of rotation in August 2011, was premised on the appellant in August 2011 being "appropriately informed of the rationale for such actions"[38] and advised that "refusal of consent might limit the capacity of the employer to intervene responsibly."[39]

20

33. On the application for special leave to appeal, counsel for the respondent frankly, and correctly, conceded the relevance of the appellant being previously

---

34 VSC Reasons, [406]: [**CAB / Tab 1 / 127**].

35 VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

36 VSCA Reasons, [96]: [**CAB / Tab 5 / 322-323**].

37 VSC Reasons, [732]: [**CAB / Tab 1 / 240**].

38 VSC Reasons, [733]: [**CAB / Tab 1 / 240-241**].

39 VSC Reasons, [678], fn 680: [**CAB / Tab 1 / 223, 224**].

outspoken, including being party to the memorandum to management, and her acceptance of psychological assistance in August 2011, as well as in February and March 2012, as being relevant to factual inquiry required.[40] Indeed, the respondent accepted that it would be "absurd to argue otherwise". But that is the very thing that the Court of Appeal did.

34. Put simply, the Court of Appeal appears to have overlooked, or set to nought, the possibility that the appellant having taken up a welfare enquiry[41] and the screening having revealed the appellant's work-related PTSD[42] (both of which were accepted), that such reality would not have played on her mind at all in
10 determining whether to accept a move away from the traumatic work.

35. It is contrary to common sense that the appellant, as part of the counterfactual, would not have accepted steps to reduce her exposure to trauma when:

(a) the appellant would have known she is injured and has PTSD,[43] in contradistinction to what otherwise occurred, namely that the appellant had no insight into her condition, and thus remained dedicated, loyal, and committed to the work (at a cost to her own welfare), that being a consequence of PTSD suffered by employees;[44]

(b) the respondent acknowledged the risks attached to the work;[45]

(c) the appellant would have been educated about the risks attached to the work[46]
20 and trained on the relevant policies and procedures, such as the VT Policy;[47]

---

[40] *Kozarov v State of Victoria* [2021] HCATrans 101, lines 364-365.

[41] VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

[42] VSCA Reasons, [105]: [**CAB / Tab 5 / 327**].

[43] VSCA Reasons, [100]: [**CAB / Tab 5 / 324**].

[44] Professor McFarlane's evidence referred to:

(a) the lack of insight of those suffering PTSD (VSC Reasons, [707]: [**CAB / Tab 1 / 231**]); and

(b) those suffering from PTSD continuing to work at a cost to self (VSC Reasons, [403], [418]: [**CAB / Tab 1 / 125-126, 131**].

[45] VSC Reasons, [670], [676], [681]: [**CAB / Tab 1 / 221, 223, 224**].

[46] VSC Reasons, [678]: [**CAB / Tab 1 / 223**].

[47] VSC Reasons, [646]: [**CAB / Tab 1 / 213**].

(d) the appellant would have known that continuing to work would cause exacerbation of her PTSD;

(e) on the accepted finding, the appellant would have consented to occupational screening;

(f) following occupational screening, the appellant and respondent would have received recommendations to rotate, take time out and/or change case allocations;[48]

(g) as part of the occupational health and safety system, the staff member would be advised that refusal of consent might limit the capacity of the employer to intervene responsively;[49] and

(h) once the situation and circumstances were explained to the employee, "a very significant majority" would have undertaken the recommended interventions.[50]

36. The effect of the Court of Appeal's finding at [110][51] is that the appellant, fully aware of the above matters, would acknowledge the risks and consent to the risk by continuing to work, thereby obviating the requirement of the respondent to enforce a system of work designed to prevent the foreseeable risk of injury. Not only was that finding not properly open, but the Court of Appeal's finding renders an employer's responsibility nugatory if employees can reject a prescribed system designed to prevent foreseeable injury.

37. The Court of Appeal failed to consider the evidence of Professor McFarlane, to whom no relevant challenge was made, that:

(a) the email sent in August 2011 demonstrated "considerable distress" and "an indication of her state of mind".[52] Each of the Court of Appeal and trial judge

---

48 VSC Reasons, [690]: [**CAB / Tab 1 / 226-227**].

49 VSC Reasons, [678] fn 680: [**CAB / Tab 1 / 327**].

50 VSC Reasons, [406]: [**CAB / Tab 1 / 223, 224**].

51 [**CAB / Tab 5 / 328**].

52 VSC Reasons, [393], [596]: [**CAB / Tab 1 / 122, 195-196**].

referred to the email; it was clear that "all was not well with the [appellant]".[53] The trial judge and Court of Appeal relied upon the email as a "sentinel event", thereby "enlivening the duty", but at the same time the Court of Appeal relied upon the email to overturn the inferential reasoning of the trial judge concerning rotation, without consideration of the breach of duty and the counterfactual scenario consequent upon such breach; and

(b) the nature of PTSD and its consequences readily explained the "wishes" or desire of the appellant to remain at the SSOU (that is, her dedication to her job, which was symptomatic of PTSD). Professor McFarlane opined that workers with PTSD remain dedicated, loyal, and committed to the work[54] and that is the reason why "it cannot be left to the employee" and that active interventions are required to provide self-protective measures.[55]

38. Further, the Court of Appeal erred[56] in finding that the respondent was precluded from rotating the appellant, where there was no evidence that the respondent could not rotate the appellant to another unit or provide time out or change the appellant's file load. Indeed, the trial judge found that "no explanation was provided by the [respondent] as to why it would have been too costly, inconvenient, or impractical to implement a more flexible approach to rotating staff from the SSOU or altering their work or case allocations"[57] and that "no good reason was advanced by the defendant showing why the plaintiff could not have been rotated to another part of the OPP that did not manage sexual offences". Indeed, at trial, the respondent placed no reliance on the contract of employment for the purpose for which was ultimately invoked by the Court of Appeal at [106].[58]

39. In any case, for the reasons explained below in the context of Ground (2),

[53] VSC Reasons, [598]: **[CAB / Tab 1 / 196]**. See also, VSCA Reasons, [64]: **[CAB / Tab 5 / 307]**.

[54] VSC Reasons, [403], [408]: **[CAB / Tab 1 / 125-126, 128]**.

[55] VSC Reasons, [403]: **[CAB / Tab 1 / 125-126]**.

[56] cf. VSCA Reasons, [106]: **[CAB / Tab 5 / 327]**.

[57] VSC Reasons, [688]: **[CAB / Tab 1 / 226]**.

[58] **[CAB / Tab 5 / 327]**.

interventions to prevent injury are, of course, consistent with the express term of the employment contract regarding the respondent's occupational health and safety obligations, namely to identify, assess and control workplace hazards.[59]

40. For these reasons, the Court below erred in concluding that the appellant would not have co-operated with steps taken by the respondent to reduce the appellant's exposure to the traumatic work in which she was involved. The Court of Appeal's finding at [106][60] cannot be maintained. The appeal ought be allowed on that basis alone.

Ground (2): The Court of Appeal erred as to causation

10 41. The effect of [110][61] of the VSCA Reasons is that "the sole real cause"[62] of the appellant's injuries was *her* choice to refuse rotation between August 2011 and February 2012.

42. Self-evidently, the respondent, like all employers, had a duty to prevent the risk of psychiatric injury to the appellant in doing the work required of her. That risk must include the risk of the appellant doing the work, continuing, or wanting to work in the SSOU on child sex abuse cases,[63] where signs and symptoms of mental harm were evident. Irrespective of the appellant's "wishes",[64] the counterfactual encompassed rotating the appellant from the SSOU area, providing time out or changing case allocation. The duty of care in this case (or any other)
20 cannot be subject to the wishes of employees who are at risk of injury. To so find, as the Court of Appeal did, deprives the employer's duty and standard of care of any import — that cannot be, and is indeed inconsistent with, the modern application of employer-employee relationships and responsibilities.

43. To deny recovery in this case would be to deprive the duty and standard of care

---

59 VSC Reasons, [733]: [**CAB / Tab 1 / 240-241**]. See also, [701]: [**CAB / Tab 1 / 229**].

60 [**CAB / Tab 5 / 327**].

61 [**CAB / Tab 5 / 328**].

62 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 524 per Deane J.

63 *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 517 per Mason CJ.

64 VSCA Reasons, [81]: [**CAB / Tab 5 / 317**].

(as found by each of the Court of Appeal and the trial judge) of any content and effect. It would enable it to be defeated by laying the blame at the feet of the employee. In rejecting reliance on the doctrine of *novus actus interveniens* in a different context, Sugarman P explained, in *Chomentowski v Red Garter Restaurant Pty Ltd*,[65] that to allow such a doctrine to operate "in a case where the very duty relied upon is not to expose the plaintiff to the risk of harm by wrongdoers would be not merely to assert a break in a chain of causation but to deny the existence of the duty itself – indeed to deny the possibility of the existence of such a duty". That applies with equal force here. That is, it is contrary
10 to public policy to deny recovery on the basis that an employee can decide not to comply with the duty and standard of care that the employer was required to enforce.[66] In such cases, there is no break in the chain of causation and the Court of Appeal has erred in identifying one.[67] It must be the case, as Professor McFarlane opined in his evidence, that the decision as to how to proceed, and thus the onus, cannot be left to the employee – rather, there must, as part of the operative duty, be active interventions by the employer in providing self-protective measures.[68]

44. To so contend is to merely emphasise what has long been recognised in the context of employer-employee relationship, namely that "the employer's obligation is not
20 merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system".[69] That involves having regard to the fact that the employer has the power to "prescribe, warn and command and enforce obedience to his commands".[70]

45. The reason why there is no such lacuna is that to accept it would be to condone an employer being derelict in its duty to its employees. Or, to adopt the language of

---

[65] (1970) 92 WN (NSW) 1070 at 1075. See also, 1086 per Mason JA. The case was cited with approval in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 517-518 per Mason CJ.

[66] *McLean v Tedman* (1984) 155 CLR 306 at 313 per Mason, Wilson, Brennan and Dawson JJ.

[67] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 517-518 per Mason CJ.

[68] VSC Reasons, [403]: [**CAB / Tab 1 / 125-126**].

[69] *McLean v Tedman* (1984) 155 CLR 306 at 313 per Mason, Wilson, Brennan and Dawson JJ.

[70] *McLean v Tedman* (1984) 155 CLR 306 at 313 per Mason, Wilson, Brennan and Dawson JJ.

Ground (2), to fail to consider "the nature and content of the respondent's duty of care". In ***McLean*** *v Tedman*, where Mason, Wilson, Brennan and Dawson JJ explained:[71]

> It is said … that the alternative system was not practicable because the employees would have refused to accept it or to have carried it out, notwithstanding that its object and effect was to protect them from injury. We would reject the suggestion that the appellant bore the onus of proving specifically that the alternative system was acceptable to the employees and that they would have carried it into effect. In our view once the appellant was able to point to an alternative and safe system which was practicable in other respects and would have obviated the relevant risk of injury, it was for [the employer] to establish that in the circumstances of the case it would have been unable to enforce compliance with the suggested system …

10

46. But the Court of Appeal's analysis at [106][72] falls into that very error, ignoring that, once an alternative and safe system of work has been identified – as it was by the appellant in identifying one, or more, of altering work allocation, or arranging time out, or rotation to another role – it then fell to the employer (here the State) to demonstrate it was unable to secure compliance with that safe system of work. Not only did the State not positively put such a case, but it did not contend – as it appears the Court of Appeal concluded – that the discharge of its duty was somehow relevantly informed by an (alleged) contractual inability to compel the appellant to rotate to another role. In adopting that approach, the Court of Appeal erred: both in its analysis of the facts and in adopting an approach antithetical to that approved in *McLean*.

20

47. Plainly, in these circumstances, the respondent did not – because it could not – contend that the appellant was aware of, and accepted, the risk of injury such as to break the chain of causation, as may be the case based on the well-accepted principle of *volenti non fit injuria*.

30

48. It follows that, in overturning the conclusion as to causation, the Court of Appeal failed to consider the nature and content of the respondent's duty of care, which

[71] (1984) 155 CLR 306 at 314.

[72] [**CAB / Tab 5 / 327**].

ought to have extended, in this case, and generally, to take positive steps to reduce "exposure to triggers for PTSD"[73] causing an employee injury, irrespective of any wishes on her part.

Part VII: Orders sought

49. The appellant seeks the following orders:

(1) The appeal be allowed.

(2) The orders of the Court of Appeal of the Supreme Court of Victoria made on 24 November 2020 and 7 December 2020 be set aside and, in their place, it be ordered that the appeal to that Court be dismissed with costs.

10 (3) The respondents pay the appellant's costs of this appeal.

Part VIII: Time for oral argument

50. The appellant's time for oral argument, including reply, is estimated to be three hours.

Dated: 9 July 2021.

	John T Rush	**John B Richards**
T	(03) 9225 7463	(03) 9225 7137
E	jtrush@vicbar.com.au	johnrichards@vicbar.com.au
	Albert Dinelli	**Gary Taylor**
T	(03) 9225 6909	(03) 9225 7777
E	albert.dinelli@vicbar.com.au	GTaylor@walshchambers.com.au

Counsel for the appellant

Brendon James
Solicitor, Bowman & Knox
03 5222 1222
lawyers@bowmanknox.com.au
Solicitors for the appellant

[73] VSC Reasons, [690]: [**CAB / Tab 1 / 227**].