

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

ZAGI KOZAROV

APPELLANT

AND

STATE OF VICTORIA

RESPONDENT

Kozarov v Victoria
[2022] HCA 12
Date of Hearing: 2 December 2021
Date of Judgment: 13 April 2022
M36/2021

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 24 November 2020 and 7 December 2020 and, in their place, order that the appeal to that Court be dismissed with costs.*
3. *The respondent pay the appellant's costs.*

On appeal from the Supreme Court of Victoria

Representation

J T Rush QC and A M Dinelli with J B Richards QC and G D Taylor for the appellant (instructed by Bowman & Knox)

B W Walker SC with G A Worth and N A Wootton for the respondent (instructed by Russell Kennedy Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Kozarov v Victoria

Negligence – Causation – Workplace injury – Psychiatric injury – Where appellant employed in Specialist Sexual Offences Unit of Victorian Office of Public Prosecutions ("OPP") – Where appellant found to have suffered psychiatric injury resulting from vicarious trauma suffered in employment – Whether respondent failed to take reasonable measures in response to evident signs of psychiatric injury – Whether respondent's failure caused exacerbation of psychiatric injury.

Negligence – Duty of care – Content of employer's duty to employee to take reasonable care to avoid psychiatric injury – Where OPP adopted Vicarious Trauma Policy to protect psychiatric health of employees – Whether appellant needed to show evident signs warning of possibility of psychiatric injury – Effect of decision in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

Words and phrases – "duty of care", "evident signs", "psychiatric injury", "real review", "safe system of work", "sentinel event", "tort", "vicarious trauma".

1 KIEFEL CJ AND KEANE J. The issues for determination in this appeal, the findings of fact, the reasons of the courts below and the arguments of the parties in this Court are summarised comprehensively in the reasons of Gageler and Gleeson JJ. We agree with their Honours that the appeal should be allowed. We write separately because it would be unfortunate if it were to be thought that the formulation and presentation of Ms Kozarov's case is a model to be emulated by others. The unduly complicated way in which this case was pursued on behalf of Ms Kozarov raised for determination issues that did not necessarily arise and which may have resulted in an artificially narrow view of her compensable injuries. The course taken should not be followed as a guide by plaintiffs who come after. Gratefully accepting the summary by Gageler and Gleeson JJ, we proceed directly to state the reasons for our concern.

2 It is apparent that the issues with which this Court is concerned would not have arisen but for what seems to have been a misunderstanding of the effect of this Court's decision in *Koehler v Cerebos (Australia) Ltd*¹. It must be appreciated that *Koehler* was concerned with the extent to which reasonable care for the mental health of an employee may require the employer to be alert for signs that, by reason of the exigencies of the employee's work, the employee is at risk of mental illness. On the undisputed findings of fact in this case, no question truly arose as to whether the employer was duty-bound to be alert in this regard.

3 In light of the undisputed facts, it is clear the officers of the respondent who were responsible for the management of the SSOU were duty-bound to exercise reasonable care to protect Ms Kozarov against risks to her mental health that were actually known to the respondent. That this was so is readily apparent from the terms of the Vicarious Trauma Policy ("the VT Policy") adopted by the respondent for the protection of the psychiatric health of employees within the SSOU before Ms Kozarov's employment commenced. No further warning signs were necessary to establish that the content of the duty of care owed by the respondent to Ms Kozarov included active steps for the care of the psychiatric health of Ms Kozarov and her fellow employees within the SSOU.

Koehler

4 The fundamental proposition for which *Koehler* stands is that the content of the obligation of an employer to take reasonable care for the safety of employees at work cannot be determined in isolation from the obligations which the parties

1 (2005) 222 CLR 44 ("*Koehler*").

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owe each other under their contract of employment². The plurality in *Koehler* emphasised the significance of the circumstance that, in that case, the plaintiff employee had "agreed to perform the duties which were a cause of her injury"³. Their Honours said⁴:

"[The employee's] agreement to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the [employee's] psychiatric health".

5 The plurality went on to say⁵:

"Because the inquiry about reasonable foreseeability takes the form it does, seeking to read an [employee's] obligations under a contract as subject to a qualification which would excuse performance, if performance is or may be injurious to psychiatric health, encounters two difficulties. *First, the employer engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job.* Implying some qualification upon what otherwise is expressly stipulated by the contract would contradict basic principle⁶. Secondly, seeking to qualify the operation of the contract as a result of information the employer *later* acquires about the vulnerability of the employee to psychiatric harm would be no less contradictory of basic principle. The obligations of the parties are fixed at the time of the contract unless and until they are varied." (emphasis added)

6 The formulation and presentation of Ms Kozarov's case was focussed upon the reference in this passage to "evident signs warning of the possibility of psychiatric injury" that oblige the employer to take steps to obviate the risk of such injury. It should be understood, however, that the circumstances of a particular type of employment may be such that the work to be performed by the employee is inherently and obviously dangerous to the psychiatric health of the employee

2 *Koehler* (2005) 222 CLR 44 at 53-54 [21].

3 *Koehler* (2005) 222 CLR 44 at 55 [27].

4 *Koehler* (2005) 222 CLR 44 at 55-56 [28].

5 *Koehler* (2005) 222 CLR 44 at 57-58 [36].

6 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347; *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.

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(just as other kinds of work are inherently and obviously dangerous to the physical health of the employee). In any such case, the employer is duty-bound to be proactive in the provision of measures to enable the work to be performed safely by the employee. The present was such a case.

Ms Kozarov's employment within the SSOU

7 It is not in dispute that the respondent's employment of Ms Kozarov did not proceed on the assumption that Ms Kozarov was capable of doing her job safely without implementation of the protective measures identified, most importantly, in the VT Policy. To the contrary, Ms Kozarov, like other employees in the SSOU, was employed on the footing that the respondent would ensure that she and her fellow employees would be protected by the implementation of the VT Policy from the risks to their mental health that were recognised as being inherent in their roles⁷. It was clear from the terms of the VT Policy that the respondent had a lively appreciation of the serious risk to Ms Kozarov's mental health posed by her work within the SSOU. No further warning signs were necessary to oblige the respondent to take reasonable steps to safeguard Ms Kozarov's mental health.

8 None of the protective measures identified in the VT Policy, or indeed any other reasonably available preventive or protective measures, were implemented by Ms Kozarov's managers within the SSOU. In particular, the primary judge found that, notwithstanding that the VT Policy both required management to "[e]ncourage" staff to rotate to minimise exposure to traumatic work and identified some options for doing so, rotations were neither in place for SSOU staff nor encouraged. In order to be moved into a different section in the Victorian Office of Public Prosecutions, it was necessary, contrary to the VT Policy, for staff to apply internally for jobs that had been advertised⁸.

9 It was not in dispute that Ms Kozarov's mental illness manifested in April 2011 when she began to suffer from post-traumatic stress disorder ("PTSD"). In this Court, the respondent accepted that if Ms Kozarov had been offered occupational screening at the end of August 2011, she would have accepted that offer, and that screening would have revealed Ms Kozarov's mental illness. The primary judge did not make a finding that the failures of the managers of the SSOU to offer occupational screening and to implement the other steps contemplated by the VT Policy caused the onset of Ms Kozarov's PTSD in April 2011, no doubt because her Honour was not invited to do so given the way Ms Kozarov's case was presented. But no other finding would seem to have been appropriate having regard to the primary judge's conclusions as to the causative effect of subsequent failures

7 See *Kozarov v Victoria* (2020) 294 IR 1 at 25-26 [97]-[99].

8 *Kozarov v Victoria* (2020) 294 IR 1 at 20-21 [80].

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to implement any similar steps in the worsening of Ms Kozarov's PTSD, and her additional later diagnosis of major depressive disorder.

10 Had Ms Kozarov's case been formulated so that the respondent's duty of care and its breach of that duty arose from the commencement of Ms Kozarov's employment, there would have been no occasion to consider whether the "sentinel event" at the end of August 2011 should reasonably have conveyed to the respondent's officers that Ms Kozarov's mental health was being adversely affected by the exigencies of her work within the SSOU. Nor would there have been any occasion to enquire whether Ms Kozarov would have been willing to co-operate in rotating her out of the SSOU at some time between August 2011 and February 2012.

11 Because of the way that the case was litigated at trial, however, the attention of the primary judge was focussed upon whether there were "evident signs"⁹ in August 2011 so as to have "enlivened" a duty of care owed by the respondent to Ms Kozarov¹⁰. It seems to have been thought that this focus was required by *Koehler*. That was not the case.

The significance of the "evident signs"

12 As to the "evident signs" of Ms Kozarov's distress referred to by the primary judge, we would be disposed to reach a different view from the Court of Appeal as to the significance of these signs in supporting the finding that the respondent had been placed on notice of a risk to the appellant's mental health by the end of August 2011. Some of these signs were not such as to warrant a conclusion that Ms Kozarov's managers were put on notice of a risk of a deterioration in her mental health, beyond the risk they would have been aware of had they known of the terms of the VT Policy.

13 Importantly, as to the fact that Ms Kozarov signed the staff memorandum of 18 April 2011 complaining of the workload of employees within the SSOU and the stress they were experiencing, it should not be accepted as a general proposition that an employer is duty-bound to treat a demand made by a group of employees for a reduction in their collective workload as an indication, by some or all of them, that their mental health cannot cope with the kind of work they have been engaged to perform and have agreed to perform, so as to require the employer to make enquiries as to the mental health of its dissatisfied employees.

9 *Kozarov v Victoria* (2020) 294 IR 1 at 128-130 [578].

10 *Kozarov v Victoria* (2020) 294 IR 1 at 11 [16], 127 [570], 140 [623].

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14 A demand by employees for a reduction in their workload may or may not be a reasonable demand as a matter of industrial relations; but, of itself and however intemperate the terms in which such a demand might be made, it would not, in general, reasonably be understood by the employer as an indication that the employees are suffering, collectively or individually, impairments to their mental health. The contrary view would make the robust bargaining that is a familiar feature of industrial relations in Australia an occasion of peril for all concerned.

15 As to this case, it is true that in the staff memorandum of 18 April 2011, there were complaints that the excessive workload of employees in the SSOU was causing those employees to suffer unacceptable levels of stress. But it is to be noted that these complaints related exclusively to excessive workloads: there was no complaint of a failure to implement the VT Policy in any respect. It will be understood that, in our view, in the peculiar circumstances of this workplace, the respondent was already in breach of its duty of care to Ms Kozarov; but, as a general proposition, in an "ordinary" workplace a reasonable response by a reasonable employer to complaints of overwork would not, without more, require that the psychiatric health of the employees be assessed.

16 Generally speaking, employees who complain about being overworked want that complaint to be treated seriously by the employer and addressed by measures such as the employment of more employees to share the workload. It is not usually in their interests for such a complaint to be treated by the employer as an indication that they, or some of them, are potential plaintiffs in an action for damages for injury to their mental health. The employer might decide that such a prospect might best be avoided by terminating their employment.

17 In addition, generally speaking, employees intent upon career advancement have a strong and legitimate interest in preserving their privacy so far as their ability to cope with the personal challenges of the work is concerned. It is poignant in this regard that Ms Kozarov, who was actively seeking promotion in the SSOU, kept from her managers the knowledge that she was seeking help from a psychologist. She was, of course, entitled to do so. But for the same reasons of personal autonomy and privacy that entitled her to keep to herself what passed between her and her psychologist, her managers were not duty-bound to seek to elicit this information from her simply by reason of her participation in collective complaints by the staff of the SSOU about being overworked and stressed as a result.

18 As to the "sentinel event" of 29 August 2011, when Ms Kozarov came into dispute with Mr Brown, it might be said that Ms Kozarov overreacted to Mr Brown's criticism of her conduct. On the other hand, Ms Kozarov's response to Mr Brown's criticism may have reflected a level of exasperation with their dealings with each other that was not entirely unjustified. It is necessary to eschew the use of hindsight in one's assessment of whether the terms of Ms Kozarov's emails

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should reasonably have been regarded by Mr Brown as symptoms of psychiatric disturbance as opposed to righteous, albeit excessive, anger.

19 In summary, we do not agree with the reasoning of the Court of Appeal in relation to the significance of the "evident signs"¹¹. But, for the reasons we have given, we do not disagree with the primary judge's conclusion that the respondent was in breach of its duty of care to Ms Kozarov from late August 2011; indeed, in our view, the respondent was in breach of its duty from the commencement of Ms Kozarov's employment. That being so, the respondent's notice of contention does not warrant upholding the decision of the Court of Appeal.

20 We agree with the orders proposed by Gageler and Gleeson JJ.

11 Compare *Victoria v Kozarov* (2020) 301 IR 446 at 470-471 [79]-[83].

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21 GAGELER AND GLEESON JJ. This appeal arises out of proceedings commenced in the Supreme Court of Victoria for damages for the negligent failure of the respondent to prevent psychiatric injury to the appellant in the course of her employment with the respondent as a solicitor in the Specialist Sexual Offences Unit ("the SSOU") of the Victorian Office of Public Prosecutions ("the OPP").

22 In February 2012, the appellant was diagnosed with post-traumatic stress disorder ("PTSD") resulting from vicarious trauma which she had suffered until then in the course of her employment. She was later also diagnosed with major depressive disorder which was found to be a corollary of the PTSD.

23 The trial judge (Jane Dixon J) held the respondent liable to the appellant in negligence and awarded damages in her favour¹². Her Honour found that the respondent had been placed on notice of a risk to the appellant's mental health by the end of August 2011 ("the notice finding"), such as to require the respondent to take steps by way of reasonable response which included offering her rotation out of the SSOU to work in another section of the OPP. Her Honour also found that, at the end of August 2011, the appellant would have accepted an offer of rotation out of the SSOU to work in another section of the OPP ("the rotation finding"), thereby avoiding the exacerbation of her PTSD that occurred between August 2011 and February 2012.

24 Upholding the notice finding but rejecting the rotation finding, the Court of Appeal (Beach and Kaye JJA and Macaulay A-JA) allowed the respondent's appeal¹³.

25 In her appeal by special leave to this Court, the appellant sought to overturn the Court of Appeal's rejection of the rotation finding. The respondent sought to support the Court of Appeal's rejection of the rotation finding and, pursuant to a Notice of Contention filed in the appeal, contended as well that the Court of Appeal erred in failing to reject the notice finding.

26 The appellant's case has been put at every stage on the basis that the respondent's liability arose from its failure to take reasonable measures in response to "evident signs" of the appellant's work-related PTSD. That language was drawn from the observation of the plurality in *Koehler v Cerebos (Australia) Ltd*¹⁴ that an employer engaging an employee to perform stated duties "is entitled to assume, in

12 *Kozarov v Victoria* (2020) 294 IR 1.

13 *Victoria v Kozarov* (2020) 301 IR 446.

14 (2005) 222 CLR 44 at 57 [36].

the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job".

27 The appellant's case continued to be so put despite an unchallenged finding by the trial judge that the nature and intensity of the SSOU's work carried an obvious risk of psychiatric injury from exposure to vicarious trauma¹⁵. Indeed, the risk of serious psychiatric injury was recognised by the respondent in its "Vicarious Trauma Policy", dated January 2008, which identified vicarious trauma as "an unavoidable consequence of undertaking work with survivors of trauma", and as a "process [that] can have detrimental, cumulative and prolonged effects on the staff member".

28 The assumption referred to in *Koehler* should not be taken to detract from the obligation of an employer, in the performance of a tortious duty to maintain a safe system of work, to exercise reasonable care to avoid a foreseeable risk of psychiatric injury to a class of employees. The question that arose in *Koehler*, whether psychiatric injury to the particular employee was reasonably foreseeable, was answered in the affirmative by the Vicarious Trauma Policy.

29 Despite the appellant having taken on an unnecessary evidentiary burden, the appeal to this Court falls to be determined on the issues joined between the parties¹⁶. The appeal therefore turns wholly on this Court's assessment of the two findings of fact on which the parties have chosen to join issue: the notice finding and the rotation finding.

30 For the following reasons, the Court of Appeal did not err in accepting the notice finding, but the Court of Appeal erred in rejecting the rotation finding. Accordingly, the appeal must be allowed.

Background facts

31 The SSOU was set up in April 2007 as a specialist unit within the OPP to prosecute all serious indictable sexual offences heard in the Magistrates', County and Supreme Courts of Victoria whether the victim was an adult or a child. At the relevant times, the SSOU comprised 25 solicitors of varying seniority, together with other professional and administrative staff.

15 *Kozarov v Victoria* (2020) 294 IR 1 at 126 [564].

16 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

Appellant's work in the SSOU

32 In June 2009, the appellant joined the SSOU as a recently admitted solicitor, in a "VPS Grade 4" role. The appellant's work in the SSOU routinely involved interaction with survivors of trauma and exposure to their traumatic experiences including by attending court to instruct in sexual assault trials, meeting with child and adult alleged victims of sexual offences and their families, viewing explicit child pornography and preparing child complainants for cross-examination¹⁷. From time to time, the appellant worked in a more senior "VPS Grade 5" role, in temporary "backfilled" positions within the SSOU¹⁸.

33 In 2009 or 2010, the appellant attended a one-day training workshop at the OPP on the topic of "Understanding and working with victims of trauma" ("the Benstead workshop"). The workshop became a forum for intense discussions about the emotional effects of work in the SSOU. On that occasion, the appellant asserted that there was not enough being done to assist SSOU staff, and she gave examples of how her work was affecting her as a mother.

34 The appellant became increasingly vocal at staff meetings from late 2010 onwards about how work was affecting her daily life, including describing feelings of paranoia about leaving her children with other people, including at activities and with school teachers, her refusal to allow her son to be an altar boy, and dreaming of her children being the complainants in her matters.

35 By 2011, the appellant was known by the manager of the SSOU, Mr Brown, and the deputy manager of the SSOU, Ms Robinson, to be a dedicated, hard-working, ambitious and loyal employee of the OPP. Mr Brown and Ms Robinson also knew that the appellant had upwards of 25 files, when the desirable file load was no more than 20; that she had been experiencing physical health ailments, including the need to take time off for medical appointments from time to time; and that she was a mother of young children and a sole parent.

36 On 7 March 2011, the appellant applied for a permanent promotion to a VPS Grade 5 role at the OPP, either in Principal Prosecutions or in the SSOU. In early May 2011, she accepted an acting VPS Grade 5 role in the SSOU for a fixed term from 28 April 2011 to 15 August 2011.

17 *Kozarov v Victoria* (2020) 294 IR 1 at 17-19 [59]-[72].

18 *Kozarov v Victoria* (2020) 294 IR 1 at 14 [45].

Events between April and August 2011

37 On 18 April 2011, SSOU staff including the appellant signed a memorandum addressed to Mr Brown and Ms Robinson concerning staff wellbeing ("the staff memorandum"). The staff memorandum followed an after-hours meeting in the absence of management at which significant concerns about wellbeing were discussed. The staff memorandum recorded that the SSOU solicitors were experiencing increasing court commitments; that solicitors were working long hours and taking work home on weeknights and on weekends; and that "solicitors ... reportedly experienced a marked increase in the symptoms associated with stress". The memorandum included a lengthy list of stress-related symptoms said to be experienced by SSOU solicitors, as well as a list of "unhealthy behaviour/lifestyle choices" that solicitors reported themselves to have made as a result of the stress-related symptoms.

38 The trial judge found that the appellant's signature on the staff memorandum "notified the [respondent] of ongoing health and well-being impacts" experienced by SSOU staff, including the appellant¹⁹. This finding was supported by expert evidence that the staff memorandum should have alerted the SSOU's managers to the probability that SSOU staff members were suffering from symptoms of PTSD.

39 Her Honour considered that the staff memorandum provided the context in which subsequent signs of risk attaching to the appellant were to be viewed and assessed. Her Honour found that "the [appellant's] demeanour, presentation and conduct both before and after the memo combined to show an accretion of signs that she was being adversely affected by her work", culminating in "the presentation of a staff member who, by around the end of August 2011, needed active intervention and proper supervision to ensure that she was not damaged by her work"²⁰.

40 Conversely, the staff memorandum conveyed the strong desire of SSOU staff to continue their specialisation in sexual offences work. The Court of Appeal accepted that the substance of the memorandum was a complaint that the SSOU solicitors were being asked to do too much in the time reasonably available²¹.

41 The staff memorandum elicited action from Mr Brown, who sent it to senior management at the OPP immediately, requesting a discussion "about the

19 *Kozarov v Victoria* (2020) 294 IR 1 at 139-140 [620].

20 *Kozarov v Victoria* (2020) 294 IR 1 at 140 [621].

21 *Victoria v Kozarov* (2020) 301 IR 446 at 467 [73].

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staff/work situation in the SSOU". In May 2011, Mr Brown sent an email to SSOU staff, summarising actions that he and Ms Robinson intended to take in response to the staff memorandum, including steps to reduce work load within the unit and to recruit more staff. Mr Brown subsequently prepared a business case to senior management which made a strong case for more SSOU staff. The business case revealed Mr Brown's awareness of health risks to which SSOU staff were exposed, in the following terms:

"The staff in SSOU are reporting burn-out and staff turnover is increasing. This is putting further pressure on the unit due to time spent covering sick leave and recruiting and the inevitable delays with filling vacant positions. New staff require training (which they are not receiving at an adequate level) and cannot immediately assume full file loads. The [SSOU] has been operating at staff levels well below the minimum for the past six months due to departures. This has resulted in pressure building up to breaking point. Staff recently conducted a meeting from which a memorandum was produced outlining the effect this is having on their work and health. The current situation is untenable and there are serious OH&S risks looming. These issues have previously been brought to the attention of the Executive on a number of occasions."

42 The staff memorandum coincided with a resilience training session at the SSOU, conducted by a psychologist, Mr Carfi, on 20 April 2011 ("the Carfi session"). Mr Brown recalled that the appellant expressed hypervigilance about paedophiles at the session but was not concerned that she might have "a particular problem". Ms Robinson recalled that the appellant spoke of being with her children, looking around, and regarding everyone as a paedophile, but did not believe that these comments related to mental ill health and they did not make Ms Robinson concerned. Ms Robinson noted that, after the session, she debriefed with Mr Carfi and nothing urgent was flagged as requiring attention.

43 On 9 June 2011, the appellant resisted allocation to her of a new file, citing her inability to cope with it due to her current work load and forthcoming trials. Nevertheless, she was required to take the matter, which concerned two young victims who had been sexually abused by their grandfather ("the Lim matter").

44 On 11 August 2011, during the trial in the Lim matter, the appellant left work early after becoming extremely dizzy in the office of another SSOU solicitor. The appellant was then on sick leave until 29 August 2011. While on sick leave, she was admitted to hospital and had an iron infusion. During this time, the appellant was informed that the more vulnerable of the two complainants in the Lim matter had attempted to commit suicide. Ms Robinson became aware of the suicide attempt but did not raise or discuss it with the appellant. On 22 August 2011, the appellant attended her general practitioner and was referred to a psychologist, Mr Foenander. The appellant attended Mr Foenander the

following day, 23 August 2011, and again on 29 August 2011. On 28 August 2011, while still on sick leave, the appellant applied for promotion to a permanent VPS Grade 5 role in the SSOU.

The "sentinel event"

45 The trial judge accepted that the appellant's presentation at work was "not one-dimensional", and noted the importance of avoiding "litigious hindsight", but found that the appellant's behaviour and presentation leading up to and around the time of the events of 29 August 2011, described below, was "abnormal and out of character"²².

46 In particular, the trial judge found, and the Court of Appeal agreed, that a "sentinel event" occurred on 29 August 2011 when the appellant returned to work after two weeks on sick leave and came into conflict with Mr Brown²³. The conflict arose out of Mr Brown's perception that the appellant had arrived at work late, when in fact she had come in early, and led to an exchange of emails. At midday, the appellant sent Mr Brown a verbose and emotional email. Later, she sent him a further email in response to a short reply from Mr Brown. The first email included a verbatim account of their verbal interactions that morning, contextualised by an account of a conversation two weeks earlier. The appellant's emails included multiple accusations (such as "you have labelled me", "[y]ou have stripped my pride", "[y]ou have shamed me today and made me feel that I have no incentive to work in [the SSOU]" and "[y]ou have made me feel I have no hope for permanent 5"); overgeneralised language (such as repetitious references to what was "always" and "never" the case); and melodramatic claims (such as claims that the appellant had apologised for being on sick leave "as it was beyond my control"; that the appellant had returned "ready to do my normal duties despite my doctor recommending I take further time to recover"; that "I am grateful for all your understanding ... during times my children were sick and I would come into work and continue working as I had no care for them with them sleeping in my office"; and that "you can't tell me where I have failed you despite saying it's always my matters that need covering. Of course they need covering I cannot physically be in more than one matter in court to instruct"). The appellant referred to herself six times as "dedicated", twice as "committed" and twice as "passionate".

47 The gist of the appellant's emails was that, as a result of her interactions with Mr Brown, and principally his suggestion that she was not coping with her work, the appellant was unable to work for the rest of the day. On any view, this

22 *Kozarov v Victoria* (2020) 294 IR 1 at 134 [598].

23 *Kozarov v Victoria* (2020) 294 IR 1 at 134 [598], 136-137 [609]; *Victoria v Kozarov* (2020) 301 IR 446 at 471 [80].

was a disproportionate reaction to the apparent conflict between the appellant and her manager, communicated in a disproportionate way.

Events from September 2011

48 From 29 August 2011 until the end of December 2011, the appellant continued to deal with serious sexual offences in the SSOU and, in November 2011, she accepted a promotion to a permanent VPS Grade 5 role in the SSOU. She took annual leave and long service leave for the whole of January 2012, as had been arranged in October 2011. On 31 January 2012, the appellant sought an extension of her leave from 7 February 2012 (when the appellant had been due to return to work) to 10 February 2012. On 9 February 2012, the appellant requested that she be moved out of the SSOU. Thereafter, there were attempts to return the appellant to work at the OPP in different areas until 20 April 2012. Those attempts were unsuccessful and, consequently, the appellant's employment was terminated.

Notice finding

49 In pursuing its Notice of Contention, the respondent did not seek to challenge the practice of this Court not to disturb concurrent findings of fact "in the absence of special reasons such as plain injustice or clear error"²⁴. In the result, the respondent failed to establish error or injustice of any kind on the part of the trial judge or the Court of Appeal in making and maintaining the notice finding.

50 The trial judge found that "viewed prospectively", by the end of August 2011, a reasonable person in the position of the respondent "would have adverted to the evident signs regarding the [appellant] and observed that she was failing to cope with her allocated work and that her mental health was at risk"²⁵. The signs relevantly included: (1) the appellant's signature to the staff memorandum, which stated staff complaints about health impacts, including psychologically based impacts, caused by the SSOU's work; (2) the appellant's statements at the Benstead workshop, staff meetings and the Carfi session about her hypervigilance and abnormally overprotective parenting practices as a result of her work; (3) the appellant's excessive file load, her case mix, which involved a high proportion of child complainant cases, and her patterns of working late and

24 *Louth v Diprose* (1992) 175 CLR 621 at 633-634. See also *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 334-337 [5]-[12], 344 [42], 378-379 [163]-[166], 410-415 [287]-[293]; *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629 at 660-661 [184]; 244 ALR 205 at 246; *Allen v Chadwick* (2015) 256 CLR 148 at 165-166 [57].

25 *Kozarov v Victoria* (2020) 294 IR 1 at 140 [623].

on weekends and public holidays; (4) the appellant's observable emotional involvement in some cases, such as using a nickname for her "favourite" child complainant; (5) the allocation to the appellant of the Lim matter, a particularly traumatic matter, in the face of her resistance to taking it because she was struggling with her existing case load; (6) the appellant's sudden departure from work on 12 August 2011, during the Lim trial, after an episode of dizziness, and her subsequent time away from work until 29 August 2011; (7) the attempted suicide of one of the child complainants in the Lim case, about which the appellant was informed while she was on leave; (8) the observation of Mr Brown (which he told the appellant was shared by others) that the appellant was not coping with the demands of her work; and (9) the appellant's "highly emotive and agitated reaction" to her disagreement with Mr Brown on 29 August 2011.

51 The Court of Appeal reasoned that the "evident signs" which preceded 29 August 2011 provided context for the disagreement between the appellant and Mr Brown on that day²⁶. Their Honours noted that they were matters of which the respondent was aware at the time of the disagreement. Their Honours considered that, in that context, the appellant's "highly emotional reaction" to her disagreement with Mr Brown, expressed in her emails on 29 August 2011, "would fairly be viewed as a clear indication, which should have been taken as a warning sign to the [respondent], that all was not well with the [appellant's] emotional state at that time"²⁷. The Court of Appeal concluded that the emails were, in effect, a "histrionic" response to Mr Brown's suggestion that the appellant was not coping and that the appellant's "loaded tone ... was such that it was open to the judge to consider that, in the context of the events that had preceded it, the [appellant's] email, and her responses at that time, constituted a 'sentinel event' which ought to have put the [respondent] on notice that the [appellant] was suffering genuine emotional distress as a result of the nature and content of her work"²⁸. It was significant that the emails were very emotional, dense and long, and were written by a hard-working, ambitious, professional solicitor²⁹. Accordingly, the Court of Appeal detected no error in the trial judge's notice finding. Their Honours considered and rejected the suggestion that the finding involved "litigious

26 *Victoria v Kozarov* (2020) 301 IR 446 at 470-471 [79].

27 *Victoria v Kozarov* (2020) 301 IR 446 at 470-471 [79].

28 *Victoria v Kozarov* (2020) 301 IR 446 at 471 [80].

29 *Victoria v Kozarov* (2020) 301 IR 446 at 471 [82].

hindsight", despite the trial judge explicitly advertent to the risks of such impermissible reasoning³⁰.

52 The respondent submitted that the Court of Appeal's affirmation of the notice finding was unreasonable when the so-called "evident signs" were viewed holistically and in the light of the respondent's responses to each matter. In particular, the respondent argued that the "evident signs" did not go beyond what would be expected in the ordinary course of the appellant's work, including the inevitable experiences of vicarious trauma. The respondent contended that the Court of Appeal failed to indicate how the "evident signs" would produce the conclusion that there was a "sentinel event" for PTSD, as opposed to vicarious trauma and its corollary, genuine emotional distress, which everyone in the SSOU necessarily experienced.

53 The notice finding was the preferable conclusion. The "evident signs", described above, signified more than merely the inevitable and universal experience of vicarious trauma in the workplace of the SSOU, in the following ways: (1) the staff memorandum, signed by the appellant, was a plain indication that she might be suffering one or more of the adverse symptoms of vicarious trauma identified in the memorandum; (2) the appellant's statements were reports of her adverse symptoms of vicarious trauma; (3) the appellant was at heightened risk of adverse consequences of vicarious trauma from an excessive work load, and by a propensity to overwork; (4) the appellant was demonstrating an unhealthy emotional involvement in some of her cases; (5) the appellant was demonstrating difficulties managing her existing case load, which were not ameliorated but instead augmented; (6) the appellant took a period of two weeks sick leave during a trial and following an episode of dizziness; (7) the appellant experienced a recent significant traumatic event in the form of the attempted suicide of a child complainant in the trial that she had left to take sick leave; and (8) Mr Brown (and others) had formed the view that the appellant, a dedicated, hard-working, ambitious and loyal employee, was "not coping".

54 Finally, the Court of Appeal did not err in finding that the appellant's "genuine emotional distress" in her interaction with Mr Brown was a significant indicator of possible work-related psychiatric injury. The respondent's submission that such distress in dealings between work colleagues was merely an aspect of the inevitable vicarious trauma experienced in the SSOU was not supported by any finding.

30 *Victoria v Kozarov* (2020) 301 IR 446 at 471 [83].

Rotation finding

55 As it was conducting an appeal by way of rehearing, the Court of Appeal was required to conduct a "real review" of the evidence given at first instance and of the trial judge's reasons for judgment to determine whether the trial judge erred in fact or law³¹. The appellant did not dispute that the Court of Appeal was in as good a position as the trial judge to decide on the proper inference to be drawn about the appellant's probable conduct from the available evidence, giving appropriate respect and weight to the conclusion of the trial judge³².

56 There is some ambiguity in the trial judge's reasons as to whether her Honour considered that, in the appellant's case, the only option that would have avoided the exacerbation of her PTSD between August 2011 and February 2012 was rotation out of the SSOU. However, the trial judge ultimately reached the conclusion that work-related screening of the appellant at the end of August 2011 "would have revealed that the [appellant] needed to be rotated out of the SSOU because of the connection between her work and her symptoms at that time"³³. The trial judge found that there was no good reason why the appellant could not have been rotated to another part of the OPP that did not manage sexual offences³⁴.

57 The trial judge proceeded on the basis that the appellant's rotation from the SSOU required her cooperation, and the Court of Appeal observed that there was no suggestion that the respondent could have compelled the appellant to move to another unit that did not involve work relating to sex offences³⁵. Thus, the appellant was required to prove on the balance of probabilities that, if offered rotation out of the SSOU, she would have accepted it. The trial judge found that the appellant discharged this burden, having regard to the appellant's recognition of her need for professional psychological help in August 2011 and her cooperation with exploring alternative roles at the OPP after 9 February 2012.

31 *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]; *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686 [43]; 331 ALR 550 at 558.

32 *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25]-[26]; *Lee v Lee* (2019) 266 CLR 129 at 148-149 [55].

33 *Kozarov v Victoria* (2020) 294 IR 1 at 164 [742].

34 *Kozarov v Victoria* (2020) 294 IR 1 at 163 [733].

35 *Victoria v Kozarov* (2020) 301 IR 446 at 478 [106].

58 The Court of Appeal noted that the appellant did not give evidence that she would have agreed to rotation out of the SSOU at the end of August 2011³⁶. Their Honours stated that the circumstances of 9 February 2012 relied upon by the trial judge were very different from the circumstances of late August 2011³⁷. Their Honours referred to the appellant's strong reaction to Mr Brown's suggestion that she was not coping and the terms of her second email on 29 August 2011, placing particular reliance on the appellant's statement that she was "passionate about continuing [her] work in the [SSOU]"³⁸. Their Honours also noted that the appellant was by then also seeking promotion in the SSOU and that, on 9 November 2011, she signed a contract for a permanent position there³⁹. On the basis of these matters, "having looked afresh at the evidence, and making due allowance for the advantage of the trial judge", the Court of Appeal formed the view that "it could not be concluded that the [appellant] proved, on the balance of probabilities, that the appropriate exercise of care by the [respondent] would have resulted in the [appellant] accepting a rotation out of the SSOU at any time between the end of August 2011 and February 2012"⁴⁰.

59 The Court of Appeal erred in forming this view. The appellant's cooperative conduct in February 2012, which was with the benefit of insight about the harmful effect of the nature and intensity of her work upon her mental health, while not determinative, was relevant evidence in support of the rotation finding⁴¹. Also relevant, and not adverted to by the Court of Appeal, was the expert evidence of Professor McFarlane, a psychiatrist, that a "significant majority" of people assessed by him and receiving appropriate advice, appropriately communicated, would accept that advice⁴². The substance of this evidence was that it is more common than not for persons to heed medical advice given to them about the cause of a diagnosed serious illness and the means by which that cause could be either

36 *Victoria v Kozarov* (2020) 301 IR 446 at 477 [104].

37 *Victoria v Kozarov* (2020) 301 IR 446 at 478 [108].

38 *Victoria v Kozarov* (2020) 301 IR 446 at 478-479 [108].

39 *Victoria v Kozarov* (2020) 301 IR 446 at 479 [109].

40 *Victoria v Kozarov* (2020) 301 IR 446 at 479 [110].

41 See *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 582 [169].

42 *Kozarov v Victoria* (2020) 294 IR 1 at 89 [406].

mitigated or removed. This was important evidence in support of the rotation finding.

60 The Court of Appeal also failed to advert to the inherent likelihood that a reasonable person advised of the risks of serious psychiatric injury might be expected, on the balance of probabilities, to accept advice to avoid those risks⁴³. It was inherently likely that the appellant, faced with advice as to the need to rotate out of SSOU in order to avoid an exacerbation of her PTSD, would have acted self-interestedly in accordance with the advice. In this regard, it is significant that the appellant gave extensive evidence at the trial and the trial judge rejected the respondent's attacks upon her credibility, did not accept that she was an unsatisfactory witness and found her evidence to be "generally coherent and credible"⁴⁴. The Court of Appeal should have adverted to the real possibility that the appellant's demeanour and credibility may have influenced the trial judge in making the rotation finding⁴⁵.

61 It is true that there was a body of material that tended against the rotation finding. This material included the appellant's commitment prior to February 2012 to the SSOU's work and the social importance of that work; the commitment of SSOU staff, including the appellant, to specialisation in sexual offence work with the accompanying inevitability of vicarious trauma and the limited opportunities for "time out"; the instances of the appellant's applications for promotion within the SSOU as further indication of her strong desire to do the traumatic work involved; and the appellant's apparent outrage at the possibility that Mr Brown thought that the appellant should no longer be in the SSOU. However, these factors were of relatively little weight in assessing the counterfactual, which involved a diagnosis of serious psychiatric illness and appropriate advice. On the whole of the evidence, the trial judge's rotation finding was the preferable one.

Conclusion

62 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside. In their place, it should be ordered that the appeal to that Court be dismissed with costs.

43 See *Rosenberg v Percival* (2001) 205 CLR 434 at 443 [24].

44 *Kozarov v Victoria* (2020) 294 IR 1 at 94-98 [430]-[449].

45 cf *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 179.

63 GORDON AND STEWARD JJ. The appellant, Ms Kozarov, was employed by the respondent, the State of Victoria ("Victoria"), in the Specialist Sexual Offences Unit ("the SSOU") of the Office of Public Prosecutions ("the OPP") between June 2009 and April 2012. During the course of her employment, Ms Kozarov suffered a psychiatric injury, namely, chronic post-traumatic stress disorder ("PTSD") and a major depressive disorder ("MDD"), as a result of her cumulative exposure to vicarious trauma in SSOU casework.

64 There were numerous signs, some more obvious than others, that Ms Kozarov was at risk of harm. She became increasingly outspoken at staff training sessions and monthly team meetings about her hypervigilance and abnormally overprotective parenting practices as a result of her work, she signed a staff memorandum to the SSOU management on staff well-being which identified the stress-related symptoms being experienced by solicitors in the SSOU, she became dizzy at work one day and went on sick leave for two weeks thereafter, and upon her return to work she was involved in a dispute with her manager about whether she was coping with her workload. Ms Kozarov ultimately requested to be rotated out of the SSOU and, after several unsuccessful attempts by the OPP to return her to work in different areas, her employment was terminated.

65 The primary question in this appeal is whether Victoria's failure to provide Ms Kozarov with a safe system of work *caused* the exacerbation and prolongation of her PTSD, and subsequent development of MDD. The answer is "yes".

66 Ms Kozarov's two grounds of appeal challenged, in different ways, the finding of the Court of Appeal of the Supreme Court of Victoria that causation could *not* be made out because Ms Kozarov would not have co-operated with steps to reduce her exposure to trauma in the SSOU. The first ground was directed to whether the Court of Appeal erred in overturning the trial judge's inference that Ms Kozarov would have co-operated with steps to reduce her exposure to trauma in the SSOU. The second ground was directed to whether the Court of Appeal, in finding that causation had not been made out, erred in failing to consider the nature and content of Victoria's duty of care. An ancillary issue, raised by Victoria's notice of contention, was whether Victoria was on notice of a risk of psychiatric injury to Ms Kozarov by the end of August 2011. It is convenient to deal with the notice of contention first and the grounds of appeal second.

Notice of contention: When was Victoria on notice of risk of harm?

67 Victoria was on notice of the risk of psychiatric injury to Ms Kozarov by no later than 29 August 2011. A reasonable person in Victoria's position would have foreseen the risk of injury to Ms Kozarov by that date, a risk that was not

far-fetched or fanciful⁴⁶. This view was correctly reached by the trial judge and by the Court of Appeal, and no sufficient reason has been shown for reaching a different conclusion⁴⁷.

68 The trial judge and the Court of Appeal identified 13 "evident signs"⁴⁸ which were said to have provided notice to Victoria of the heightened risk regarding Ms Kozarov's mental health in connection with her work. The first nine evident signs related to events which had occurred by the end of August 2011. Those signs, as well as other relevant matters which preceded Ms Kozarov's work with the SSOU, may conveniently be divided into three time periods: (1) before Ms Kozarov commenced work with the SSOU (October 2007 to June 2009); (2) after Ms Kozarov commenced work with the SSOU (June 2009 to 29 August 2011); and (3) the "sentinel event" on 29 August 2011. It is necessary to address each time period in turn. The events within each time period, and across time periods, were cumulative.

Before Ms Kozarov commenced work with the SSOU (October 2007 to June 2009)

69 The events in the first time period – before Ms Kozarov commenced work with the SSOU – do not and cannot relate specifically to notice of risk of harm to Ms Kozarov⁴⁹. Rather, they show that Victoria was on notice of the risks to SSOU solicitors *generally* from burnout, work stress and exposure to vicarious trauma. They direct proper attention to matters known to Victoria, namely the nature and extent of the work being done by Ms Kozarov when she commenced work with the SSOU. Put in different terms, they give the matters in the next period, concerning Ms Kozarov's work with the SSOU, a particular complexion.

70 The first event occurred on 11 October 2007 when Ms Drysdale, who then held the title "Project Manager, Sexual Offence Reforms", emailed the group "OPP Sexual Offences", sharing a link to an article on vicarious trauma and saying: "[o]ne of the most often asked questions when I go out to talk about the work of

46 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48, cited in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 [19].

47 See *Allen v Chadwick* (2015) 256 CLR 148 at 166 [57], citing *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 434-435, *Louth v Diprose* (1992) 175 CLR 621 at 633-634 and *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330 at 334-336 [6]-[11], 378-379 [164]-[166], 410-415 [286]-[293].

48 *Koehler* (2005) 222 CLR 44 at 57 [36].

49 See *Koehler* (2005) 222 CLR 44 at 57 [35].

the [SSOU] is – [h]ow do staff look after themselves and cope with such difficult work and how does [the] OPP support staff to do so?".

71 That was followed, in January 2008, with the SSOU publishing, as part of the SSOU manual, a policy document headed "Vicarious Trauma Policy", which (among other things) identified that vicarious trauma was "an organisational and [occupational health and safety ('OH&S')] issue, especially for specialist sex offences staff"; acknowledged that research indicated that vicarious trauma was "an unavoidable consequence of undertaking work with survivors of trauma ... in particular, the survivors of sexual assault"; and stated that vicarious trauma could have "detrimental, cumulative and prolonged effects".

72 Then, in March 2009, after conducting a one-day vicarious trauma workshop for SSOU staff, Ms Benstead, a psychologist, prepared a report for the SSOU which said that "[a]n overwhelming majority of the participants related to the signs and symptoms of [vicarious trauma] and the importance of self-care in their work".

73 Two months later, in May 2009, Ms Penhall, then principal solicitor of the SSOU, sent a memorandum on the topic of staff well-being to Ms Fatouros, then Directorate Manager of the SSOU, which said that "the very nature of the work of prosecuting sex offence[s] can of itself elevate stress levels, [and] solicitors have reportedly experienced a marked increase of late in the symptoms associated with stress" ("the Penhall Memo"). A number of symptoms reported by staff were then listed.

After Ms Kozarov commenced work with the SSOU (June 2009 to 29 August 2011)

74 Ms Kozarov commenced work with the SSOU in June 2009. She dealt with cases of an abhorrent nature involving child rape and offences of gross depravity. She was required to consider, among other things, witness statements and video and audio recorded evidence which contained graphic and disturbing content. In some cases, she was also required to watch explicit child pornography.

75 In September 2009 or March 2010, Ms Kozarov attended at least one of the one-day workshops on vicarious trauma conducted by Ms Benstead, at which she "gave examples of how her work was affecting her as a mother" and "spoke of being uncomfortable even leaving her children with their grandparents, because of thoughts of inappropriate behaviour". By late 2010, Ms Kozarov had become increasingly vocal at monthly staff team meetings, including instigating discussions on how work was affecting the daily lives of staff.

76 Then, on 30 March 2011, Ms Kozarov attended an after-hours staff meeting which was held without management present, at which "significant concerns" were raised about how the SSOU staff were struggling and felt that they did not have

the support they needed. Subsequently, on 18 April 2011, Ms Kozarov signed a staff memorandum which (like the Penhall Memo) set out "stress-related symptoms experienced by solicitors" in the SSOU.

77 Two days later, on 20 April 2011, Ms Kozarov attended resilience training for the SSOU staff run by Mr Carfi, a psychologist who worked for an organisation which provided counselling services that the SSOU staff were entitled to access as part of the OPP's Employee Assistance Programme. At the resilience training, Ms Kozarov spoke "about being alert to paedophiles at swimming pools ... and of her sense of being uncomfortable with people looking at her children".

78 In addition to being vocal in public fora about the effects that the nature of the work was having on her, from June to August 2011 Ms Kozarov communicated directly with her superiors about her workload, specific cases and her health. On 9 June 2011, Ms Kozarov resisted – ultimately unsuccessfully – the allocation to her of what was called "the Lim case", saying that she was unable to handle that case with her existing workload. On 11 August 2011, Ms Kozarov became dizzy at work and afterwards sent an email to another solicitor in the SSOU, copying the then Directorate Manager of the SSOU, Mr Brown⁵⁰, in which she said: "I do not think I will last the rest of the day. I truly am not feeling well." Following the dizziness, Ms Kozarov was on sick leave for two weeks. During her sick leave, she became aware that one of the complainants in the Lim case had attempted to commit suicide, an incident of which the deputy manager of the SSOU was aware. She returned to the office on 29 August 2011.

"Sentinel event" – The dispute with Mr Brown (29 August 2011)

79 On 29 August 2011, the morning of her return to work after two weeks of sick leave, Ms Kozarov had a dispute with her manager, Mr Brown, in which Mr Brown asserted that Ms Kozarov was not coping with her work. Ms Kozarov responded with a series of long, detailed and emotionally charged emails. In those emails, Ms Kozarov explained that it was her "first day back at work after two weeks off on sick leave" and that she had returned "ready to do [her] normal duties despite [her] doctor recommending [she] take further time to recover". In relation to Mr Brown's assertion that she was not coping with her work, Ms Kozarov relevantly said: in a recent file review, Mr Brown had praised her for "not dropping the ball despite all going on in [her] life"; after being allocated the Lim case, she had "worked every night from home and came in on weekends [and] even public holidays to produce the best work possible and keep on top of all [of her] matters"; and Mr Brown could not tell her where she had failed him "despite saying it's always [her] matters that need covering". Ms Kozarov also said in the emails that the dispute with Mr Brown had caused her to feel "discriminated against as a

50 "Mr Brown" is a pseudonym.

single mother working full time" and "shamed", and that she had "no incentive to work in [the SSOU]". In her final email to Mr Brown that day, Ms Kozarov said that while she was "passionate about continuing [her] work in the [SSOU]", she was "very hurt and emotional" and for that reason "could not stay [the] rest of the day" and "felt it best to let the dust settle rather than come back to work emotional".

80 Viewed against the background of the inherently difficult nature of the work carried out by Ms Kozarov and other solicitors in the SSOU, these matters, in combination, ought to have put Victoria on notice that Ms Kozarov was at risk of psychiatric injury in the continued performance of her work by no later than 29 August 2011. Victoria's notice of contention should be dismissed.

Did Victoria's breach of duty cause Ms Kozarov's psychiatric injury?

81 As both of Ms Kozarov's grounds of appeal are directed to the question of causation, they can be addressed together. Victoria's breach of its duty of care *caused* the exacerbation and prolongation of Ms Kozarov's PTSD and subsequent development of MDD. To understand the issue of causation, it is first necessary to address the nature and content of Victoria's duty of care and the way in which it was breached by Victoria's acts and omissions.

Duty of care

82 Victoria had a duty of care to take all reasonable steps to provide Ms Kozarov with a safe system of work⁵¹. The trial judge found that a safe system of work should have included: "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". That finding was not challenged by Victoria in the Court of Appeal or in this Court.

83 Victoria's duty was "not merely to provide [that] safe system of work", but to "establish, maintain and enforce such a system", taking account of Victoria's power, as employer, "to prescribe, warn, command and enforce obedience to [its] commands"⁵². Indeed, as senior counsel for Victoria conceded, the duty required

51 *Koehler* (2005) 222 CLR 44 at 53 [19].

52 *McLean v Tedman* (1984) 155 CLR 306 at 313.

Victoria to do "almost everything" it could "short of forcing rotation" to protect Ms Kozarov from the risk of psychiatric injury.

84 The duty of care not being in dispute, it does not fall for this Court to consider whether "[t]he trial judge and the Court of Appeal ... formulated an unrealistic duty to intrude into an employee's mental well-being", which might raise considerations of privacy, autonomy and dignity of the person⁵³, or whether the content of the duty was defined without properly considering the contract of employment, equity and any applicable statutory provisions⁵⁴. Victoria's submissions to that effect are rejected.

Breach

85 The trial judge found – and it has not been challenged – that Victoria breached its duty of care. Her Honour said that Victoria's "response to the risks to [the] SSOU staff and [Ms Kozarov] was not that of a reasonable employer. [Victoria] failed to implement the steps required to prevent injury to its employees."

86 The trial judge explained that Victoria's breach was in respect of *each aspect* of the duty of care, as follows:

- (1) "[t]he OH&S framework within the SSOU was woefully inadequate and did not include a sufficient program of rigorous training for staff and management about the cumulative impacts of vicarious trauma and the risks of PTSD from the work";
- (2) Victoria did not "provide training to assist management to identify 'red flags' or training on how and when managers should respond to signs of concern, including by conducting welfare checks or referring an employee for optional work related screening";
- (3) "when a welfare inquiry [of Ms Kozarov] was plainly required (around the end of August 2011), this did not occur, and there was no offer of occupational screening"; and
- (4) there was no "system in place to respond to the outcome of any such screening".

53 See *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports ¶81-919 at 70,353 [45]-[46]; *New South Wales v Briggs* (2016) 95 NSWLR 467 at 476 [28], 519 [225].

54 See *Koehler* (2005) 222 CLR 44 at 53 [21].

Duty and breach prior to 29 August 2011

87 During oral argument, senior counsel for Victoria acknowledged that Victoria's duty of care required it to implement a safe system of work from the beginning of the employment relationship, although no liability in negligence was found by the trial judge prior to 29 August 2011. This is likely explained by the trial judge's finding that "[i]f the measures [required to discharge the duty of care] are disaggregated ... neither an active OH&S system, nor training of staff, each taken in isolation, would necessarily have led to prevention of [Ms Kozarov's] injury".

88 The position is thus that Victoria had a duty which existed from the time Ms Kozarov commenced employment with the SSOU in June 2009, and aspects of that duty (for example, relating to the SSOU's OH&S framework and vicarious trauma training) were capable of being breached before 29 August 2011. However, it was not until 29 August 2011, when Victoria failed to intervene by making a welfare inquiry of Ms Kozarov and offering her occupational screening, that Victoria breached its duty in a way which could be said to have *caused* the exacerbation and prolongation of Ms Kozarov's PTSD and subsequent development of MDD.

89 Indeed, subject to Victoria's notice of contention, which has been dismissed, both parties in this Court were content to argue the case on the basis that 29 August 2011 was the critical date.

Causation

90 As to causation, it was not in dispute in this Court that "if [Ms Kozarov] had been offered an appropriate welfare enquiry, she would have taken up that offer" and that "screening by a clinician at or about the end of August 2011 would probably have revealed [Ms Kozarov's] work-related symptoms of PTSD".

91 The only question was whether notification of Ms Kozarov's work-related symptoms of PTSD would have "prompted reduction of [Ms Kozarov's] exposure to trauma by 'altering work allocation, or arranging time out, or rotation to another role, if required', because [Ms Kozarov] *would have co-operated with those steps* if appropriately informed of the rationale for such actions" (emphasis added).

92 Contrary to what the Court of Appeal found, Ms Kozarov *would* have co-operated and her exposure to trauma *would* have been reduced.

93 On a "real review" of the evidence, that inference had a greater degree of likelihood than any competing inference and should not have been overturned by the Court of Appeal⁵⁵.

94 First, the matters relied upon by the trial judge in support of the finding that Ms Kozarov would have accepted an offer of screening *also* support the finding that Ms Kozarov would have co-operated with a reduction of her exposure to trauma. Those matters were that Ms Kozarov: "had previously been outspoken about the impacts of her work in the SSOU at staff meetings and during the resilience training session with Mr Carfi on 20 April 2011"; "was prepared to accept a referral to [a psychologist] by her [general practitioner] when she was unwell in August 2011"; "had been willing to liaise with Mr Carfi and [a human resources] manager about her future role at the OPP after 9 February 2012"; and "agreed to be assessed by Mr Carfi at the request of the OPP in March 2012". It is also inherently implausible that Ms Kozarov would have accepted an offer of screening, leading to a probable diagnosis of PTSD, but then would not have co-operated with a course of action to relieve the PTSD in the circumstances.

95 Second, in the counter-factual where Victoria *had* discharged its duty of care⁵⁶, Ms Kozarov would have responded to an offer to reduce her exposure to vicarious trauma if she: (a) had received "more intensive training" on the risks posed by vicarious trauma and PTSD; (b) had been diagnosed by a clinician with work-related symptoms of PTSD; and (c) had received an offer from management of modified work allocation, time out or rotation. That is very different to what in fact occurred. As such, very little (if any) weight should be given to Ms Kozarov's application for promotion within the SSOU on 28 August 2011 or her strong response to Mr Brown's assertion on 29 August 2011 that she was not coping with her work. As senior counsel for Victoria properly conceded, neither of those matters occurred against the background of Ms Kozarov having been diagnosed

55 *Lee v Lee* (2019) 266 CLR 129 at 148 [55], citing *Fox v Percy* (2003) 214 CLR 118 at 126-127 [25] and *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at 686 [43]; 331 ALR 550 at 558. See also *Masters Home Improvement Pty Ltd v North East Solution Pty Ltd* (2017) 372 ALR 440 at 466 [101], citing, among other cases, *Luxton v Vines* (1952) 85 CLR 352 at 358, *Holloway v McFeeters* (1956) 94 CLR 470 at 480-481, *Plomp v The Queen* (1963) 110 CLR 234 at 242, *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 535-536, *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 284-285 [45] and *R v Baden-Clay* (2016) 258 CLR 308 at 315 [4], 331 [70]-[71].

56 See *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 753 [37], 762 [90], 783 [178]; 381 ALR 375 at 384-385, 396, 424.

with PTSD. Yet, those are the matters on which the Court of Appeal placed principal weight.

96 Third, the unchallenged expert evidence of Professor McFarlane, a clinical psychiatrist and international expert on PTSD, was that "a very significant majority of people", if assessed as having a work-related psychiatric injury, and after having had explained to them what is happening to them and having been given the context, consequences and circumstances of their continued employment in their role, will accept the advice of a clinician in respect of that injury. While this is not conclusive, neither the Court of Appeal nor Victoria identified any reason why, on the counter-factual, Ms Kozarov's response to the diagnosis of work-related symptoms of PTSD would have been different from the response of the very significant majority of people⁵⁷. And, as senior counsel for Victoria properly conceded, this was "a very important consideration".

97 Finally, given that Ms Kozarov *would* have co-operated with the reduction of her exposure to trauma, no barrier to causation is presented by her contract of employment. As the trial judge found, assuming Ms Kozarov's co-operation, "no good reason was advanced by [Victoria] showing why [Ms Kozarov] could not have been rotated to another part of the OPP that did not manage sexual offences". The question of whether Victoria could have *compelled* Ms Kozarov to rotate does not arise, as compulsion would not have been necessary.

Conclusion and orders

98 For those reasons, the orders proposed by Gageler and Gleeson JJ should be made.

57 See *Rosenberg v Percival* (2001) 205 CLR 434 at 443 [24].

- 99 EDELMAN J. The facts and background to this appeal are set out in the reasons of Gageler and Gleeson JJ and Gordon and Steward JJ. I agree with the reasons in both judgments and the orders proposed by Gageler and Gleeson JJ. I seek to add only brief observations about the conceptual approach, and its application in this case, to ascertaining the liability of an employer for negligently failing to take reasonable steps to avoid allocating work, or creating a workplace, that causes or exacerbates psychiatric injury to an employee.

The employer's duty of care to take reasonable steps to avoid psychiatric injury to an employee

The first stage: the existence and scope of a duty of care

- 100 At a high level of generality, the duties that arise in the law of torts fall into two categories: (i) those that arise by "a voluntary undertaking independent of contract"⁵⁸ based upon "an assumption of responsibility"⁵⁹; and (ii) those that are imposed, independently of any undertaking, by a statutory or common law rule.

- 101 An employer's duty of care to prevent psychiatric injury to an employee can arise in either or both categories. If the duty arises by an undertaking based on an assumption of responsibility, express or implied, then neither the existence nor the content of the duty can "be considered without taking account of the obligations which the parties owe one another under the contract of employment"⁶⁰. The "affinity between tort and contract here is strong"⁶¹. The contract might define the entirety of the undertaking or it might shape the content of the undertaking. The undertaking can be more or less extensive than the duty not to cause psychiatric injury that is separately imposed by law.

- 102 No assumed duty to avoid psychiatric injury was put in issue in these proceedings. The case was argued as one based only upon the imposed duty to take reasonable steps to avoid allocating work, or creating a workplace, that causes or

58 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528, quoting *Pollock's Principles of Contract*, 13th ed (1950) at 140.

59 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 528-529. See *Swick Nominees Pty Ltd v LeRoi International Inc [No 2]* (2015) 48 WAR 376 at 443-444 [370]-[373].

60 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 53 [21].

61 Brown, "Assumption of Responsibility and Loss of Bargain in Tort Law" (2006) 29 *Dalhousie Law Journal* 345 at 354.

exacerbates psychiatric injury to an employee. The employment contract was not even tendered in evidence at trial.

103 By contrast with the assumed duty, the employer's duty to ensure the "[p]rotection of mental integrity from the unreasonable infliction of serious harm"⁶² is imposed by law and is not dependent upon any undertaking by the employer. In this sense, it is no different from the employer's duty to protect an employee's physical integrity from the unreasonable infliction of harm. It has long been recognised that psychiatric injury "is just as really damage to the sufferer as a broken limb ... [and] equally ascertainable by the physician"⁶³. It was this imposed duty that Ms Kozarov's case was based upon, with her plea that the respondent's liability arose as a consequence of the "reasonably foreseeable risk of [Ms Kozarov] suffering psychiatric injury whilst undertaking her employment duties".

104 Because there is no negligence "in the air"⁶⁴, the imposed duty to take reasonable steps to avoid allocating work, or creating a workplace, that causes or exacerbates psychiatric injury to an employee will only be "engaged" when there is a reasonably foreseeable risk of psychiatric injury to the employee of the general kind that occurred⁶⁵. Whether a risk of psychiatric injury is reasonably foreseeable will depend upon (i) "the nature and extent of the work being done by the particular employee" and (ii) any "signs given by the employee concerned"⁶⁶.

The second and third stages: breach and causation

105 The existence of a duty of care owed to the employee is the first stage of the enquiry. If a duty exists, and the psychiatric injury is within the scope of that

62 *Tame v New South Wales* (2002) 211 CLR 317 at 379 [185].

63 *Owens v Liverpool Corporation* [1939] 1 KB 394 at 400. See also Goold and Kelly, "Who's Afraid of Imaginary Claims? Common Misunderstandings of the Origin of the Action for Pure Psychiatric Injury in Negligence 1888-1943" (2022) 138 *Law Quarterly Review* 58.

64 *Martin v Herzog* (1920) 126 NE 814 at 816, quoting Pollock, *The Law of Torts*, 10th ed (1916) at 472; *Chester v Waverley Corporation* (1939) 62 CLR 1 at 12; *Bourhill v Young* [1943] AC 92 at 101-102. See also *Palsgraf v Long Island Railroad Co* (1928) 162 NE 99 at 101; *Bourhill v Young* [1943] AC 92 at 108, 116-117; *Seltsam Pty Ltd v McNeill* (2006) 4 DDCR 1 at 4 [4]-[5].

65 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 57 [35].

66 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 57 [35].

duty, the focus will then turn to an enquiry as to breach: having regard, on the one hand, to the magnitude of the possible harm and the degree of probability of its occurrence and, on the other hand, to the burden of alleviating action, what steps would a reasonable person in the position of the employer have taken in response⁶⁷? This was the subject of the respondent's notice of contention in this Court.

106 If it is concluded that an employer is in breach, the steps that should have been taken to avoid or reduce the risk of psychiatric injury will inform the question of causation. This question will usually require asking whether the failure by the employer to take reasonable steps was a necessary condition for the psychiatric injury that the employee suffered. In other words, would the existence or extent of the psychiatric injury not have occurred but for the employer's breach? This issue was the subject of Ms Kozarov's grounds of appeal. No other issue, such as remoteness or scope of liability, arises on this appeal.

Duty, breach, and causation in this case

107 In the circumstances of this case, psychiatric injury to *every* employee of the Specialist Sexual Offences Unit ("the SSOU") of the Victorian Office of Public Prosecutions ("the OPP") was a reasonably foreseeable consequence of the nature and extent of the work undertaken. The Vicarious Trauma Policy of the OPP, to which the primary judge referred⁶⁸, cited research indicating that vicarious trauma "is an *unavoidable consequence of undertaking work with survivors of trauma*". But even without this policy, the very nature and extent of the work of the SSOU were such that the respondent was correct to concede on this appeal that at all relevant times the risk of psychiatric injury was such that it owed a duty of care to Ms Kozarov.

108 By its notice of contention, however, the respondent alleged that it had not breached its duty of care. In considering the matters relevant to determining the reasonableness of the respondent's conduct – the magnitude of the possible harm and the degree of probability of its occurrence on the one hand, and the burden of taking precautions on the other – a critical matter is the point in time when the reasonableness of the respondent's conduct falls to be assessed.

109 At the moment that Ms Kozarov commenced work in the SSOU in June 2009, the nature of the work undertaken in the SSOU required immediate precautions in relation to every employee in that unit. As Gordon and Steward JJ observe, the primary judge noted that these precautions included an active

⁶⁷ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48. Compare *Wrongs Act 1958* (Vic), ss 48-49, which, relevantly, do not apply to claims excluded by s 45.

⁶⁸ *Kozarov v Victoria* (2020) 294 IR 1 at 23 [94] (emphasis of primary judge).

Occupational Health and Safety framework and more intensive training for managers and staff about the risk posed by vicarious trauma and post-traumatic stress disorder in order to identify and to respond to signs of concern. But the primary judge concluded that neither of these measures, at least in isolation, would necessarily have prevented Ms Kozarov's psychiatric injury. It is possible that the measures, in combination, might have prevented Ms Kozarov's psychiatric injury but her case was not run on that basis either as a primary or alternative case. Her case focused only upon the greater precautions that were required to be taken by her employer at the later point in time of August 2011, and the correspondingly increased likelihood that these greater precautions would have prevented exacerbation of her psychiatric injury.

110 A reasonable person in the position of Ms Kozarov's employer would have been aware of the risks that existed from the commencement of any work in the SSOU. As more "evident signs" of psychiatric injury to Ms Kozarov emerged, that reasonable person would have appreciated that there was a considerable increase in the likelihood and the seriousness of a psychiatric injury to her or, if psychiatric injury already existed, a considerable increase in the likelihood of it becoming worse. Correspondingly, the extent of alleviating precautions against the risk of harm that would reasonably be expected to be taken by the respondent in relation to Ms Kozarov also increased. At the very least, these increased precautions included, as the primary judge found, a welfare enquiry of Ms Kozarov⁶⁹.

111 It may be that, by the end of August 2011, the foreseeable risk of causing or exacerbating psychiatric injury was so great, and the likely extent of that foreseeable injury was so serious, that reasonable precautions would have included compulsory rotation of Ms Kozarov to a different part of the OPP that did not prosecute sexual offences. Putting to one side whether even at common law an employee can waive their rights to a safe place of work, an employer will not comply with the common law duty to ensure a safe place of work by acquiescing in the refusal of an employee to be rotated from a position that, by reason of some physical characteristic of the employee, involves a high risk of serious physical injury to that employee. Psychiatric injury is no different.

112 Ultimately, it is unnecessary in this case to decide whether the reasonable precautions of the respondent required compulsory rotation. For the reasons given by Gageler and Gleeson JJ and Gordon and Steward JJ, the better view of the counterfactual based on lawful conduct⁷⁰ is as follows: if the respondent had taken the reasonable steps of making a welfare enquiry and offering Ms Kozarov a

69 *Kozarov v Victoria* (2020) 294 IR 1 at 156 [704].

70 *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 753 [37], 762 [90], 775 [151], 783 [178]; 381 ALR 375 at 384-385, 396, 413-414, 424; *Talacko v Talacko* (2021) 95 ALJR 417 at 429 [51]; 389 ALR 178 at 191.

referral for occupational screening then she would have accepted that offer and, with the benefit of screening by a clinician, the screening would probably have revealed that she had symptoms of post-traumatic stress disorder, with the result that Ms Kozarov would have agreed to a rotation out of the SSOU and her psychiatric injury would not have been exacerbated.

Conclusion

113

I agree with the orders proposed by Gageler and Gleeson JJ.

