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PUTTING EMPLOYERS ON NOTICE: *KOZAROV V VICTORIA* (2022) 399 ALR 573

I Introduction

Since the late 1990s, claims for psychiatric injury against employers have continued to increase in prevalence.[1] However, despite the cultural and regulatory shift towards recognition of mental health issues,[2] research suggests that 'employees typically suffer in silence' in the workplace.[3] Studies have found that employees are 'significantly more likely to under-report' mental illnesses compared to other health conditions,[4] and that mental illness continues to 'remain hidden and largely unmanaged in the workforce'.[5] This phenomenon of under-reporting may be attributed to factors such as the prevailing stigma surrounding mental illness,[6] or the fear of losing one's job.[7]

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1 Robin Young, 'Stress Related Injuries Also Relevant as OHS Consideration' (2010) 62(8) *Keeping Good Companies* 485, 485.

2 Productivity Commission, *Mental Health* (Report No 95, 30 June 2020) vol 2, 301 ('*Productivity Commission Mental Health Report*').

3 Teladoc Health, 'Tackling a Global Mental Health Crisis in the Workplace: How Employees View Mental Health at Work and What Employers Can Do To Help' (Paper, 2019) 1.

4 Prashant Bharadwaj, Mallesh M Pai and Agne Suziedelyte, 'Mental Health Stigma' (2017) 159(1) *Economics Letters* 57, 58. See also Ruth E Marshall et al, 'Mental Health Screening amongst Police Officers: Factors Associated with Under-Reporting of Symptoms' (2021) 21(1) *BMC Psychiatry* 135:1–8.

5 Young (n 1) 486. See also: Anthony LaMontagne, 'Burnt Out, Hate Your Job? Well, the Going Just Got Tougher', *Sydney Morning Herald* (online, 27 December 2009) <https://www.smh.com.au/politics/federal/burnt-out-hate-your-job-well-the-going-just-got-tougher-20091226-lfn8.html>; Felix O Chima, 'Depression and the Workplace: Occupational Social Work Development and Intervention' (2005) 19(4) *Employee Assistance Quarterly* 1, 1.

6 Rina Hastuti and Andrew R Timming, 'An Inter-Disciplinary Review of the Literature on Mental Illness Disclosure in the Workplace: Implications for Human Resource Management' (2021) 32(15) *International Journal of Human Resource Management* 3302, 3302, 3307.

7 Young (n 1) 486.

Employers have a non-delegable common law duty of care to take all reasonable steps to provide a safe system of work.[8] This involves taking steps to avoid exposing employees to unnecessary risks of injury.[9] Injury relevantly includes physical injury as well as psychiatric injury. To prove a claim of negligence for work-related psychiatric injury, an employee must establish that their employer: (1) was placed on notice of a reasonably foreseeable risk of psychiatric injury;[10] (2) breached their duty of care by failing to take reasonable steps to reduce the risk;[11] and (3) the breach caused the employee's psychiatric injury.[12]

Previously, the leading decision in this area was *Koehler v Cerebos (Australia) Ltd* ('*Koehler*'),[13] where the High Court of Australia effectively placed the onus on employees to establish the existence of evident warning signs that place the employer on notice of the reasonably foreseeable risk of injury.[14] The plurality in *Koehler* stated:

> [T]he 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.[15]

The complexities in establishing work-related psychiatric injury caused by the negligence of the employer were highlighted in the recent High Court decision of *Kozarov v Victoria* (2022) 399 ALR 573 ('*Kozarov*'), which sought to distinguish *Koehler*. Whilst negligence cases must be considered against their own facts,[16] *Kozarov* provides useful clarification on employer obligations with respect to preventing psychiatric injury — particularly when the nature of work presents an obvious risk to psychiatric health. Considered in light of an increased focus on mental wellbeing in Australian workplaces,[17] the High Court decision in *Kozarov* puts employers on notice that they must take risks to the psychiatric health of their employees seriously.

8 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 53 [19] ('*Koehler*').

9 *Kozarov v Victoria* (2020) 294 IR 1, 102 [467] (Supreme Court of Victoria) ('*Kozarov (Supreme Court)*').

10 *Kozarov v Victoria* (2022) 399 ALR 573, 577 [12] (High Court of Australia) ('*Kozarov*').

11 Ibid 592–3 [85]–[89].

12 Ibid 591 [81], 593–4 [90]–[97].

13 *Koehler* (n 8).

14 Ibid 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

15 Ibid.

16 *Kozarov (Supreme Court)* (n 9) 8 [2].

17 *Productivity Commission Mental Health Report* (n 2) vol 2, 301.

II Background and Litigation History

Zagi Kozarov commenced proceedings in the Supreme Court of Victoria against her employer, the State of Victoria, for psychiatric injury she suffered in the course of her employment. At first instance, Jane Dixon J found in favour of Kozarov, awarding her damages for pain and suffering, past economic loss, and loss of future earnings, totalling to $435,000.[18] This award was overturned by the Victorian Court of Appeal, and subsequently restored by the High Court.

A *Background Facts*

Kozarov was employed by the State of Victoria as a solicitor in the Victorian Office of Public Prosecutions' ('OPP') Specialist Sexual Offences Unit ('SSOU') between June 2009 and April 2012.[19] Kozarov worked on 'cases of an abhorrent nature involving child rape and offences of gross depravity', including graphic content, explicit child pornography and witness statements.[20] In February 2012, Kozarov was diagnosed with post-traumatic stress disorder ('PTSD') as a result of her 'cumulative exposure to vicarious trauma in SSOU casework'.[21] Additionally, Kozarov was later diagnosed with major depressive disorder ('MDD') as a corollary of the PTSD.[22] Kozarov claimed that her injuries were caused by the 'ongoing' and 'repeated exposure to a high volume of child sexual offence cases' during her employment in the SSOU.[23] She alleged that there was an 'unsafe system of work' and a failure by the OPP 'to take reasonable steps to protect her from harm'.[24]

Kozarov's case centred upon the argument that '[t]here were numerous signs … that [she] was at risk of harm'.[25] Kozarov relied upon the following 'evident signs'[26] to argue that the State of Victoria was placed on notice of a reasonably foreseeable risk of injury:

(1) she signed an SSOU staff memorandum to management 'detailing [the staff members'] urgent concerns about the pressures and workload in the unit';[27]

(2) she was 'outspoken at staff meetings … regarding her hypervigilance and abnormally protective parenting practices as a result of her work';[28]

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18 *Kozarov (Supreme Court)* (n 9) 171 [777].

19 *Kozarov* (n 10) 587 [63] (Gordon and Steward JJ).

20 Ibid 590 [74].

21 Ibid 587–8 [63].

22 Ibid.

23 *Kozarov (Supreme Court)* (n 9) 9 [4].

24 Ibid 9 [5].

25 *Kozarov* (n 10) 588 [64].

26 *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

27 *Kozarov (Supreme Court)* (n 9) 9 [8], 129 [578(a)].

28 Ibid 129 [578(b)].

(3) she was 'known to be carrying an excessive file load … involving a high proportion of child complainant cases' and 'frequently took work home';[29]

(4) she displayed 'observable signs of emotional involvement in some of her cases';[30]

(5) she avoided taking on a child incest case ('Lim') 'because she was struggling with her existing case load';[31]

(6) her manager, Mr Brown, knew she left work 'suddenly during the Lim trial after an episode of dizziness' and was subsequently absent from work for 17 days;[32]

(7) whilst on leave, she became aware that the child complainant in the Lim case attempted suicide, 'causing her distress';[33]

(8) when she returned to work, Mr Brown 'told her that he and others believed she was not coping in the SSOU' and that she became 'less reliable';[34]

(9) she had a 'highly emotive and agitated reaction' to her disagreement with Mr Brown following his comments about her not coping;[35]

(10) her professional relationship with Mr Brown ruptured, and she expressed 'disappointment in her former mentor';[36]

(11) her 'personality and demeanour were observed to have changed' and management saw her in tears at times;[37]

(12) she called a meeting with the OPP Legal Practice Manager to 'discuss grievances' and 'sought improvements on … junior staff being exposed to challenging material';[38] and

(13) she applied to combine her annual leave and long service leave, then applied to extend her long service leave and ultimately communicated she was unable to return to work at the SSOU 'because of how the work was affecting her'.[39]

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29 Ibid 129 [578(c)].

30 Ibid 129 [578(d)].

31 Ibid 129 [578(e)].

32 Ibid 129 [578(f)].

33 Ibid 129 [578(g)].

34 Ibid 129 [578(h)].

35 Ibid 129 [578(i)].

36 Ibid 129 [578(j)].

37 Ibid 130 [578(k)].

38 Ibid 130 [578(l)].

39 Ibid 14 [42], 130 [578(m)].

B *Supreme Court of Victoria*

The trial judge found in favour of Kozarov. Justice Dixon held that the State of Victoria was on notice as to risks to Kozarov's mental health,[40] which required it to implement 'specific measures or a specific system of work in response to the risk'.[41] The reasonable steps identified were formulated based on the SSOU's own Vicarious Trauma Policy which was never properly implemented or followed.[42] They included making a welfare inquiry,[43] and offering Kozarov a rotation to a position outside of the SSOU to prevent further exposure to sexual offence cases.[44] Justice Dixon found that

> [v]iewed prospectively … a reasonable person in the position of [the State of Victoria] would have adverted to the evident signs … and observed that she was failing to cope with her allocated work and that her mental health was at risk.[45]

As the reasonable steps identified were not taken, Dixon J held that the State of Victoria breached its 'duty to avoid foreseeable harm to an employee's mental health'.[46] Further, her Honour also held that if such reasonable steps had been taken, Kozarov would have accepted an offer of rotation, preventing the further exacerbation of her PTSD and MDD, ultimately satisfying the element of causation.[47]

C *Victorian Court of Appeal*

The State of Victoria sought leave to appeal Dixon J's decision on two grounds: (1) that the trial judge erred in finding that the State of Victoria was on notice as to the risk of injury ('notice finding');[48] and (2) that the trial judge erred in finding that Kozarov would have accepted an offer of rotation had one been made ('rotation finding').[49]

Regarding the first ground, the State of Victoria argued that the trial judge's decision 'involved impermissible "litigious hindsight"' by erroneously failing to consider the evidence in the context of what was known at the time.[50] However, the Victorian Court of Appeal dismissed the first ground of appeal, upholding the

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40 Ibid 128–30 [578]–[579], 140 [622].

41 Ibid 140 [624].

42 Ibid 9 [7].

43 Ibid 148 [660].

44 Ibid 154 [691].

45 Ibid 140 [623].

46 Ibid 133 [593].

47 Ibid 163 [733], 164 [739].

48 *Victoria v Kozarov* (2020) 301 IR 446, 450 [7] ('*Kozarov (Court of Appeal)*').

49 Ibid 450 [8].

50 Ibid 466 [70], citing *Koehler* (n 8) 55–6 [28] (McHugh, Gummow, Hayne and Heydon JJ).

trial judge's notice finding.[51] Whilst accepting that each of the 13 evident signs '[w]hen viewed in isolation … might not individually constitute relevant notice', the Court of Appeal held that Dixon J took the correct approach by considering the matters in combination and in the context of the work performed by Kozarov.[52] For example, the Court of Appeal reasoned that the evident signs provided context for the disagreement between Kozarov and her manager, Mr Brown.[53] In this context, the Court of Appeal stated that Kozarov's highly emotional reaction to the disagreement 'did not occur in isolation or "out of the blue"', but rather 'in the context of the nature, content and volume of the workload that she was bearing'.[54] Thus, her reaction 'would fairly be viewed as a clear indication, which should have been taken as a warning sign to [the State of Victoria], that all was not well with the plaintiff's emotional state at that time'.[55]

However, the appeal was allowed on the second ground relating to the rotation finding, overturning the first instance decision and ruling in favour of the State of Victoria. Central to the Court of Appeal's finding was the fact that Kozarov did not give evidence that she would have agreed to an offer of rotation out of the SSOU.[56] Thus, the Court of Appeal held that the trial judge's conclusion that Kozarov would have accepted a rotation offer involved a 'significant degree of hypothesis' and was 'based on inferences'.[57] Their Honours placed particular reliance upon Kozarov's statement that she was 'passionate about continuing [her] work' in the SSOU,[58] as well as the fact that she was seeking promotion and had signed a contract for a permanent position in the SSOU.[59] Thus, the Court of Appeal concluded that Kozarov failed to prove on the balance of probabilities 'that the appropriate exercise of care by [the State of Victoria] would have resulted in [Kozarov] accepting a rotation out of the SSOU'.[60]

III High Court Decision

Kozarov appealed to the High Court, seeking to overturn the Court of Appeal's decision to allow the appeal. The State of Victoria, by Notice of Contention, contended that the Court of Appeal erred in upholding the notice finding.[61] By way of four separate judgments, comprising: (1) Kiefel CJ and Keane J; (2) Gageler and

51 Ibid 470 [76].

52 Ibid.

53 Ibid 470–1 [79].

54 Ibid 471 [79].

55 Ibid.

56 Ibid 477 [104].

57 Ibid.

58 Ibid 478 [108].

59 Ibid 479 [109].

60 Ibid 479 [110].

61 *Kozarov* (n 10) 579 [25].

Gleeson JJ; (3) Gordon and Steward JJ; and (4) Edelman J, the High Court unanimously allowed the appeal, deciding in favour of Kozarov and setting aside the Court of Appeal's orders.

A *The Notice Finding*

With respect to the notice finding, the High Court found that the State of Victoria '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',[62] and that 'no sufficient reason … [was] shown for reaching a different conclusion'.[63] Whilst the High Court unanimously upheld the notice finding, each separate judgment offered differing reasons.

The High Court (with the exception of Gordon and Steward JJ) clarified that the 'assumption … in *Koehler* should not be taken to detract from the obligation of an employer … to exercise reasonable care to avoid a foreseeable risk of psychiatric injury',[64] and where 'the nature and intensity of the SSOU's work carried an obvious risk of psychiatric injury from exposure to vicarious trauma',[65] the question of reasonable foreseeability is answered in the affirmative.[66]

Justices Gageler and Gleeson upheld the notice finding as the 'preferable conclusion'.[67] Their Honours referred to the evident signs, notably Kozarov's 'genuine emotional distress'[68] following her dispute with Mr Brown, which 'was a significant indicator of possible work-related psychiatric injury'.[69] Their Honours further commented that Kozarov took on 'an unnecessary evidentiary burden' on the issue of foreseeability by attempting to establish 'evident signs' as required by *Koehler*.[70] Justices Gordon and Steward upheld the notice finding with reference to the 'inherently difficult nature of the work carried out by Ms Kozarov', which 'ought to have put [the State of Victoria] on notice that Ms Kozarov was at risk of psychiatric injury in the continued performance of her work'.[71] However, their Honours did not comment on the principles from *Koehler*.

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62 Ibid 584 [49] (Gageler and Gleeson JJ). See also 578–9 [19] (Kiefel CJ and Keane J), 588 [67] (Gordon and Steward JJ), 598 [113] (Edelman J).

63 Ibid 588 [67] (Gordon and Steward JJ).

64 Ibid 580 [28] (Gageler and Gleeson JJ).

65 Ibid 579 [27] (Kiefel CJ and Keane J).

66 See above nn 64–5. See also ibid 596 [107] (Edelman J).

67 *Kozarov* (n 10) 585 [53] (Gageler and Gleeson JJ).

68 Ibid 584 [51].

69 Ibid 585 [54].

70 Ibid 580 [29]. See also *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

71 *Kozarov* (n 10) 591 [80] (Gordon and Steward JJ).

Whilst Kiefel CJ and Keane J agreed with the orders proposed by Gageler and Gleeson JJ, their Honours did not agree with the significance the Court of Appeal placed on the evident signs to establish notice.[72] Their Honours warned that an employee's mere 'demand … for a reduction in their collective workload' should not be taken as a 'general proposition that an employer is duty-bound … to make enquiries as to [their] mental health'.[73] Their Honours considered that, '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 employees be assessed'.[74] Nevertheless, their Honours agreed with the notice finding, given that the risks to Kozarov's mental health were 'readily apparent from the terms of the Vicarious Trauma Policy'.[75]

Finally, Edelman J delivered a separate judgment — agreeing with the reasoning of Gageler and Gleeson JJ, and Gordon and Steward JJ — providing additional guidance as to the conceptual approach that ought to be taken in this area of law.[76] Justice Edelman agreed that the State of Victoria was on notice, as a 'reasonable person in the position of [the State of Victoria] would have been aware of the risks'.[77] In making this finding, Edelman J referred to the Vicarious Trauma Policy,[78] the 'very nature and extent of the work of the SSOU',[79] and the '"evident signs" of psychiatric injury'.[80] For Edelman J, the 'foreseeable risk … was so great', and the 'likely extent of that foreseeable injury was so serious', that a reasonable response from the State of Victoria would have involved a compulsory rotation.[81] His Honour's judgment will be considered further in Part IV below.

The High Court's clarification regarding *Koehler* somewhat restored the common law principle that the question of *reasonable* foreseeability is a question of fact concerned with whether a reasonable person in the same circumstances would have foreseen a risk to Kozarov's psychiatric health. In Kozarov's circumstances, the risk was not only plainly obvious, but was also actually foreseen in the sense that the SSOU's own Vicarious Trauma Policy outlined those risks.[82] Chief Justice Kiefel and Keane J explained that *Koehler* was only concerned with whether the employer could have reasonably foreseen risk to the employee's psychiatric health

72 Ibid 577 [12] (Kiefel CJ and Keane J).

73 Ibid 577 [13].

74 Ibid 578 [15].

75 Ibid 575 [3].

76 Ibid 594–8 [99]–[113] (Edelman J).

77 Ibid 597 [110].

78 Ibid 596 [107].

79 Ibid.

80 Ibid 597 [110].

81 Ibid 597 [111].

82 Ibid 579–80 [27].

given the exigencies of the work.[83] The High Court in *Koehler* determined that regard should be had to the employment contract, and in circumstances where the employee had agreed to perform the work that caused the injury, the risk was not reasonably foreseeable absent other 'evident signs'.[84] In *Kozarov*, the State of Victoria's argument that the 'evident signs' relied on by Kozarov 'did not go beyond what would be expected in the ordinary course of [Kozarov's] work, including the inevitable experiences of vicarious trauma'[85] was rejected by the High Court — and rightly so.

B *The Rotation Finding*

On the second ground of appeal, the High Court unanimously found that the Court of Appeal erred in overturning the rotation finding and reinstated the trial judge's conclusion that, had Kozarov been offered rotation out of the SSOU she would have cooperated, which would have prevented the exacerbation of her psychiatric injury. Thus, for all seven justices, causation was made out.

Justices Gageler and Gleeson admitted that there was 'some ambiguity in the trial judge's reasons' as to whether rotation would have been the 'only option that would have avoided the exacerbation of [the] PTSD'.[86] However, their Honours ultimately found that the Court of Appeal erred in overturning the rotation finding for two reasons. First, the Court of Appeal disregarded relevant evidence in support of the rotation finding. This evidence included Kozarov's 'cooperative conduct' in seeking to be rotated,[87] and the expert evidence of Professor McFarlane which stated that a '"significant majority" of people' would follow 'medical advice given to them about the cause of a diagnosed serious illness' and would accept the advice to be rotated.[88] Second, the Court of Appeal failed to consider a reasonable person's self-interest to prevent psychiatric injury and accept advice to avoid those risks.[89] Justices Gageler and Gleeson held that 'it was inherently likely' for Kozarov to have acted 'self-interestedly in accordance with the advice' regarding the need to rotate out of the SSOU.[90] Further, their Honours referred to Dixon J's findings at trial that Kozarov's evidence was 'generally coherent and credible', and noted that the Court of Appeal should have considered the 'real possibility that the appellant's demeanour and credibility may have influenced the trial judge in making the rotation finding'.[91]

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83 Ibid 575 [2] (Kiefel CJ and Keane J).

84 *Koehler* (n 8) 57–8 [36] (McHugh, Gummow, Hayne and Heydon JJ).

85 *Kozarov* (n 10) 585 [52].

86 Ibid 586 [56] (Gageler and Gleeson JJ).

87 Ibid 586–7 [59].

88 Ibid 587 [59].

89 Ibid 587 [60], citing *Rosenberg v Percival* (2001) 205 CLR 434, 443 [24] (McHugh J).

90 *Kozarov* (n 10) 587 [60] (Gageler and Gleeson JJ).

91 Ibid.

For Gordon and Steward JJ, causation was the 'primary question', which their Honours analysed in detail.[92] Differing from the other judgments which focused on rotation, Gordon and Steward JJ framed the duty as requiring the State of Victoria to do '"almost everything" it could "short of forcing rotation"'.[93] Their Honours found that the State of Victoria breached their 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'[94] when they 'failed to intervene by making a welfare inquiry … and offering her occupational screening'.[95] Nonetheless, their Honours upheld the trial judge's conclusion that Kozarov would have cooperated with an offer of rotation, which would have reduced her trauma, since this inference had a 'greater degree of likelihood than any competing inference'.[96]

Justice Edelman upheld the rotation finding, noting that — had the State of Victoria taken the reasonable steps of making welfare enquiries and offering occupational screening — these steps would have revealed symptoms of PTSD, leading Kozarov to agree to rotation and thereby preventing exacerbation of her psychiatric injury.[97] Chief Justice Kiefel and Keane J did not expressly make a finding on this issue, but agreed with Gageler and Gleeson JJ's orders allowing the appeal.[98]

IV Comment

A *Distinguishing Koehler*

Kozarov's lawyer, Patricia Toop, explained that since 2005, *Koehler* had stood as the leading precedent in this area, which created significant difficulty for plaintiffs to prove negligence causing psychiatric injury in the workplace.[99]

Chief Justice Kiefel and Keane J were critical of the formulation and presentation of Kozarov's case, harshly describing it as 'unduly complicated', resulting in 'an artificially narrow view of her compensable injuries', and not a 'model to be emulated by others'.[100] Their Honours stated that Kozarov erroneously relied upon the *Koehler* decision and subsequent focus upon 'evident warning signs'.[101] Instead,

92 Ibid 588 [65] (Gordon and Steward JJ).

93 Ibid 591 [83].

94 Ibid 592–3 [88] (emphasis in original).

95 Ibid.

96 Ibid 593 [93].

97 Ibid 597 [112].

98 Ibid 579 [20] (Kiefel CJ and Keane J).

99 'Employer Liability for Psychiatric Injury', *The Law Report* (ABC Radio National, 26 April 2022) <https://www.abc.net.au/radionational/programs/lawreport/workplace-psychiatric-injury-v2/13854748>.

100 *Kozarov* (n 10) 575 [1] (Kiefel CJ and Keane J).

101 *Koehler* (n 8) 57 [36] (McHugh, Gummow, Hayne and Heydon JJ).

their Honours asserted that the State of Victoria's duty of care was 'readily apparent from the terms of the Vicarious Trauma Policy' and the stressful nature of the work, such that no evident warning signs were 'necessary to establish' a duty of care.[102] This view was also reflected in the judgments of Gageler and Gleeson JJ and Edelman J.[103]

Chief Justice Kiefel and Keane J were arguably overly critical of Kozarov's approach, considering that the State of Victoria had raised *Koehler* as a defence in arguing that they could not have reasonably foreseen Kozarov's risk of injury due to her statement that she was 'passionate about continuing [her] work',[104] as well as the fact that she had sought promotion and signed a permanent employment contract.[105] Thus, it arguably would have been remiss of Kozarov not to address *Koehler* in her submissions. Irrespectively, whilst the reference to evident warning signs was not required to establish a duty of care in this context, these factors were nevertheless relevant to the elements of breach and causation.

The difficulty regarding proof of negligence in the case of psychiatric injury was explained by Keane JA in *Hegarty v Queensland Ambulance Service* ('*Hegarty*'):[106]

> [W]hile an employer owes the same duty to exercise reasonable care for the mental health of an employee as it owes for the employee's physical well-being, special difficulties may attend the proof of cases of negligent infliction of psychiatric injury. In such cases, the risk of injury may be less apparent than in cases of physical injury. Whether a risk is perceptible at all may in the end depend on the vagaries and ambiguities of human expression and comprehension. Whether a response to a perceived risk is reasonably necessary to ameliorate that risk is also likely to be attended with a greater degree of uncertainty; the taking of steps likely to reduce the risk of injury to mental health may be more debatable in terms of their likely efficacy than the mechanical alteration of the physical environment in which an employee works.[107]

On the basis of these difficulties, courts have adopted a narrow approach in determining foreseeability and causation, largely stemming from the decision in *Koehler*. For example, *Hegarty*, decided shortly after *Koehler*, concerned an ambulance driver who suffered PTSD caused by repeated exposure to vicarious trauma.[108] The Queensland Court of Appeal disagreed with the trial judge's finding that, if supervisors had been properly trained, they would have recognised signs of stress and

102 *Kozarov* (n 10) 575 [3] (Kiefel CJ and Keane J).

103 Ibid 579–80 [26]–[29] (Gageler and Gleeson JJ), 594 [99], 595 [103] (Edelman J).

104 *Kozarov (Court of Appeal)* (n 48) 478 [108].

105 Ibid 479 [109].

106 [2007] QCA 366 ('*Hegarty*').

107 Ibid [41].

108 Ibid [34].

dysfunction.[109] Focusing on the employee's 'dignity'[110] and 'entitlement to privacy',[111] Keane JA considered that a reasonable response from supervisors was to treat Mr Hegarty's complaints as a claim for improvement in conditions of employment.[112] Similarly, in *Taylor v Haileybury*,[113] Beach J found that a teacher who had a heavy workload and was under considerable stress had contractually agreed to do the work.[114] The employer had no reason to regard expressions of frustration to show a risk to psychiatric health.[115]

In *Kozarov*, the High Court's departure from *Koehler* (and the cases which followed *Koehler*) was subtle, but significant. The message is clear that, in occupations where there is an obvious risk to psychiatric health, an employer cannot assume that the employee is coping absent evident signs to the contrary. However, it is unclear how courts in the future will distinguish an obvious risk like in *Kozarov*, from occupations where *Koehler* still requires evident signs of risk. This is because the High Court decided *Kozarov* on its unique facts, and did not specify any other forms of employment which are 'inherently and obviously dangerous to the psychiatric health of the employee'.[116] Given the extreme nature of Kozarov's work, involving continuous exposure to highly graphic and disturbing content, it is likely that the 'inherently and obviously dangerous'[117] threshold would be difficult to meet. Ideally, the decision in *Kozarov* would also extend to any persons working in traumatic and stressful jobs, such as paramedics, emergency health care workers, military personnel and police. However, it is currently unclear whether *Kozarov* would extend to such occupations.

Justice Edelman's judgment included additional observations which may be indicative of a potential change in approach where courts are more willing to treat psychiatric injuries more similarly to physical injuries. First, his Honour said:

> [T]he employer's duty to ensure the '[p]rotection of mental integrity from the unreasonable infliction of serious harm'[118] is imposed by law … [i]n this sense, it is no different from the employer's duty to protect an employee's physical integrity … [i]t has long been recognised that psychiatric injury 'is just as really

109 Ibid [97].

110 Ibid.

111 Ibid.

112 Ibid [97]–[98] (Keane JA).

113 [2013] VSC 58.

114 Ibid [143].

115 Ibid [141].

116 *Kozarov* (n 10) 576 [6].

117 Ibid.

118 Ibid 595 [103] (Edelman J), quoting *Tame v New South Wales* (2002) 211 CLR 317, 379 [185] (Gummow and Kirby JJ).

> damage to the sufferer as a broken limb … [and] equally ascertainable by the physician'.[119]

Also significant is Edelman J's comment with respect to the Court of Appeal's finding that Kozarov would not have cooperated with a rotation out of the SSOU. His Honour said:

> [A]n 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.[120]

Justice Edelman's remarks in obiter are in stark contrast to Keane JA's observations in *Hegarty* and may be indicative of the court's willingness to reconsider *Koehler* entirely. This concept is expanded on below in the context of statutory regulation. However, Kiefel CJ and Keane J's dissent in this respect — which are more reflective of Keane JA's observations in *Hegarty* — should also be noted:

> 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.[121]

B *The Future of Assessing Psychiatric Risk*

The High Court's decision in *Kozarov* is timely against the background of recent developments in work health and safety ('WHS') laws and regulation. The 2018 review into Australia's model WHS laws revealed that psychological health had been 'neglected' in the broader WHS framework.[122] The review recommended that the model WHS regulations be amended to deal with 'how to identify the psychosocial risks associated with psychological injury and the appropriate control measures

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119 *Kozarov* (n 10) 595 [103] (Edelman J), quoting *Owens v Liverpool Corporation* [1939] 1 KB 394, 400 (MacKinnon LJ).

120 *Kozarov* (n 10) 597 [111] (Edelman J).

121 Ibid 578 [17] (Kiefel CJ and Keane J).

122 Marie Boland, *Review of the Model Work Health and Safety Laws* (Final Report, December 2018) 33 <https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf>.

to manage those risks'.[123] In April 2022, Ministers responsible for WHS agreed to implement the recommendation.[124] Regulation 55D of the model regulations now requires employers to, as far as is reasonably practicable, eliminate or reduce psychosocial risks — having regard to a list of factors, including job demands and tasks.[125] Victoria's proposed amendments to their *Occupational Health and Safety Regulations 2017* (Vic) go a step further, requiring employers to put in place a prevention plan for identified psychological hazards, and for employers with more than 50 employees to provide a written report with respect to any psychological complaints received.[126] The proposed regulations are also more specific, in that the following are all listed as potential risks to an employee's psychological health and safety:

> Bullying, sexual harassment, aggression or violence, exposure to traumatic events or content, high job demands, low job demands, low job control, poor support, poor organisational justice, low role clarity, poor environmental conditions, remote or isolated work, poor organisational change management, low recognition and reward, poor workplace relationships.[127]

More broadly, there are significant costs to employers for poor employee mental health beyond a potential personal injury claim or breach of statutory WHS duty. A 2016 study found: (1) workers with psychological distress took four times as many sick days per month; (2) had 154% higher performance loss; and (3) cost employers an average of $6309 more per year than those without psychological

123 Ibid 35.

124 'Implementation of WHS Ministers' Agreed Response to the Review of the Model WHS Laws', *Safe Work Australia* (Web Page) <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/implementation-whs-ministers-agreed-response-review-model-whs-laws>.

125 Safe Work Australia, *Model Work Health and Safety Regulations* (at 14 April 2022) reg 55D <https://www.safeworkaustralia.gov.au/sites/default/files/2022-06/model_whs_regulations_-_14_april_2022.pdf> ('*Model WHS Regulations*').

126 Employers, employees and other interested parties were invited to make submissions on the proposed amendments to Victoria's OHS regulations prepared by WorkSafe Victoria: 'Proposed OHS Amendment (Psychological Health) Regulations', *Engage Victoria* (Web Page, 31 March 2022) <https://engage.vic.gov.au/proposed-psychological-health-regulations>. The proposed amendments are set out in *Occupational Health and Safety Amendment (Psychological Health) Regulations* (Exposure Draft) <https://www.vic.gov.au/sites/default/files/2022-03/Proposed-OHS-Amendment-%28Psychological-Health%29-Regulations%20%281%29.DOCX>.

127 This is set out in the examples listed under proposed reg 5 (definition of 'psychosocial hazard'): *Occupational Health and Safety Amendment (Psychological Health) Regulations* (Exposure Draft) 3 <https://www.vic.gov.au/sites/default/files/2022-03/Proposed-OHS-Amendment-%28Psychological-Health%29-Regulations%20%281%29.DOCX>.

stress.[128] Therefore, employers have a broader interest to take proactive steps to take care of their employees' mental health in addition to protecting themselves from litigation. Despite workplace psychological health traditionally receiving less attention than physical health and safety,[129] there has been a recent 'increase in focus on mental health, both at a population and workplace level'.[130] There is now a body of material accepting that factors such as excessive workloads create a risk to psychiatric health,[131] with more employers making commitments to promote better mental health.[132] Whilst employer liability for psychiatric injury is a complex issue, the shift towards better mental health suggests *Koehler* places an 'unnecessary evidentiary burden'[133] on litigants seeking recourse from employers who do not safeguard the mental health of their employees.

As a result of *Kozarov*, employees working in environments with an inherently obvious risk to psychiatric health no longer bear the burden of establishing evident warning signs to determine foreseeability of risk to psychiatric harm. Instead, in occupations like Kozarov's, the onus now shifts back to the employer to take reasonable steps to implement adequate measures to protect their employees' mental health.[134] This is incredibly important in this area of law, considering the lack of reporting of mental illness in the workforce, and the remaining stigma that prevents employees from disclosing their mental health concerns out of fear of discrimination or job loss.[135] However, it remains unclear the exact types of occupations *Kozarov* would apply to. As the law stands, *Koehler* may still have application in respect of occupations which do not meet the threshold of an inherently obvious risk to psychiatric health.

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128 Harry Bechner and Maureen Dollard, *Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism* (Report, November 2016) 8.

129 *Productivity Commission Mental Health Report* (n 2) vol 2, 301.

130 Black Dog Institute, 'Modern Work: How Changes to the Way We Work Are Impacting Australians' Mental Health' (White Paper, October 2021) 2.11 <https://www.blackdoginstitute.org.au/wp-content/uploads/2021/10/modern_work.pdf>.

131 Ibid 2.10; *Productivity Commission Mental Health Report* (n 2) vol 2, 301; *Model WHS Regulations* (n 125) reg 55D(2)(c); Safe Work Australia, *Work-Related Psychological Health and Safety: A Systematic Approach to Meeting Your Duties* (National Guidance Material, January 2019) <https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf>.

132 *Productivity Commission Mental Health Report* (n 2) vol 2, 331–4.

133 *Kozarov (High Court)* (n 10) 580 [29].

134 Ibid.

135 Bharadwaj, Pai and Suziedelyte (n 4) 57; Marshall et al (n 4) 1; Young (n 1) 485–6.

V Conclusion

The High Court's decision to restore the $435,000 damages payout to Kozarov will have positive implications for future claimants in proving workplace psychiatric injury. Further, in distinguishing the 16-year-old *Koehler* decision for forms of employment that are inherently stressful and traumatic, the High Court has provided much needed practical clarity for plaintiffs and practitioners as to the correct approach required to litigate cases in this area.

In light of the High Court's decision in *Kozarov*, employers should be very cautious to assume that there is no risk to an employee's psychiatric health simply because the employee has agreed to perform the work. Considered in light of increased statutory regulation, employers are on notice that they must take active steps to protect employees from psychiatric harm. Thus, employers now ought to review their policies and relevant procedures carefully, to ensure they are adequately protecting the mental health of their employees and providing safe workplaces.

The High Court's decision in *Kozarov* will hopefully mark the continuance of increasing recognition and protection against psychiatric injury in the workplace. It will be most interesting to see the broader consequences of this decision, and how it may influence the recognition and prevention of psychiatric injury in other forms of traumatic and stressful employment. With an increased focus on the importance of mental health both generally and in the workplace, it is now well accepted that factors such as excessive workloads are a risk to psychiatric health. In such circumstances, the principles from *Koehler* require reconsideration. The High Court's departure from *Koehler* in *Kozarov* may be indicative of a willingness to fully reconsider *Koehler* in a future decision.