



Work Stress, Vicarious Trauma and the Public Mental Health Framework

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An Important Issue

- Work stress is a major determinant of adverse mental health
- What are the duties of care of employers toward persons placed under work pressure or foreseeably exposed to trauma?
 - Police, train drivers, ambulance officers, paramedics/journalists, lawyers working in the sex crime area
- Illustrative decisions about employers' duties from Australia's highest court



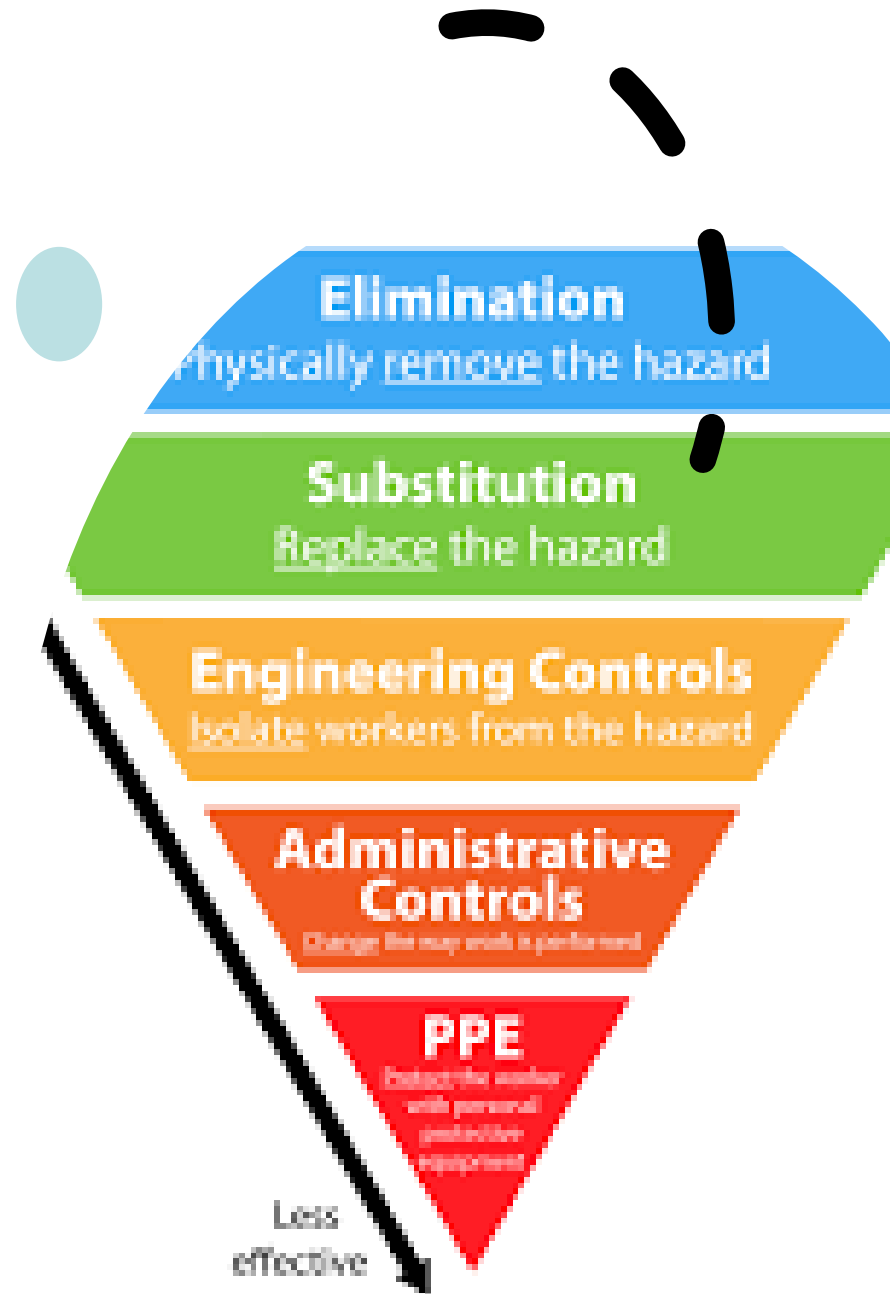
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

- K employed as a merchandising representative and could not perform her duties to her satisfaction
- K repeatedly told management that changes had to be made and her work needed to be changed: too big an area, too many stores, v little time
- No changes were made
- She fell ill with a major depressive illness



Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

- K claimed a breach of the employer's common law duty to provide a safe system of work
- Succeeded before WA District Ct but not in the Court of Appeal or High Court



Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44 at [21]

McHugh, Gummow, Hayne & Heydon JJ:

- The content of the duty which an employer owes an employee to take reasonable care to avoid psychiatric injury cannot be considered without **taking account of the obligations which the parties owe one another under the contract of employment, the obligations arising from that relationship which equity would enforce and, of course, any applicable statutory provisions**

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

- A reasonable person in the position of the employer would not have foreseen the risk of psychiatric injury to the appellant.
- The central inquiry remains whether, in all the circumstances, the risk of a plaintiff sustaining a recognisable psychiatric illness was reasonably foreseeable, in the sense that the risk was not far fetched or fanciful (at [33])

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

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. (at [36])

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44 at [41]

There was no indication (explicit or implicit) of any particular vulnerability of the appellant. ... she made many complaints to her superiors but none of them suggested (either expressly or impliedly) that her attempts to perform the duties required of her were putting, or would put, her health at risk. She did not suggest at any time that she was vulnerable to psychiatric injury or that the work was putting her at risk of such an injury. None of her many complaints suggested such a possibility. Her complaints may have been understood as suggesting an industrial relations problem.

Hegarty v Queensland Ambulance Authority [2007] QCA 366

- Ambulance officer with PTSD and OCD sued for failing to detect his workplace injuries
- Qld Ct of Appeal upheld appeal: even in inherently stressful occupations the content of an employer's obligations are still shaped and potentially limited by the terms of the contract of employment
- Employers should not inquire too deeply into employees' mental states or personal lives (Keane JA)



The Age Co Ltd v YZ [2019] **VSCA 313**



- Journalist worked in court reporting including in relation to the Freeman murder
- Claimed negligence for PTSD
- Court of Appeal overturned award of damages in relation to an early failure to love YZ from crime reporting but agreed that a later move of her back to court reporting caused a significant deterioration in her health and was a breach of duty

The Age Co Ltd v YZ [2019] VSCA 313 at [129]-[132]

First, whether psychiatric injury is reasonably foreseeable involves difficult questions because the risk of injury may be less apparent than in cases of physical injury and may depend on the vagaries and ambiguities of human expression and comprehension.

Secondly, whether a response to a perceived risk to psychological health is reasonably necessary to ameliorate that risk may be uncertain, and the likely efficacy of responses more debatable than a mechanical alteration of the physical environment.

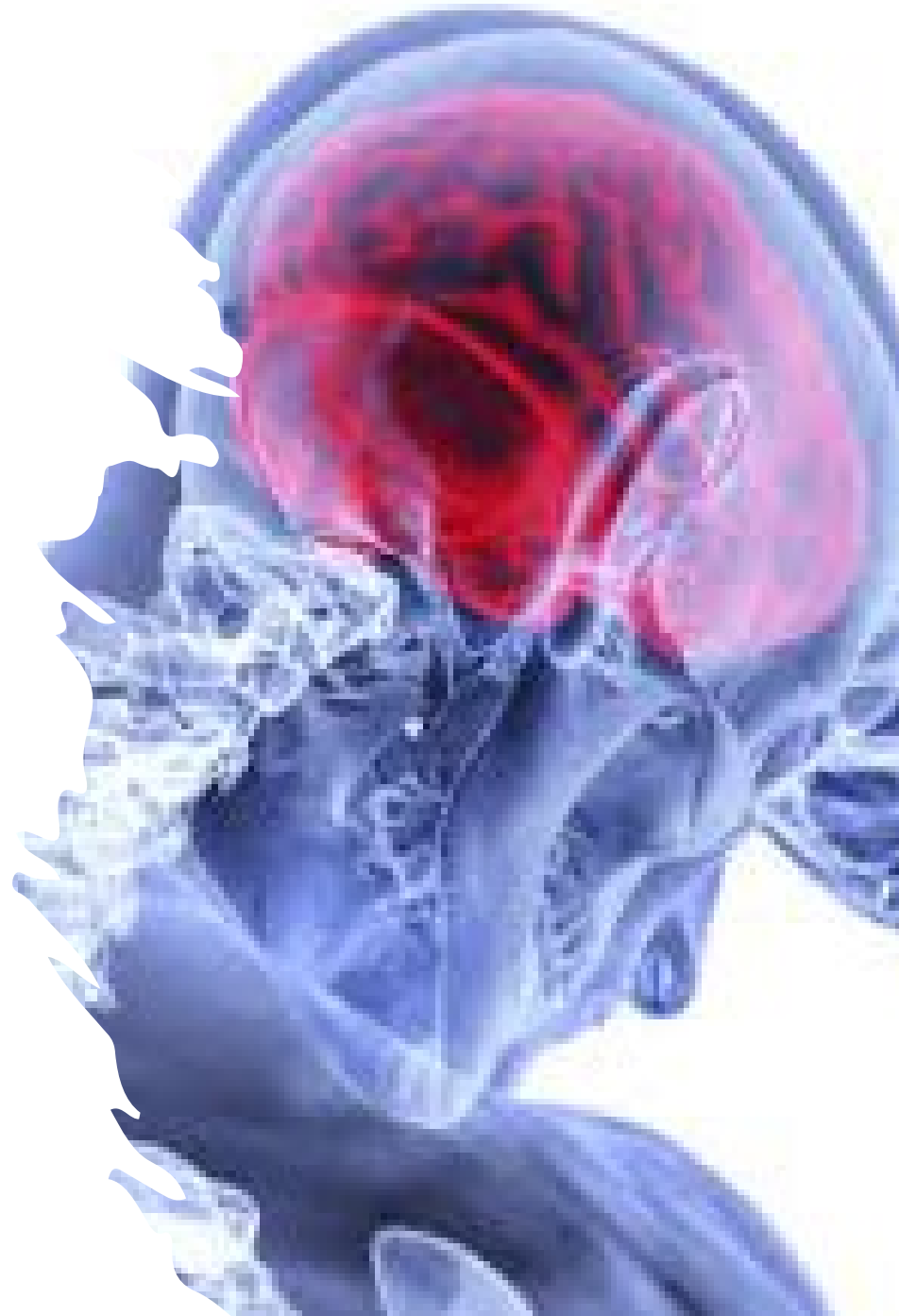
Thirdly, the articulation of the content of the duty of care and the imposition of a positive duty to take active steps to prevent the risk of foreseeable injury must take into account the private and personal nature of psychological illness and the dignity of employees and their entitlement to undertake their chosen work free of harassment and intimidation. Care must be taken to ensure that solicitude for an employee's privacy does not overwhelm those other considerations that give rise to a meaningful duty of care to avoid injury.

Finally, it may be difficult to establish that, had the proposed steps been taken by the employer, the injury would have been avoided



The Intrinsic Risk Issue

- What is the responsibility of an employer where psychiatric injury is inherently foreseeable by virtue of the nature of the employment?



Kozarov v Victoria **[2022] HCA 12**

- K was a solicitor in the Serious Sexual Offences Unit (SSOU) of the Victorian DPP
- She became vocal about how work was affecting her daily life, including describing paranoia about leaving her children with others, her refusal to let her son be an altar boy, and dreaming of her children being complainants in her matters



Kozarov v Victoria [2022] HCA 12

- K known as dedicated, hard-working, ambitious and loyal employee
- Carried a heavier than usual load
- Applied for a promotion in Principal Prosecutions or SSOU
- April 2011: Complaint made by SSOU solicitors, including K, about workload
- K resisted being allocated a new file because of workload but was required to take it on and then took sick leave & then had a conflict (on 29 August 2011) with superior after news of suicide attempt by complainant
- Diagnosed with PTSD & major depressive disorder

Kozarov v Victoria [2022] HCA 12, Kiefel CJ & Keane J

- K was employed on the basis that she would be protected by VT policy. Risks to employees' mental health were recognised (at [7])
- 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** (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.** (at [6])

Kozarov v Victoria [2022] HCA 12, Kiefel CJ & Keane J

- 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, eg rotation (at [8])
- If K had been offered occupational screening at the end of August 2011, she would have accepted that offer, and that screening would have revealed K's mental illness (at [10])

Kozarov v Victoria [2022] HCA 12, Kiefel CJ & Keane J

- K's complaints about excessive workload were not necessarily indicative of mental illness
- No evident signs of mental illness
- However, the employer was in breach of duty to provide a safe workplace

***Kozarov v Victoria* [2022] HCA 12 at [28], Gageler and Gleeson JJ**

- 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.

Kozarov v Victoria [2022] HCA 12 at [53], Gageler & Gleeson JJ

- (1) the staff memorandum, signed by K, was a plain indication that she might be suffering one or more of the adverse symptoms of vicarious trauma identified in the memorandum;
- (2) K's statements were reports of her adverse symptoms of vicarious trauma;
- (3) K was at heightened risk of adverse consequences of vicarious trauma from an excessive work load, and by a propensity to overwork;
- (4) K was demonstrating an unhealthy emotional involvement in some of her cases;

Kozarov v Victoria [2022] HCA 12, Gageler & Gleeson JJ

(5) K was demonstrating difficulties managing her existing case load, which were not ameliorated but instead augmented;

(6) K took a period of two weeks sick leave during a trial and following an episode of dizziness;

(7) K 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) Her superior had formed the view that K, a dedicated, hard-working, ambitious and loyal employee, was "not coping". (at [53])

***Kozarov v Victoria* [2022] HCA 12, Gageler & Gleeson JJ**

- The primary consideration in relation to the responsibilities of the employer was not K's commitment to work in the SSOU but the **real possibility of her becoming unwell**

Kozarov v Victoria [2022] HCA 12, Gordon & Steward JJ

- There were numerous signs, some more obvious than others, that Ms K was at risk of harm (at [64])
- Victoria was on notice of the risk of psychiatric injury to Ms K by no later than 29 August 2011. A reasonable person in Victoria's position would have foreseen the risk of injury to Ms K by that date [not earlier], a risk that was not far-fetched or fanciful
- Ms K would have accepted screening and accepted an offer to reduce her exposure to VT

Kozarov v Victoria [2022] HCA 12 at [103], Edelman J

- The employer's duty to ensure the "[p]rotection of mental integrity from the unreasonable infliction of serious harm" 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.

Kozarov v Victoria [2022] HCA 12 at [104], Edelman J

- 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 occurred.
- 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"

Kozarov v Victoria [2022] HCA 12 at [107], Edelman J

- Psychiatric injury to *every* employee of the SSOU of the Victorian OPP was a reasonably foreseeable consequence of the nature and extent of the work undertaken.
- A reasonable person in the position of Ms K'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 K 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. ([110])

***Kozarov v Victoria* [2022] HCA**

12 at [110]-[111], Edelman J

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 K also increased. At the very least, these increased precautions included ... **a welfare enquiry of Ms K**. 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 K to a different part of the OPP that did not prosecute sexual offences.

Bersee v State of Victoria [2022]

VSCA 231

- B was a secondary school teacher who claimed that his MDD and chronic anxiety was caused by a change in workload
- Ct of Appeal affirmed approach of asking whether psychiatric injury became foreseeable to his employer by reason of evident signs

Bersee v State of Victoria

[2022] VSCA 231 at [77]

- In *Koehler* the High Court refused to embrace as a universal proposition that because stress may cause psychiatric injury, all employers must recognise that all employees are at risk of psychiatric injury from stress at work and therefore such injury is reasonably foreseeable. The vice of that proposition was that it serves to aggregate what is an individual inquiry directed to the duty owed to each particular employee

Bersee v State of Victoria

[2022] VSCA 231 at [87]

- *Kozarov* reinforces the point that questions of foreseeability, which are relevant to the existence and scope of a duty of care, breach of duty, or remoteness of damage, are fact and context specific. In some cases, psychiatric injury will be a reasonably foreseeable consequence of the performance of work and in others it will not be. In *Koehler*, the High Court referred to what an employer might reasonably assume about the ability to perform the work safely, and in *Kozarov* the Court concluded that the assumption was irrelevant in the face of the incontrovertible evidence as to risk,

Bersee v State of Victoria

[2022] VSCA 231 at [89]

- *Kozarov* makes plain that evident signs of distress or vulnerability on the part of a plaintiff are not a precondition that must be satisfied before psychiatric injury can be found to be reasonably foreseeable and are not a legal criterion for liability. Rather, they provide a means by which reasonable foreseeability may be established on the facts, and in some cases, the absence of them may mean that the employer would have no reason to suspect that psychiatric injury is on the cards for the particular employee or class of employees.

Duties of Employer in Relation to VT Psychiatric Injury

- Proactivity in provision of measures to enable safe work (Kiefel CJ & Keane J)
- Implementation of measures in VT Policy (Kiefel CJ & Keane J)
- Attentiveness to heightened risks if excessive workload or signs such as unhealthy emotional involvement or “not coping” or overly emotionally engaged (Gageler & Gleeson JJ) but should not unduly intrude (*Hegarty*)
- Needs to ask: is there a real possibility of employee becoming unwell (Kiefel CJ & Keane J) or is it “reasonably foreseeable”? (Edelman J)

Duties of Employers in Relation to VT Psychiatric Injury

- Obligation to do **“welfare inquiry”** when on notice of emerging issues
- Potential obligation to change employee’s work (at least for a time)
- Still less than clear and context-dependent but need for alertness and responsiveness to **“signs”** by employers



Relevant Publications

- **R Scott and I Freckelton, “The Duty of Care to Protect Employees against the Risk of Psychiatric Harm from Vicarious Trauma” (2023) 30(2) *Journal of Law and Medicine* 358**
- **K Wilson and I Freckelton, “Work Stress, Vicarious Trauma and the Public Mental Health Framework (‘PMHF’): *Kozarov v Victoria* [2022] HCA 12 and its Aftermath” (2023) 30(2) *Journal of Law and Medicine* (in press)**