

Work Stress, Vicarious Trauma and  
the Public Mental Health Framework  
(PMHF): *Kozarov v Victoria* [2022]  
HCA 12 and its Aftermath

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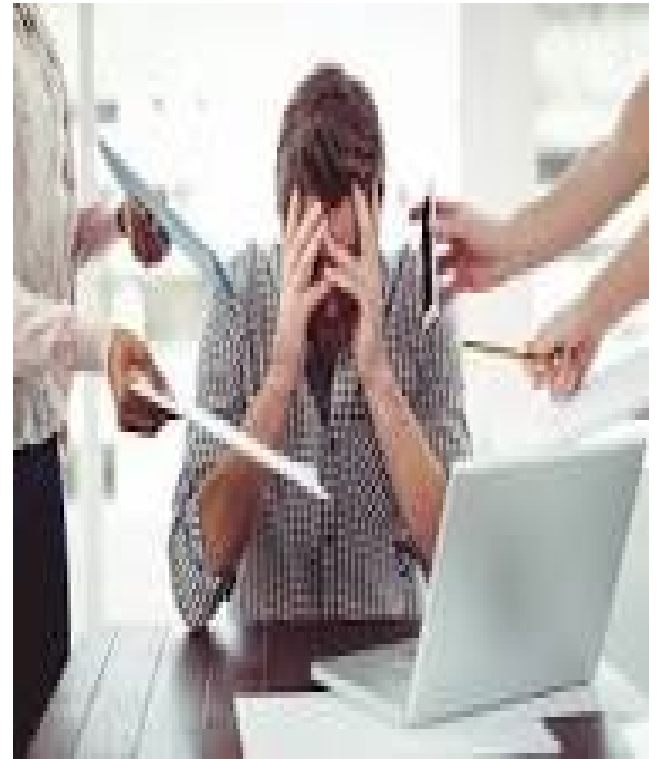
# Road Map of Presentation



- This research is part of a much larger project on creating a public mental health framework
- Work Stress as a Social Determinant of Mental Health (SDMH)
- Legal significance of *Kozarov* and subsequent authority
- Significance of *Kozarov* for Employers
- Questions raised by *Kozarov*
- OHS for psychological harm
- Conclusion

# Work Stress as a SDMH

- Good decent work is a protective factor for mental health
- However, psychosocial work-factors are related to a range of mental health problems, especially anxiety and depression, and *physical* health problems
- Increased work stress claims over last 30 years
- Shift from physical jobs to service-based economy (health, education and community services)
- Mental ill-health costs the economy \$200-220 billion
- \$17 billion for presenteeism and absenteeism due to work stress
- Every \$1 invested in preventing psychiatric injury produces \$4 of increased productivity
- Psychiatric injury not taken as seriously as physical injury



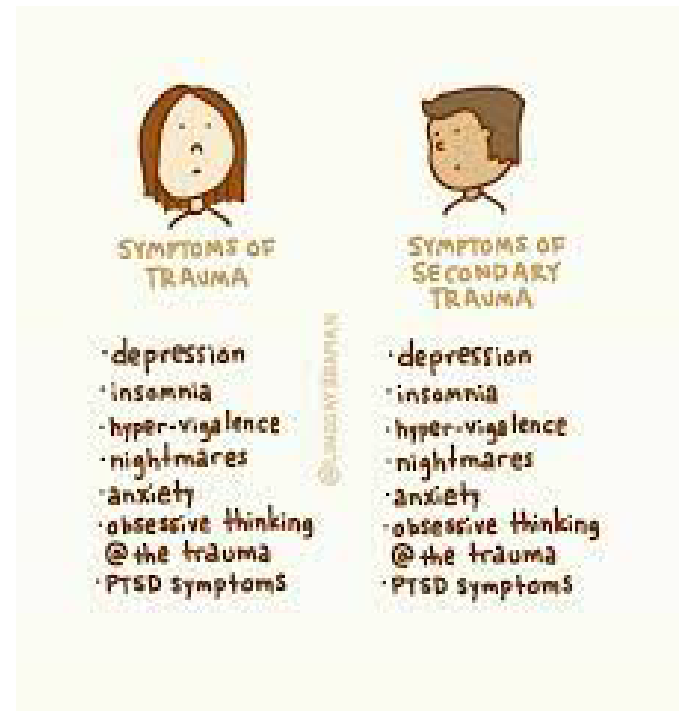
# Work Stress as a SDMH

- Factors that are bad for mental health include – job strain (high demand-low latitude), effort-reward imbalance, long work hours, job insecurity, bullying and harassment, organizational injustice and work-family conflict
- Vicarious trauma, compassion-fatigue and burnout – work which involves victims of trauma, high emotional load and graphic material
- Poor employment conditions like insecure work are commercial determinants of mental health



# Legal Significance of *Kozarov* (Narrow)

- Highlights significance of vicarious trauma (VT)
- Implications for a wide range of occupations including lawyers, police, ambulance officers, health workers, counsellors, journalists & military
- Doesn't challenge *Koehler*, but may modify and narrow the scope of it
- Three sub-categories of cases (i) overwork, (volume of work) (ii) vicarious trauma (types of inherently dangerous work), (iii) bullying and harassment (abusive of power/poor workplace relationships and context)
- *Koehler* applies to routine and prosaic work that is not inherently mentally dangerous and an employer would have no reason to suspect psychiatric injury could be "on the cards" (*Bersee* para 88 -89)
- "*Koehler* and *Kozarov* are at opposite ends of a single spectrum and do not represent a divergence of principle" (*Bersee* para 88)



# Legal Significance of *Kozarov* (Wide)

- *Bersee* held that a duty of care to prevent psychiatric injury does not automatically arise for all aspects of employment (despite work stress as a SDMH)
- *Bersee* and *Elisha* did not limit an employer's obligation to vicarious trauma or those inherent risks which are generally well-known or incontrovertible
- Rather, *Bersee* and *Elisha* involved close contextual analysis of the facts and combined the employers awareness of the type of risks associated with the performance of particular work (and changes to their work) and known vulnerabilities of the employee concerned
- “The non-delegable duty of care owed by an employer to an employee must often involve a degree of anticipation concerning the potential for risk. Further, the issue is to be determined by reference to the anticipation of the ordinary reasonable employer; not an unreasonable or blinkered one.” (*Elisha*, O'Meara J, para 437)
- *Bersee* warns of the dangers of having “too high” a bar to duty of care – “evident signs” may not be warning signs but can actually be signs of injury

# Significance of *Kozarov* for Employers

- In occupations with inherent risks of psychiatric injury employers can't wait for "evident signs" they need to develop policies from the outset
- Employers must *actually implement* their VT and other policies
- VT precautions include an *active* OHS framework, training for managers and staff about VT and PTSD, welfare checks & referrals for screening, temporary or permanent rotation (possibly compulsory)
- *Post-Kozarov* authority suggests employers need to give wider consideration to the psychological risks of the work they require employees to do and known employee vulnerabilities beyond VT.

# Questions raised by *Kozarov*

- What types of work are inherently psychiatrically dangerous?
- What level of knowledge does a reasonable but “not blinkered” employer need to have of the psychological risks of the work required? Not medical (*Elisha*). Could research on SDMH, OHS standards assist?
- Should an employer *force* an employee to rotate? What if rotation isn’t possible? Or, creates other problems?
- Is the distinction between the amount (*Koehler*) and type of work (*Kozarov*) too artificial? Why is excessive work okay? (EY Oceania Report)
- Should *Koehler* be overruled/abandoned and the test for duty of care in psychiatric injury cases simply be “reasonable foreseeability”? Should the real battleground in work stress cases become breach and causation?
- Should there be some more objective standards around inherent risks and limits on overwork (eg. s62 Fair Work Act, Senate Inquiry on Work and Care (2023))?
- “*Evident signs*” only applying in rare cases where people might have specific individual vulnerabilities that the employer is aware of, or ought to be aware of?



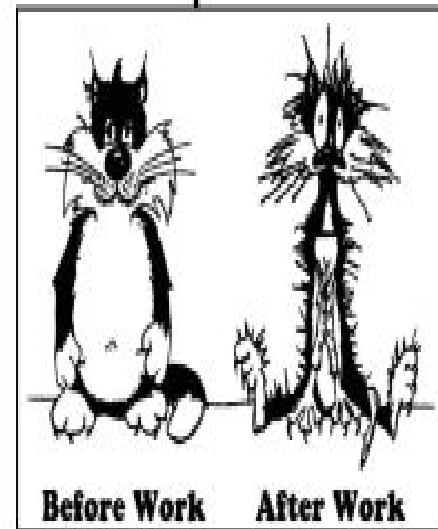
# OHS Changes – Prevention of Psychiatric Injury

- Boland Review (2019) of OHS laws identified prevention of psychiatric injury as a significant gap that needed to be filled
- Model OHS laws, regulations and codes of practice developed and implemented in most states to promote national harmonization, except for Victoria
- Worksafe Australia *Managing Psychosocial Hazards at Work Code of Practice* (2022) – sets how employers can identify, assess, eliminate and control risks of psychiatric injury
- In Victoria “harm” includes “psychological harm,” in section 5 *Occupational Health and Safety Act 2004* (Vic) but there are no detailed provisions; new regulations still being developed
- Victorian cuts to WorkCover removes weekly payments for psychiatric harm caused by work stress from excessive work and burnout

# Conclusion

- Case law on employer's duty of care and liability for psychiatric injury is rapidly evolving
- New developments in OHS law are also trying to increase employer awareness and responsibility for preventing psychological harm
- Potentially OHS changes mean that even if *Koehler* remains, OHS regulations will become part of the employment contract and content of the duty of care
- General overall shift towards greater employer responsibility for preventing psychiatric injury
- But, there's probably still discrimination the legal treatment of psychiatric/psychological harm and prevention of physical injury

## Workplace Stress: An Epidemic



# References

- Kay Wilson and Ian Freckelton AO KC ‘Work Stress, Vicarious Trauma and the Public Mental Health Framework (‘PMHF’): *Kozarov v Victoria* [2022] HCA 12 and its Aftermath’ (2023) 30(3) *Journal of Law and Medicine* (forthcoming).
- Kay Wilson, ‘Building Mentally Healthy Workplaces’ *Pursuit* 9 May 2023.

# Any Questions?

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