

Vicarious Trauma: Implications for Legal Practitioners and Judicial Officers



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Issues

- Work stress, overwork and exposure to traumatic material can all affect mental health – in many contexts
- How should the legal system (criminal and civil) impose responsibility for responding to the potential for mental harm caused in the workplace?
- What is the content of the duties of care of employers toward employee and non-employee legal practitioners?



Useful Lenses

- Criminal Law: occupational health and safety obligations of employers
- Tort Law: breach of duty of care to employees



Prosecution of Court Services Victoria (2023)



- Plea of guilty by CSV to a charge of failing to provide and maintain a safe workplace: s21 of the *OH&S Act 2004* (Vic)
- Prosecutor asserted that from at least December 2015 to September 2018, workers at the Coroners Court of Victoria were at risk from exposure to *traumatic materials*, role conflict, high workloads and work demands, poor workplace relationships and inappropriate workplace behaviours.



An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.

Context of three prominent suicides associated with Victorian courts

Prosecution of Court Services Victoria (2023)



- Numerous complaints, including allegations of bullying, favouritism and cronyism, verbal abuse, derogatory comments, intimidation, invasions of privacy and perceived threats to future career progression.
- A number of workers took leave after reporting feelings of anxiety, PTSD, stress, fear and humiliation.
- A senior solicitor took three months personal leave, during which time she was diagnosed with a work-related major depressive disorder, and then took her own life in September 2018

Prosecution of Court Services Victoria (2023)

- Magistrate Walsh (from NSW) imposed the maximum fine of \$380,000 and said in his sentencing reasons that the offending was so serious that he would have sentenced Court Services Victoria to a harsher penalty if he could have done so.
- Held that the lives of many employees had been “put at risk” by the failure of Court Services Victoria to protect staff from harm: “the gravity of the offending is significant as is the culpability and degree of responsibility”

Significance of Court Services Victoria Prosecution

- Reinforcement of OH&S obligations
- Affirmation of employers' responsibilities in the court context
- Reminder of consequences of stresses in court system, exacerbated in courts where vicarious trauma is a mainstay

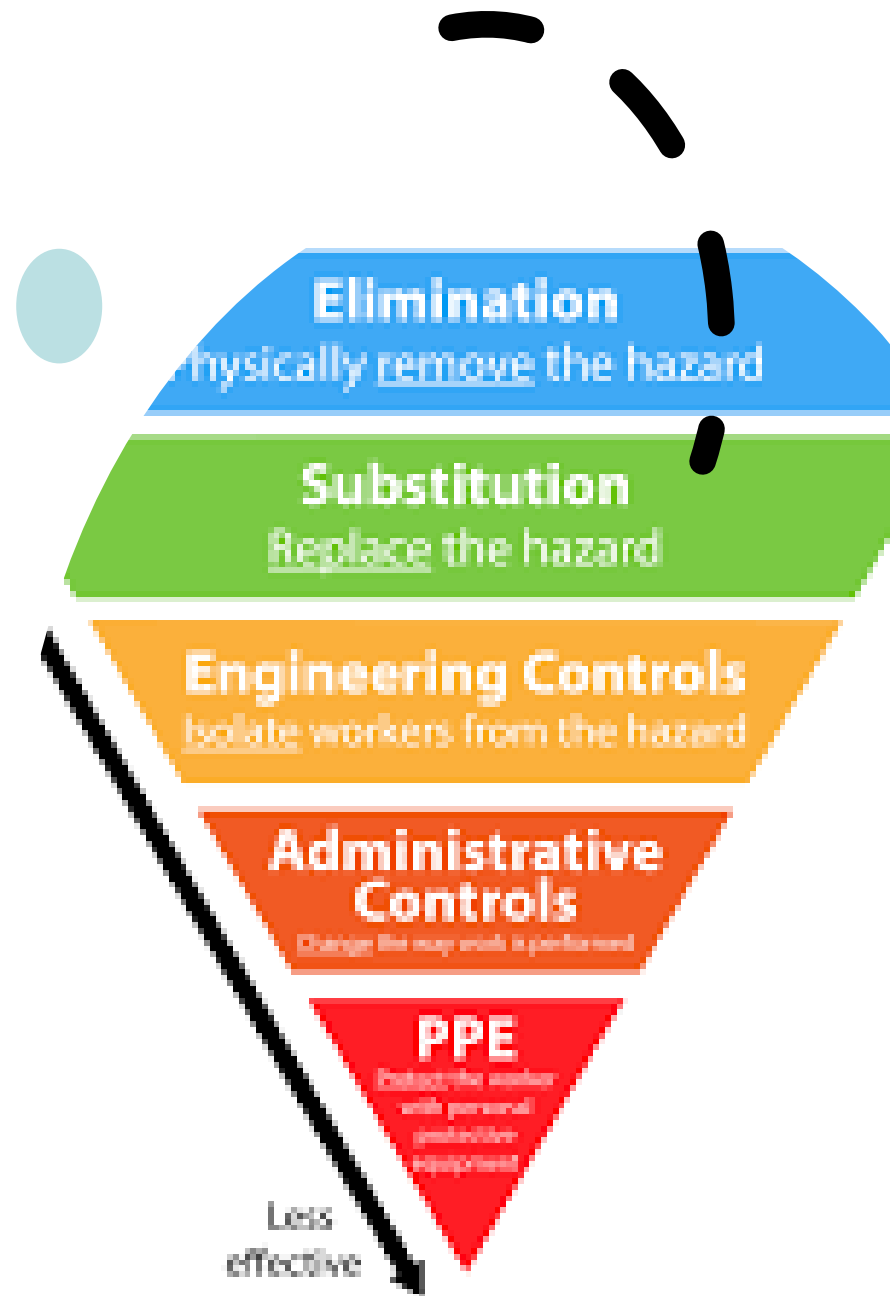
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

- 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 successfully 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)



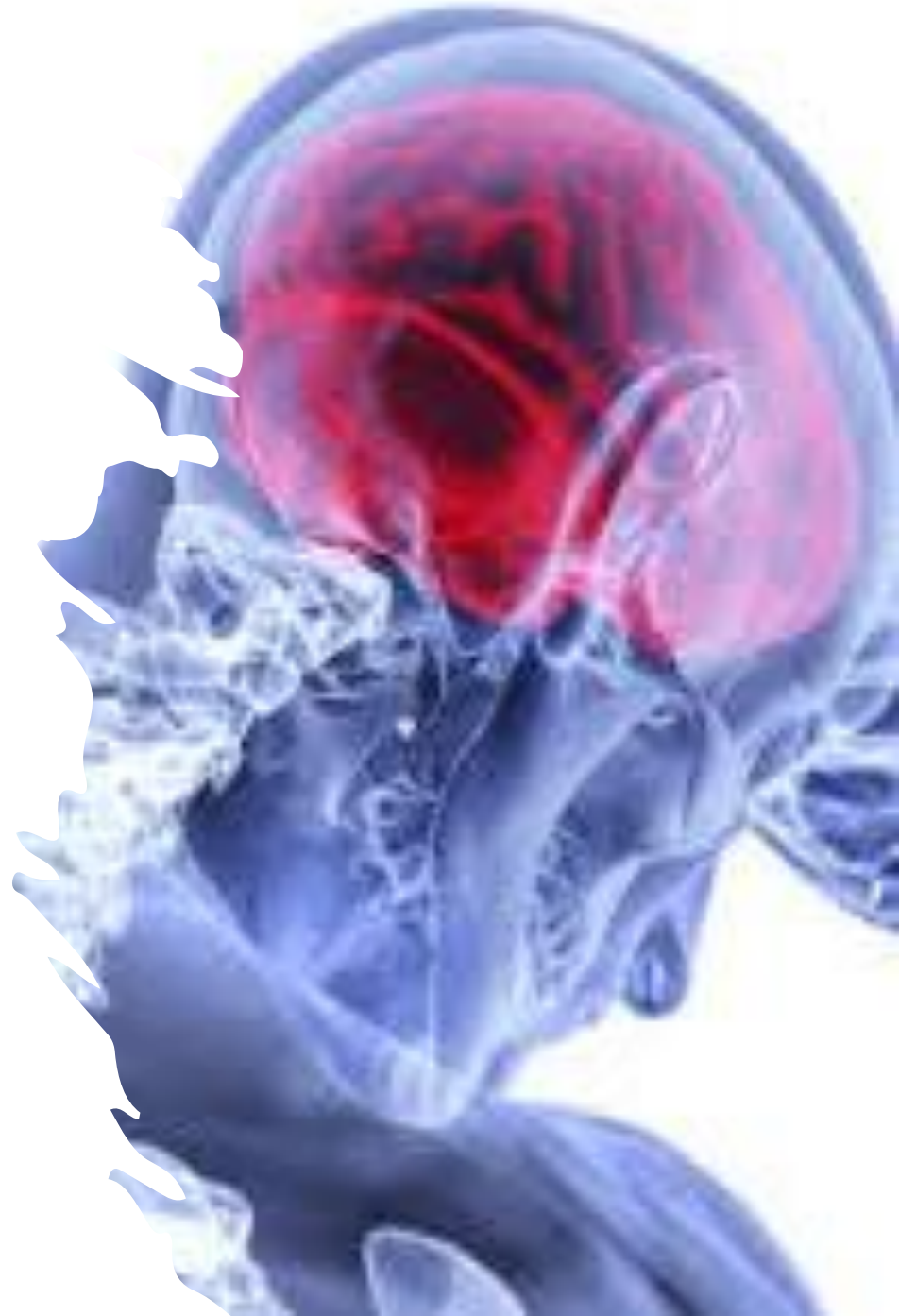
See Freckelton, 2008, 15 PPL 17

Hegarty v Queensland Ambulance Authority [2007] QCA 366 at [45]

The resolution of this issue is fraught with difficulties peculiar to cases of psychiatric injury. In cases of apprehended psychiatric injury, unlike cases concerned with the amelioration of physical risks in the workplace, important values of human dignity, autonomy and privacy are involved in the formulation of a reasonable system of identification of psychiatric problems which may warrant an employer's intervention and the making of a decision to intervene. An employee may not welcome an intrusion by a supervisor which suggests that the employee is manifesting signs of psychiatric problems to the extent that help should be sought, especially if those problems are having no adverse effect upon the employee's performance of his or her duties at work.

The Intrinsic Risk Issue

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



Kozarov v Victoria **(2022) 273 CLR 115**

- Zagi Kozarov 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)

273 CLR 115

- K known as dedicated, hard-working, ambitious and loyal employee
- Carried a heavier than usual workload
- 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, took sick leave & then had a conflict (on **29 August 2011**) with a superior after news of suicide attempt by complainant
- Diagnosed with PTSD & major depressive disorder & sued



Kozarov v Victoria, 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: 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, Kiefel CJ & Keane J

- K's **complaints** about excessive workload were **not necessarily indicative of mental illness** [note the 2 separate categories for the purposes of liability]
- **No evident signs** of mental illness
- However, **the employer was in breach of duty to provide a safe workplace**

***Kozarov v Victoria*, 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, 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, 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, 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, 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, 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, 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, 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. (at [110])

Kozarov v Victoria, 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.

Duties of Employer in Relation to VT Psychiatric Injury after *Kozarov*

- **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) (evident signs)but should not unduly intrude into personal lives(*Hegarty*)
- Need to ask: is there a real possibility of employee becoming unwell (Kiefel CJ & Keane J) or is it “reasonably foreseeable”? (Edelman J)

Ongoing Issues

- Psychiatric disorder may be wholly or partly affected by work
- It may be exacerbated by it
- Often there are home factors
- The dichotomy between overwork cases and especially traumatogenic workplaces is not absolute
- Frequently there is an overlap with excessive work burdens
- Can be harassment or poor management
- Legal (and other) workers are entitled to health privacy and not to be harassed or subjected to serial mental health assessments (*Hegarty*)



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: mandatory screening, rotation, suspension
- Issues for self-employed lawyers & smaller organisations/firms where options are limited
- Role of professional associations?



Relevant Publications

- **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* 641**
- **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**
- **R Scott and I Freckelton, “Vicarious Trauma Among Legal Practitioners and Judicial Officers” (2024) 31(3) *Psychiatry, Psychology and Law* 500**
- **I Freckelton, “Lawyering, Judging and the Pressures of Legal Work” in J Marychurch et al (ed), *Wellness for Lawyers* (Lexis Nexus, 2024, in press)**